



COVID-19 – Employment law

Current as at 18 April 2020

There has been a lot of information to take in lately with all the news, restrictions and incentives. It's fair to say that there has been much panic, confusion and misinformation. Given announcements were coming thick and fast, it was hard to keep up! This has been another challenge for affected businesses.

Legislation was passed by Commonwealth Government to introduce the JobKeeper scheme, which operates between 9 April 2020 to 28 September 2020. The *Fair Work Act 2009* (Cth) (the **Fair Work Act**) has also been amended, as well as many of the Awards to allow employers to modify working conditions during the COVID-19 pandemic.

We have outlined the following important changes to assist to better understand the recent changes. If you have any specific concerns or questions, please do not hesitate to contact our office to discuss.

Stand down provisions

Eligible employers may stand down employees for some or all of their usual hours if they cannot be usefully employed due to the impact of COVID-19. Eligible businesses are those which are non-essential facilities which the state/federal governments have restricted operating such as gyms, sporting venues, restaurants and cafes.

The Fair Work Act allows an employer to stand down an employee: if *'the employee cannot usefully be employed'* and standing them down is *'because of...a **stoppage** of work for any cause for which the employer cannot reasonably be held responsible.'* A mere downturn or deterioration in business or trade is not sufficient to access the stand down provisions. We recommend you seek legal advice before relying on the stand down provisions, as this is a very high bar.

If there are other opportunities to usefully employ staff, then these should be used. The employer must exhaust all other options, including working from home and or working in an alternative role. It should be a last resort to impose the stand down provisions.

Employers are not required to pay employees during the stand down period. However, the employee may elect to take some or all of their accrued annual or long service leave entitlements during this period (subject to some restrictions). Employers may be eligible to access the JobKeeper scheme, discussed further below.

Note that National Employment Standard (**NES**) entitlements, such as annual leave and long service leave, continue to accrue during a period of stand down.

Redundancy

There are restrictions on any business which make an employee's position redundant. The employee is entitled to receive paid notice calculated according to the length the employee has been employed by the business and the employee's age.

It may be preferable for businesses to stand down employees until they know more as to what the future holds until a decision is made about redundancies. Once the restrictions are lifted, businesses will need their employees to recommence business.

Sponsored employees

The Department of Immigration announced on 4 April 2020 that 457 and 482 visa holders who have been stood down (but not made redundant) will be able to maintain their visa validity and can apply for an extension of their visa through the usual application process. The visa status does not change because the sponsored employee is still considered to be employed.

Please see link: <https://www.fairwork.gov.au/find-help-for/visa-holders-migrants/migrant-worker-and-visa-holder-information-during-coronavirus>

Employee quarantine

If an employee is required to self-isolate due to restrictions imposed by the government, the employer is not required to pay them during the isolation period. However if the requirement arose in the course of the employee's duties, the employer must pay the employee during the isolation period. For example, if the employee came into contact with a person who was proven to have contracted COVID-19 during their work activities, the employer must pay the employee during self-isolation.

If an employer directs the employee to stay away from work and there are grounds to believe the employee may have been exposed to COVID-19 (other than in the course of their employment), the employee will not be entitled to be paid during the isolation period. However, if the employer directs the employee to stay away from work but the employee is well and willing to attend for work, the employer must pay the employee.

If an employee chooses to not attend for work but is well (exceeding the government restrictions), the employer is not required to pay the employee.

As is usual, the employer is required to pay sick/carer's leave, if an employee is unwell or is required to care for a child or another immediate family or household member. If there is insufficient leave, the employee can be required to take unpaid leave.

Permanent employees are entitled to be paid on public holidays.

Regardless of government requirements to self-isolate, health and safety obligations should be observed by employers.

Businesses should ensure that any discussions with employees regarding their health should be handled confidentially and privacy laws apply.

Award variations

Many of the Awards have been varied to add the following entitlement to employees (available between 8 April 2020 and 30 June 2020):

- 2 weeks unpaid 'pandemic leave' who are required to self-isolate (but who are not entitled to paid leave)
- twice the amount of annual leave at half pay.

There are other changes which have recently being made and are yet to be made to specific Awards in order to respond to issues arising from the virus.

You can register to receive updates to the applicable award through the Fair Work Ombudsman's website: <https://www.fairwork.gov.au/website-information/staying-up-to-date/subscribe-to-email-updates>

Variation to working conditions

Businesses should discuss options with employees in advance, to minimise the impact on them, such as:

- flexible working arrangements
- working from home
- reducing or varying hours
- accessing accrued annual and long service leave
- taking leave at half pay

There may be restrictions on businesses imposing certain variations on employees without their consent, particularly businesses which do not qualify for JobKeeper. Check the relevant Award and see information regarding JobKeeper.

Agreements to vary working conditions should be put in writing.

JobKeeper scheme legal obligations

Eligible employers who access the JobKeeper scheme must do the following:

- if the relevant employee cannot be usefully employed for their usual days or hours due to COVID-19 or government initiatives to slow transmission of COVID-19, give written directions to the relevant employee, which directions are reasonable¹, to:
 - stand down the employee, by directing them to not work on a day or days that the employee would typically work
 - reduce the ordinary hours of work of the employee²
 - vary the employee's duties which is necessary to maintain continuing employment of one or more employees of the employer³

or

 - vary employee's location which is necessary to maintain continuing employment of one or more employees of the employer, including directing the employee to work from home⁴.
- consult with the employee before giving a JobKeeper enabling direction
- pay the employee for the relevant fortnight (the wage condition) the greater of⁵:
 - \$1,500 including:
 - salary, wages, commission, bonus or allowances paid to the employee
 - tax withheld
 - salary sacrifice superannuation contributions, and
 - agreed deductions
 - the amount payable to the employee for the work they performed

Agreements to vary working conditions should be put in writing.

¹ It is unclear what is considered to be 'reasonable', however a direction may be unreasonable if it would impact on the employee's caring responsibilities. The directions apply to the period that they are entitled to receive JobKeeper payments for the subject employee. Any variations must be safe and within the business's operations.

² In this circumstance, the employee is entitled to engage in secondary employment, formal training or development.

³ The variation to duties must be within the employee's skill, competency and hold any necessary qualifications (eg to operate a forklift, to hold a forklift licence). The duties must be safe and within the scope of the employer's business operations. If the duties are subject to a higher rate of pay under an Award, the employee must be paid at the higher rate.

⁴ If the direction is to work at a place other than their home, it must not be an unreasonable distance and it must be safe and within the employee's business operations.

⁵ Employees who received less than \$1,500 per fortnight (before tax) before JobKeeper will now receive minimum \$1,500 per fortnight (before tax).

The employee's hourly base rate of pay cannot be reduced to less than what would have applied had the direction not been given.

Employers must still comply with its obligations to pay wages and comply with unlawful termination and related laws, health and safety and workers' compensation laws.

At this stage, the JobKeeper allowance applies from 30 March 2020 to 27 September 2020.

Payments are administered by the ATO. Questions about eligibility should be directed to your accountant or to the ATO.

Applications can be made to the Fair Work Commission to deal with JobKeeper disputes in most cases.

This article contains comments of a general nature and is not intended to be relied upon. No responsibility will be accepted by the author for any loss arising from reliance on this article. Legal advice should be sought in respect to your specific circumstances.

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