

Level Three: What does that look like for New Zealand employers?

The prospect of a shift to Alert Level 3 is encouraging for many of us who have been in lockdown for almost four weeks. But the move brings with it a new set of questions for employers. How can health and safety duties be met by a business reopening? Can employees refuse to return to work? How will Level 3 affect changes made during Level 4?

With New Zealand having spent only 48 hours at Level 3 back in March, this remains largely uncharted territory for employers, employees, and advisors.

What changes for workplaces at Level 3?

Workplaces can now open if:

- workers cannot work from home;
- workplaces are operating safely;
- customers are not allowed on premises; and
- businesses can trade without physical contact with customers (e.g. through phone/online orders, delivery, pick-up and drive-through).

Each of these conditions must be met, and there are very few exceptions (limited to supermarkets, dairies and petrol stations).

What does 'operating safely' mean?

Fortunately, the government has provided some, albeit limited, guidance on this point. 'Operating safely' means:

- complying with the Level 3 requirements within the Alert Levels resource table on [covid19.govt.nz](https://www.covid19.govt.nz);
- meeting appropriate public health requirements for their workplace (e.g. putting up physical barriers); and
- fulfilling all other health and safety obligations.

What this looks like is going to depend on the workplace itself. For example, if an office needs to implement a skeleton staff, it may look at rostering days in the office or having employees work in different areas of the premises. Other measures to consider include staggering breaks and work times, providing protective equipment and potentially providing car parking facilities to remove the need for employees to take public transport. Anything that minimises physical contact between individuals is worth considering.

These COVID-specific requirements overlap with the overarching statutory duty in the Health and Safety at Work Act 2015 (HSWA), which still requires that an employer takes all reasonably practicable steps to ensure the health and safety of employees. Employers are not expected to do the impossible, but should put significant thought and planning into how their business will operate under Level 3.

It is important to remember that the statutory HSWA duty extends to both physical and mental health of employees. Our recent bulletin takes a closer look at an employer's duties in relation to the mental health of its employees.

Employees returning to work

Those who have been able to work from their homes in full lockdown will probably continue to do so in Level 3. However, those who meet the conditions set out above will likely be returning to the workplace. Some, if not most, employees are going to have concerns about doing so and it is important that employees have the opportunity to communicate these concerns to management. These should be given genuine consideration and responses should provide detailed information reassuring employees as to how those concerns are being or have been addressed.

There will be some employees who are unwilling to return to work at all at Level 3. No case will be the same, which means a blanket approach will not be appropriate, but in the event that the parties cannot reach an agreement, many employment agreements will allow the employer to request a medical opinion which can be used to assess whether the employee is able to attend work. Their employment arrangements can then be assessed in light of this.

What about the changes we made under Level 4?

Level 4 saw a number of New Zealand employers implement changes to hours, pay and other terms of employment in an attempt to maintain financial viability. If variation agreements are signed and do not contain language to the contrary, these changes can be continued at Level 3. However, we would recommend reviewing the position of the business as a measure of good faith and communicating with employees as to how these changes are assisting the business and if they will continue, and if so, when the next stage of review will be.

We claimed the wage subsidy but are still in difficulty, can we do anything before the 12 weeks is up?

Employees aren't the only source of financial pressure on an employer and in some circumstances, the wage subsidy will not provide adequate relief. However, the principal purpose of the wage subsidy is to keep individuals in employment and in the event that the employer cannot provide anything further, an employee should be receiving that subsidy as a minimum.

The options here will come down to whether as an employer, you applied for the wage subsidy prior to or after 4pm on 27 March 2020.

If the wage subsidy application was submitted prior, the employer declared that it would make best endeavours to retain employees throughout the 12-week period. If the application was submitted after, the employer declared that it would retain those employees.

Breaching the declaration, opens an employer up to risk of action from the Ministry of Social Development. This may come down the track when audits begin, or earlier if an employee reports their employer's behaviour. Only the declaration after 27 March 2020 requires that the subsidy be repaid if employers fail to meet any of the obligations on how the subsidy must be used, though it is still unclear on how enforcement will be approached.

We recommend you consult your legal advisor before proceeding with further employment changes.