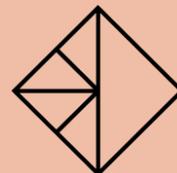


# During and post lockdown: top tips for employers of migrant workers



The impact of the COVID-19 pandemic will have massive implications for employers of migrant workers in New Zealand.

Very soon it is going to become much harder for employers to secure work visas to enable them to recruit and retain migrant workers across all industry sectors and in all roles, from the most specialised, highly skilled roles through to lower-skilled and lower-paid roles. Additionally, there are likely to be substantial processing delays and the timing for lodging applications will become increasingly important.

Despite the challenging times ahead, there is still plenty that employers can do to position themselves to continue to attract and retain talented migrant workers where needed and to ensure that the work visa applications they (or their employees) make are successful.

Our two-part article below highlights some of the anticipated impacts that the virus will have on the New Zealand immigration system and provides guidance to employers on how they can best prepare themselves for the challenges that lie ahead.

## Part one: likely outcomes

### Tougher labour market test = harder to get work visas

As we are all painfully aware, the virus outbreak is likely to lead to substantial job losses in New Zealand. It has been predicted by some experts that the number of jobs lost due to the virus could be as high as 200,000, which will result in substantial increases to the rate of unemployment. Experts also predict that the unemployment rate is likely to peak at the end of 2021 and will then drop sharply thereafter.

In immigration terms, higher levels of unemployment means we will see a much tougher labour market test being applied to temporary work visas (Essential Skills work visas) – for at least the next 12 months and possibly longer. In simple terms: it will be harder to secure work visas for migrant workers because there will be an assumption that there are Kiwi workers available for vacant positions.



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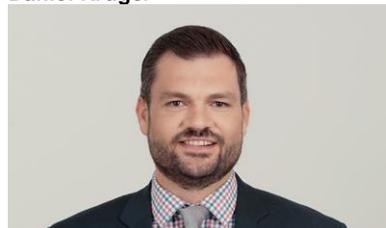
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The labour market test is a key component of an Essential Skills work visa application. The purpose of the test is to ensure that employers are giving New Zealand citizens and residents the first option at jobs. In order to be able to meet the labour market test an employer must demonstrate that they have made “genuine attempts” to recruit a New Zealand citizen or resident who is suitably qualified and/or experienced for the role or who can “readily be trained to do the work on offer”. If, despite genuine attempts, a Kiwi is unable to be sourced, the labour market test component of the work visa application is satisfied.

The labour market test must be conducted when the initial work visa is applied for and also at each extension application. The theory here is that the labour market should be re-tested at regular intervals to allow for changes in the unemployment rate and/or the possibility that although previously there may have been no suitable Kiwis available in the market, that may have changed over time.

With higher levels of unemployment, employers should expect to encounter some resistance from Work & Income. They will have increasing expectations that employers act in good faith when considering any potentially suitable New Zealand residents or citizens who may be available (or trainable) to do the work.

Here, it’s important to remember the policy criteria that apply: if there is a New Zealand candidate that is suitably qualified or can be readily trained to do the role on offer, then the labour market test will not be satisfied.

Practically, the impact of this is that if there are two candidates that both possess the required qualifications or experience for the role, one being a Kiwi and the other a migrant worker, the employer would be expected to offer the role to the Kiwi, even if the migrant worker is the “preferred” (or clearly the best) candidate.

Similarly, in the situation of a visa renewal application for an incumbent migrant worker, the employer will be required to conduct a further labour market test to confirm there continue to be no suitably qualified Kiwis in the market. If, as part of the labour market testing a New Zealand citizen/resident candidate was identified that can satisfy all the pre-requisites for the role, the employer is not able to rely on the fact that the incumbent migrant worker is an existing employee and “knows the business” etc. The expectation will be that the role is offered to the Kiwi.

In light of the anticipated flooding of the employment market of New Zealand citizens and residents across all industry sectors, we anticipate the standard that all employers need to meet in order to demonstrate the labour



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market test has been satisfied will become substantially higher. This tougher labour market test will apply across job roles of all skill levels, but is likely to be even more focused around lower paid or lower-skilled job roles where the prerequisite work experience may be minimal. Generally speaking, the lower the skill level of the job, the higher the level of scrutiny you should expect – as there will be a presumption that a suitable Kiwi should be able to be found.

### **Immediate (and growing) impact**

We expect that this tougher labour market test is likely to be implemented almost immediately following the lockdown, even before INZ has officially amended its formal policy in this regard. Historically, when a policy change has been imminent, we have seen Immigration Officers start to apply the new policy in practice prior to its official introduction.

Following the lockdown we anticipate the focus on this component will steadily increase until such time as the new policy is fully operational. What this means for employers and work visa holders is that applications lodged/processed now or soon after lockdown are likely to have the current labour market test policy applied to them. However, as time progresses post-lockdown, we anticipate the labour market test will steadily become tougher.

### **Employer accreditation requirements**

Linked to the introduction of a tougher labour market test will be an increased expectation on accredited employers to demonstrate their commitment to recruiting and training and upskilling New Zealand citizens and residents. This requirement is one of the key criteria under the current accreditation policy. However, with a greater “pool” of potentially suitable New Zealand citizens available in the market, employers will need to do more to show that they are genuinely committed to recruiting and training “Kiwis first”. This higher standard required for accreditation will apply to those employers looking to renew their accreditation status and also to first-time applications.

We also note here that the current accreditation system is an optional one. However, INZ has indicated it will move to a new system of compulsory accreditation for any employer that wishes to hire a migrant worker via an employer-sponsored visa. The compulsory accreditation system had been flagged for introduction in 2021 so it’s likely this higher standard will likely be applied to almost all employers of migrant workers as early as January 2021.

### **Processing times likely to blow out**



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We understand that INZ are currently operating on a skeleton staff and that their resources are mainly deployed in relation to urgent applications related directly to the COVID-19 situation. Only a few of INZ's staff are able to work from home. On that basis, there will be only an extremely limited number of immigration applications that are able to continue to be processed during the lockdown period.

This means that at the end of the lockdown period, there will be a substantial backlog of cases already with INZ. It is likely to take INZ a substantial period of time to case-work these applications, whilst also dealing with a potential flood of applications soon after the lockdown ends and so we can expect estimated application processing times to blow out even further. It's therefore important to lodge renewal visa applications as early as possible to ensure visas can be processed before visa expiry dates. There is going to be a fairly long queue regardless, but our advice is to do your best to secure a position near the front of it. The lockdown presents an opportunity to prepare applications in readiness for lodgement as soon as possible, and in some instances where possible file these applications during the lockdown period to secure an early place in the "queue".

Accredited employers and those considering becoming accredited should also aim to make their applications ASAP in light of these expected processing time delays. If you are considering applying to become accredited or if you have a current certificate of accreditation that is due to expire between now and March 2021 we recommend applying now to secure your place in the queue.

## **Part two: getting ready**

There are a number of things you can do now to get the best outcome for your business and your employees in anticipation of these pending changes. We have previous experience advising and supporting employers in recessionary markets so it is easy for us to draw on that experience and share with employers what they need to do to prepare for the difficult immigration processing times ahead.

### **Review your workforce**

As a first step it's important to take a close look at the migrant workers in your business with a view to anticipating the likely impact that these changes will have on them. This will be of particular importance to those employees who are in low skilled or low paid roles.



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## **Make visa applications now**

If you have Essential Skills visa holders or holders of Post Study (open) work visas that are key employees to retain in your business and whose current visa will expire prior to 31 December 2020, we recommend making their next visa application as soon as possible before these new tougher measures are introduced. This recommendation applies to all work visas, regardless of the skill level of the role, but is of greater significance in relation to lower skill (ANZSCO level 4 and 5 roles).

Employers and employees may be reluctant to apply early if they still have several months to run on their current visa. Similarly, for employees on temporary visas with upcoming expiries (between 2 April 2020 and 9 July 2020), many of them will have received the automatic visa duration extension (up until 25 September 2020) that is issued as a result of the Epidemic Management Notice. In these cases, it may be considered that it is not necessary to lodge a further visa application until the closer to the time of the new expiry date (25 September). However, the risk here is that if the application is not made until later in the year, the likelihood of a tougher labour market test may mean that many work visa applications that would be approved under the current policy, will be challenged and/or declined by INZ later in the year.

If you wish to retain excellent migrant workers, then the approach here is securing longer term visas for them now before it gets really tough to do so. Once they have longer extensions in place, it is business as usual for them until they require a future extension. But, importantly, the labour market conditions relevant for that future determination are likely to be far improved than what is forecast for the rest of this year and into the start of 2021.

## **Review job descriptions, advertisements and selection processes**

With a tougher labour market test, it will be important for job descriptions and job advertisements to be well drafted in order to clearly articulate the key skills, qualifications and experience required for the role. Loosely drafted documents often lead to INZ reaching the conclusion that the labour market test is not satisfied and/or lead to unnecessary delays in the processing timeframes.

Additionally, care needs to be taken in the selection process to ensure that engagement with Work & Income (and any candidates recommended) is appropriate and that New Zealand citizens/residents that apply for roles are carefully considered in line with the expectations on employers to offer Kiwis the first crack at positions vacant.

## **Supporting documents need to be spot-on**



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In addition to ensuring that the different elements of the labour market test are conducted correctly, the importance of providing well-drafted employer support documents can also be a “make or break” aspect of the application. Without good advice about how to present the results of the labour market test to demonstrate that genuine attempts have been made an application that should succeed can still be declined. Additionally, well drafted documents that are “decision-ready” will help to ensure that the application travels through the system as quickly as possible, with minimal unnecessary delays.

Our team are experts in supporting employers to navigate the immigration system to make it work for their business. We are able to assist you with each of these steps to ensure you can be as prepared as possible for the new world of immigration policy that we will face in the times ahead during and after COVID-19.

For further information or assistance with visa and immigration matters please contact us on + 64 3 379 3720 or email [liveinnewzealand@laneneave.co.nz](mailto:liveinnewzealand@laneneave.co.nz)

