

## **ADVISORY – MANAGING STAFF AND VOLUNTEERS TRAVELLING OVERSEAS FOR COMPETITIONS**

### **Introduction**

A number of legal and practical issues arise when staff and volunteers travel overseas for international competitions - for example to the upcoming Commonwealth Games in April. This advisory sets out some relevant points to consider.

Some of these are legal points, and may give rise to liability. Others are more practical. Thinking through these issues and putting appropriate arrangements in place ahead of time might prevent problems or disputes arising that could be distracting or disruptive during a competition, or expensive and time consuming subsequently.

### **Employees, contractors and volunteers**

People may undertake work or activities for sporting organisations at an international competition as employees, contractors or volunteers. This advisory focuses mainly on employees, although some aspects also apply to volunteers and contractors.

Organisations often use **contractors** in this setting. There can be some risk with these arrangements. If there is a dispute and the true nature of the relationship is deemed to be an employment relationship (which it can be, despite the labels and form of contract used), then the minimum employment standards outlined below would apply. (A separate advisory about the use of contractors is planned for later this year).

A **volunteer** is someone who performs an activity without receiving or expecting payment or reward. Volunteers can be reimbursed for expenses, or receive payments to help cover expenses, such as per diems, or travel or meal allowances.

At a competition, a person may have multiple roles, for example, he or she may perform paid duties for one or more organisations, and other unpaid duties or activities as a volunteer. We recommend having separate documentation for each role, being clear about when each is being performed, and keeping them as separate as possible. This is not about segregation or separation for the sake of it, but about taking steps to ensure that when an employee is in fact working as a volunteer, there is a clear distinction. When should team uniforms be worn or team resources be used for instance?

Organisations should have a policy around declaring and managing conflicts when individuals are working or volunteering for multiple organisations.

### **Is it work?**

'Work' as an employee triggers a range of implications for employers, including pay, time-recording, holidays and leave, and health and safety obligations.

Time spent overseas by employees for competitions will involve a mix of work and non-work. Whether an activity is 'work' for legal purposes is fact-specific and depends on the nature and extent of the individual's

responsibilities, the constraints on them and the benefit to their employer of the activity (for instance 'sleepover' cases where disability support workers supporting clients in residential care were found to be working while asleep). The greater these factors, the more likely the activity may constitute work. For example:

- Coaches attending training sessions, events where their athletes are competing and post-event debriefs or media conferences will almost certainly be work. Travel from NZ to the competition and back, and local travel to and from events is also likely to be work, unless other arrangements are agreed (such as people who travel home to NZ late to build in a holiday).
- Coaches attending events where their athletes are not competing could be working if they are assessing competitors, familiarising themselves with the course or performing another activity associated with their role; or they might be attending out of personal interest in a non-work capacity.
- In some situations time spent away overnight can be work if employees have significant responsibilities (including a likelihood of having sleep interrupted to deal with work situations), the activity is important to the organisation or their personal freedoms are highly constrained (for example, a Chef de Mission might score highly against each factor).

### **Hours of work**

Employment agreements should make it clear that travel and work at international competitions is part of an employee's job requirements and part of their 'agreed hours'.

There is a question about whether these arrangements may constitute an 'availability provision' under the Employment Relations Act 2000. If so, the organisation might have to pay an additional amount for the employee's availability, or not be able to require the employee to work outside of his or her standard, 'guaranteed' hours. In our view, the rules in the Act about availability provisions were not intended to catch this sort of situation, but they remain largely untested.

For salaried employees there is a simple fix to put the issue beyond doubt. We recommend that employment agreements record that the employees' salary compensates them for their availability for work outside hours and during overseas competitions and for all hours worked (or similar).

For waged employees, if they are paid extra for attending international events, it would assist to record that the payment compensates the employees for their availability etc. If there is no extra payment, there is no immediate risk of liability, but the issue may be raised and need addressing.

Regardless, to comply with other statutory requirements, agreements should also state that employees may need to work more than 40 hours in a week including at nights and on weekends at times. These types of agreements can be recorded in a side agreement or letter if need be, covering the particular competition.

### **Payment for work**

If an employee is working, he or she must be paid at least the minimum wage (currently \$15.75 an hour, increasing to \$16.50 an hour from 1 April 2018) for each hour worked.

Organisations cannot assume that a salary will satisfy any payment obligations irrespective of how many hours an employee actually works. Instead, the following minimum rates apply (rates stated are those applying from 1 April 2018):

- Employees paid by the hour must receive at least \$16.50 per hour
- Employees paid by the day must receive at least \$132 per day plus \$16.50 per hour for each hour exceeding 8 hours a day
- Employees paid by the week must receive at least \$660 per week plus \$16.50 per hour for each hour exceeding 40 hours a week
- All other employees must receive at least \$1,320 per fortnight plus \$16.50 per hour for each hour exceeding 80 hours a fortnight

For example, an employee on a salary of \$50,000 (gross) who is paid weekly will need to be paid \$1,155 rather than the usual \$961.54 if the employee works 70 hours at a competition in a given week. Additional payments will also inflate total KiwiSaver contributions (which must be paid on top of the minimum wage), and will likely increase the rate at which annual holidays are paid over the subsequent 12 months.

Another way of managing additional hours is to provide for employees to take "Time Off in Lieu" of working (TOIL). This could for example apply to any additional work on weekends or outside normal hours, or could be limited to situations where the employee's hours in a given week would otherwise create minimum wage issues.

Employees may be willing to do anything it takes to help an athlete succeed, and the law should not stop or stifle that. At the same time, organisations need to ensure that they manage their budgetary constraints in a way that meets their legal obligations. There should be clear agreements and expectations set around the work employees are required to perform and the paid hours this may involve at international competitions. Activities beyond those agreed hours (or the organisation's budgetary constraints) may need to be performed as a volunteer, or covered by TOIL.

Organisations must also keep accurate wage and time records that include details about the number of hours worked each day in a pay period and the pay for those hours (including any additional hours, if required to be able to demonstrate compliance with minimum wage rules).

### **Public holidays**

- The organisation should document what the arrangements will be on public holidays while the employee is overseas.
- If an employee works on a (New Zealand) public holiday, he or she must be paid at least time and a half the usual rate for the hours worked (this also has to be stated in the employment agreement).

- Employees are also entitled to an alternative holiday on pay if they work on a public holiday that would otherwise be a working day for them.
- Parties can agree to transfer a public holiday to another date – eg an employee working over Easter 2018 for the Commonwealth Games could agree to transfer Good Friday and Easter Monday to other identified working days later in the year (provided certain criteria are met).
- Employees on-call on a public holiday may also be entitled to an alternative holiday on pay if they were so restricted that they could not enjoy a whole holiday.

### **Expenses**

- An employer is generally obliged to pay for any reasonable expenses an employee incurs in the course of his or her work. This would normally include the cost of overseas travel, accommodation, meals and internal travel unless these costs were met by another body (eg the organising committee or NZOC) or other arrangements were agreed. The organisation may also cover the costs of travel insurance, vaccinations and any necessary visas/permits.
- Payment could be through reimbursing the employee's costs, paying suppliers directly or through paying a reasonable estimate in anticipation of these expenses (eg a daily rate, meal or travel allowance etc).
- Organisations should be clear about what arrangements apply to expenses including what expenses the employer will cover, any spending limits and any process requirements (eg the need for itemised tax invoices etc).
- Any agreements for an employee or volunteer to pay certain expenses themselves should be documented.

### **Health and safety**

- There is a question about the extent to which the NZ health and safety legislation applies to work outside of New Zealand. In our view, the general duties are broad enough to apply to travel and work overseas at competitions for a NZ sporting organisation, and it would be prudent for organisations to operate on that basis regardless.
- Under that legislation, sporting organisations have a duty (in essence) to ensure, so far as reasonably practicable, that their activities do not put the health and safety of workers or other people at risk.
- Workers and volunteers must also take reasonable care of their own health and safety, comply with health and safety instructions, and ensure that their actions do not adversely affect their own or any other person's health and safety.
- Practically, organisations need to understand the risks associated with the travel and work at the overseas competition. They need a plan to eliminate or mitigate those risks (including providing appropriate information and training to workers and volunteers), and they need to monitor and respond to incidents appropriately. Factors to consider include:

- Any travel warnings or advisories. Depending on the country, it may also be advisable to ask workers to register their travel and contact details with the Ministry of Foreign Affairs and Trade (MFAT), to regularly review any travel advisories issued and know how to contact the nearest NZ Embassy/ High Commission/ Consulate
  - Applicable emergency procedures and evacuation plans including contact people (and having updated next-of-kin details), and how to access emergency funds
  - Any health and safety risks associated with the destination and event (for example the competition facilities and equipment; the local environment eg risk of heat stroke; potential exposure to toxins and disease, eg Zika, food and drinking water safety; and security risks)
  - Appropriate measures to respond to those risks, for example site inductions at competition facilities; vaccinations, medical supplies and first aid equipment; the use of chaperones, local drivers or security as appropriate
- Some services like International SOS can provide risk information on destinations and pre-travel advice, updates and monitoring of staff while overseas, access to medical and security services and disaster and emergency response.
  - International competitions are high-pressure environments, with the potential for harm from stress or fatigue. Organisations should have appropriate systems in place to monitor and manage the risk of psychological harm (for example stress, depression), as well as physical harm. Employee Assistance Programmes (EAP) may be able to provide phone support or e-counselling from overseas.
  - If staff are injured overseas (while working or otherwise) the injury may be covered by NZ's Accident Compensation scheme (ACC), but ACC does not generally cover local medical costs or the costs of repatriation.
  - Appropriate travel insurance should be arranged that covers any planned activities, personal liability, medical treatment, emergency medical evacuation and any pre-existing conditions.

### **Managing employees at a distance**

- Organisations should ensure that they maintain appropriate contact with any employees and volunteers travelling and working overseas, including regularly checking in to monitor their wellbeing and respond to any issues that may occur.

### **Expectations around behaviour**

- Organisations should remind employees of the behavioural standards and expectations that apply (for example core values, Code of Conduct), and that they are expected to conduct themselves responsibly and comply with any applicable sporting codes, competition rules and local laws. Specific advice should be given to employees where the local laws are quite different and stricter than in NZ. There may also be social and cultural norms that employees will be expected to follow or at least be aware of.

- Any inappropriate behaviour (whether during work or non-work time) has the potential to attract negative media. This was recently demonstrated in Pyeongchang when a Canadian athlete, his wife and a technical coach were arrested for allegedly stealing a car while drunk and driving it to the athletes' village.
- A breach of local laws could result in arrest and potential imprisonment, court action and criminal sanctions (or civil liability). Alleged offenders may also be barred from leaving the country until the case is resolved.

## **Conclusion**

We recommend working through the points covered by this advisory and considering what arrangements are appropriate for your organisation in terms of travel and work overseas at international competitions. Discussing and defining the arrangements in advance is helpful.

If you have any questions arising from this advisory, you can contact us through the Sport New Zealand legal helpdesk provided by Buddle Findlay, on 0800 BUDLAW (0800 283 529), or seek advice from your usual lawyer.

Buddle Findlay can also help with developing any policies, agreements or other documentation to help organisations manage employees or volunteers travelling overseas for competitions, or provide advice in response to any employment issues that might arise during international competitions.