

COVID-19 RETURN TO WORK

MAY 2020

As coronavirus restrictions begin to ease across the country, many Australians are feeling hopeful that we will soon be back at work with our colleagues. It's expected that workers will return to their workplaces in the coming months as Governments start to shift its focus from containment of the virus to repairing the economy.

The National Cabinet has agreed to a set of COVID-19 Safe Workplace Principles, which puts an onus on employers and employees to work together to provide a safe working environment and actively control the transmission of COVID-19 while at work (see: <https://swa.govcms.gov.au/covid-19-information-workplaces/other-resources/national-covid-19-safe-workplace-principles>). The principles highlight key issues to be taken into account by employers as they plan the return of employees to the workplace.

To be compliant with their statutory work health and safety (WHS) obligations, employers should undertake a risk assessment and develop a COVID Safe Plan in preparation for workers and visitors returning to the workplace.

CONTINUE TO WORK FROM HOME, WHERE POSSIBLE

During the height of the lock-down, the NSW Public Health Order (Order) required individuals to remain at home unless they had a reasonable excuse not to do so. In effect, employees were obliged to work from home unless it was not possible to do so.

The obligation to remain at home has been removed from the Order. For the time being, employees are free to leave their home to attend work even if they are able to work from home. However, the Order now provides that NSW employers must allow their employees to work at home where it is reasonably practicable for them to do so.

This new obligation has the following implications for NSW employers:



they may ask (but not oblige) employees to return to their workplace where working from home is still possible. Accordingly, an employee may refuse a request or a purported direction from the employer to attend the workplace in these circumstances. This is still a significant change from the pre-lockdown position; and



if it's not reasonably practicable for an employee to work from home, the employer may require them to attend the workplace. Such an employee will not be entitled to wages or personal/carer's leave if they remain at home as a precautionary measure provided that they are otherwise fit to work and not able to work from home.

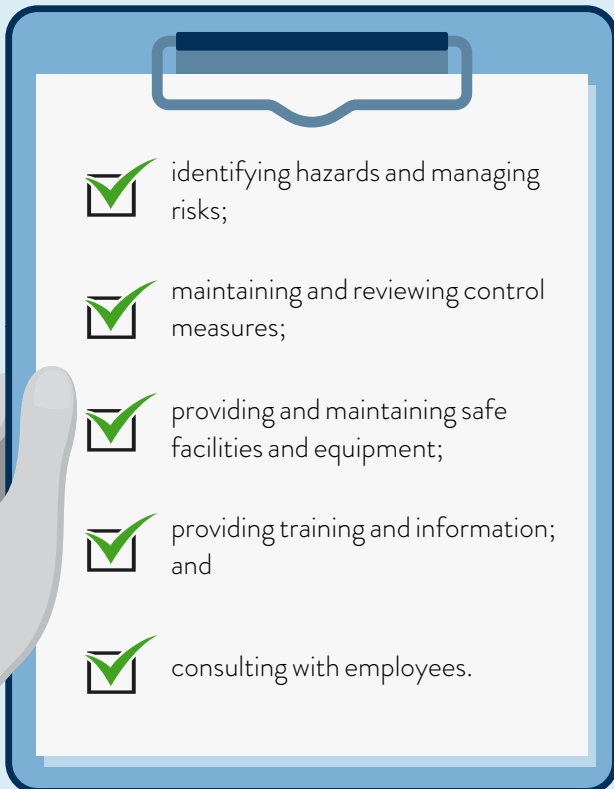
The new obligation is significant for NSW employers who are planning the return of employees to their workplace. Without the ability to direct employees, some NSW employers may need to plan for a sizeable portion of their workforce continuing to work from home for the foreseeable future.

As employers are unable to direct some employees to attend the workplace, we recommend that employers plan the safe return to the workplace in a consultative way by identifying key positions which are required to return and other employees who are interested in returning to the workplace as the first step.

WHS OBLIGATIONS

A person carrying on a business or undertaking including employers (Employers) and employees (and other types of workers) have various obligations under work health and safety legislation in relation to WHS.

Employers must take “all reasonably practicable steps” to ensure the health and safety of people (or similar obligation) at work and to provide a safe workplace including by:



These general obligations apply to Employers in relation to the risk of COVID-19 in the same way as any other risk at the workplace. Examples of specific base-line measures which Employers should be implementing at their workplace are set out below.

COVID-19 is a known risk both physically and psychologically. Various guidelines setting out control measures have been published by the Chief Medical Officer, State Health Departments and publications by workplace safety regulators such as SafeWork NSW. Whilst WHS legislation does not detail the specific measures which must be taken by Employers in response to the pandemic, it’s likely that these control measures would be considered by any Court dealing with a prosecution as reasonably practicable measures in most (if not all) workplaces. It is difficult to conceive of any circumstances where an employer would be able to defend a prosecution where the control measures were not taken.

Under the uniform WHS legislation, officers (which include directors of the Employer) must exercise due diligence to ensure that the Employer meets its WHS obligations. This is a personal duty and personal liability attaches in the event of a breach. In these circumstances, matters encompassed within the due diligence obligation include:

- + having up to date knowledge of WHS matters as they relate to the management of COVID-19; and
- + ensuring that the Employer has appropriate resources and processes to eliminate or minimise risks of COVID-19 to health and safety.

Workers are also obliged to take reasonable care for their own health and safety and to take care that their conduct does not adversely affect the health and safety of others at work.

In practice, this means that workers should:

- + take sensible precautions such as maintaining social distancing at work and adopting appropriate hygiene practices;
- + familiarise themselves with and comply with directions, policies and procedures of their Employer relating to the pandemic; and
- + promptly notify the employer of any issues, injuries or incidents including if the worker has symptoms of the virus.

The penalties for breach of a duty will depend on the nature of the conduct (for example, reckless or inadvertent) and the level of risk to which a person was exposed. Under NSW WHS legislation, there are three categories of offences with the most serious offence attracting a maximum penalty of up to:

\$3 MILLION FOR A COMPANY;

\$600,000 AND/OR 5 YEARS’ IMPRISONMENT FOR AN INDIVIDUAL CONDUCTING A BUSINESS OR AN OFFICER; AND

\$300,000 AND/OR 5 YEARS’ IMPRISONMENT FOR OTHER INDIVIDUALS.



WHS COMPLIANCE

We set out some of the basic WHS compliance measures for Employers managing the risk of COVID-19 at their workplace.

Social Distancing

- + a distance of at least 1.5 metres is kept between people;
- + physical greetings, such as handshaking and hugging are avoided;
- + non-essential face to face meetings are not held. Meetings should continue to be held via video conferencing or phone;
- + people eat lunch at their desks or outside, rather than in the lunch room;
- + food handling and sharing of food in the workplace is limited
- + non-essential travel be avoided;
- + strict hygiene among food preparation (canteen) staff and their close contacts is promoted and highlighted; and
- + consider staggering start and finish times to minimise gatherings in common areas such as lifts and building foyers.

Monitor COVID-19 Symptoms

Implementing policies dealing with the management of actual and suspected COVID-19 infections at the workplace which include:

- + explaining that the common symptoms of the virus include fever, coughing, sore throat and shortness of breath;
- + requiring employees to advise their employer if they are displaying any of these symptoms and the outcome if they undertake a test for COVID-19; and
- + directing workers to go/stay home and self-quarantine if they are showing any of the above symptoms.

Good Hygiene

- + Implement policies requiring the following:
- + frequently wash hands for at least 20 seconds with soap and water and use an alcohol-based hand sanitiser;
- + cover their coughs and sneezes with their elbow or a tissue;
- + put used tissues straight into the bin;
- + avoid touching their eyes, nose and mouth;
- + clean and disinfect frequently used objects such as mobile phones, keys, wallets and work passes;
- + increase the amount of fresh air available by opening windows or adjusting air conditioning; and
- + signs and posters around the workplace to remind and educate workers and visitors of the risk of COVID-19 and the measures that are necessary to stop its spread.

Regular Cleaning

Routinely clean surfaces as follows:

- + frequently touched surfaces, such as door handles, bedrails, tabletops, light switches, should be cleaned frequently with detergent solution; and
- + minimally touched surfaces, such as floors, ceilings, walls, blinds, should be cleaned regularly with detergent solution, when visibly soiled and immediately after any spillage. Sinks and basins should also be cleaned on a regular basis.

When and how often a workplace should be cleaned and disinfected will depend on the likelihood and risk of contaminated materials being present in the workplace.

KEY ACTIONS FOR EMPLOYERS TO TAKE

In summary, the key steps that we recommend employers implement prior to workers returning (or as soon as possible in circumstances where workers have already returned), include:



CONSULTATION: consulting with workers about the return to work plan, including about who will be returning to the workplace;



COVID SAFE PLAN: prepare and introduce a COVID Safe Plan that provides the road map for workers and visitors returning to the workplace, including an overview of risks and measures designed to mitigate those risks; and



WHS MEASURES: implementation of the WHS measures (set out in the tables above) to ensure the health and safety of workers in the workplace.

INDUSTRY SPECIFIC GUIDELINES

COVID-19 guidelines have been published on the following websites:

[Safe Work Australia](#)

[Worksafe Queensland](#)

[WorkSafe Tasmania](#)

[Safe Work NSW](#)

[WorkSafe SA](#)

[WorkSafe ACT](#)

[WorkSafe Victoria](#)

[WorkSafe WA](#)

[NT Government](#)

The team at Gilbert + Tobin are here to address any queries that you may have in relation to safely returning workers back to the workplace.

Read Gilbert + Tobin's other COVID-19 insights at:
[GTLAW.COM.AU/KNOWLEDGE/COVID-19](https://www.gtlaw.com.au/knowledge/covid-19)