

Remote work a legal minefield for employers

Health and safety

Michael Pelly and Hannah Wootton

Law firms are already handling mental health claims stemming from remote work and expect to see discrimination claims from employees who have been told they must return to the office, leading employment lawyers have warned.

The obligation to provide a safe workplace has become far more complicated during the COVID-19 crisis, with employers having to juggle the competing occupational health and safety risks of staff working from home and returning to the office.

Arnold Bloch Leibler partner Bridget Little said employers had to "face up to the new reality".

"We won't be returning to the workplace as it was before. Employers now need to manage a split workforce," Ms Little said.

"Some staff will be coming back, most likely in a staggered way, and those people will be exposing themselves and the workplace to a greater risk of the virus. At the same time, employers are responsible for staff who either need to, or want to, continue working from home, a place an employer has far less control."

Ms Little said the "lens has to be much wider now".

"It should take in physical health, mental health, transport to and from work, office working space, office communal space, home offices and the intersection of all of these."

Ms Little said her firm was already handling mental health claims that cited working from home.

The hazards were complemented by anxiety about the virus itself and the economic impact of the lockdown restrictions.

"It's easy for employees to work over a longer span of hours. Employers should be keeping an eye on this, and encourage people to log off, and switch off, at the end of the workday."

King & Wood Mallesons partner Phil Willox said both employers and employees had an obligation to take all "reasonably practicable" steps to keep a safe and healthy home workspace.

"This requires a risk assessment to manage both physical and psychosocial hazards. These present potential for legal liability if not managed correctly," Mr Willox said.

He said physical hazards included tripping or falling, electrical appliances and the general working environment, including noise, security, fire exit access and first aid.

"In particular, good ergonomic practices are essential, such as workstation set-up and taking regular breaks."

Erin Kidd, special counsel on employment law at McCabe Curwood, said bosses would have to take special care with those who were reluctant to return to the workplace. Some could have special continuing care responsibilities, and others might not want to expose themselves – and their families – to health risks.

"In relation to those employees, hasty decisions by an employer may give rise to allegations of discrimination or adverse action," Ms Kidd said.

Ms Little said she also expected those with genuine reasons would seek to enforce their rights.

"Discrimination claims used to be the hot topic, but they have fallen out of favour in the past five years," she said.

Key points

Growth in mental health claims caused by anxiety and working in isolation.

Discrimination claims expected to rise over workplace return plans.



Bosses now need to manage a split workforce, says law partner Bridget Little. PHOTO: JUSTIN MCMANUS

"I wouldn't be surprised to see them re-emerge."

Ms Kidd said that if a workplace followed workplace safety guidelines, returning to the office largely became a matter of employer discretion.

"Ultimately, if the employer wants the employee back in the workplace, then they can direct the employee to return. Any refusal by the employee to follow a reasonable direction could have disciplinary consequences."

Norton Rose Fulbright partner Kath Norris, who advised construction and resources companies that have stayed open throughout the lockdown, said it was essential employers implement the SafeWork checklists.

"Being able to say you've fully followed these guidelines will offer legal protection if there's an outbreak at your workplace," she said.

"There's still a lot being learned about this virus, which you can see in the [Cedar Meats] abattoir outbreak, but if you're doing what's best practice based on what's currently known, then you're in a very strong position legally."

Patient zero at the Cedar Meats outbreak was still going to work while he was contagious, but asymptomatic.

HR Legal partner George Chapman said employers should resist any temptation to control employees' out-of-hours conduct – or insist they download the government's COVID-19 app.

She pointed out that it was unlawful to treat a person unfavourably as a result of their choice.

"Employers can encourage employees to download the app but must avoid an adverse action should employees opt not to download it – irrespective of whether the device is personal or company owned."

KWM's Mr Willox said employers may also have to deal with cases of COVID-19 in the workplace. "Given not all employees or visitors to a workplace will have the COVIDSafe app, logging of people in and out of offices will also be critical for contact tracing," he said.