



## FAQ: COVID-19 (Coronavirus) Employer rights and obligations

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By now, most, if not all, workplaces will be impacted in some way by the coronavirus (also referred to as COVID-19) pandemic.

To help, we've prepared this information sheet covering some of the frequently asked questions our employer clients are asking us. **However, you need to get specific legal advice for individual circumstances (and the possibility that enterprise agreements or workplace policies may affect some situations).**

*On this point, please note that the information in this sheet does not constitute legal advice. To keep it as short as possible, it is also not a complete description of the matters it covers. Rather, it is guidance of a broad and general nature only and should not be relied on for specific cases. For information or advice about your particular workplace or a specific case, please contact us directly on the details below.*

Further, we understand that many businesses will be (or are already) doing it tough due to COVID-19. For this reason, we are offering reduced rates (including for existing clients) for any new inquiries relating to COVID-19.

### Can I require employees not to attend their usual workplace?

Yes, if you consider this is an appropriate and reasonably practicable control measure to reduce or eliminate the risk of COVID-19 for employees and others in your workplace. Employers have duties under occupational / work health and safety (**OHS/WHS**) legislation in each State and Territory to provide and maintain a work environment that is without risk to health and safety and adequate facilities for workers in carrying out their work, so far as is reasonably practicable. This includes the risk of contracting COVID-19 in the workplace or in carrying out duties (even away from the usual workplace).

Some employers are directing some or all workers to work from home. Others are using a mix of working from home and minimal staff in the workplace, in some cases on a rotating basis i.e. 1/3 in the office and 2/3 from home, rotating in weekly cycles. For some employers it will not be reasonably practicable to have workers work from home, e.g. workplaces with specialised plant

and equipment. In those cases, employers should take whatever forms of risk minimisation are reasonably practicable, such as social distancing at work, information about hygiene, etc.

Whatever the case in your workplace, to comply with OHS/WHS legislation, you should conduct a risk assessment, consult with affected workers, and take all reasonably practicable steps to eliminate (or if not possible, reduce) the risk of COVID-19 in your workplace or in the course of workers' work.

Remember, too, under OHS/WHS legislation, 'workers' means more than employees. It extends to independent contractors and their employees, and others.

### **Do I have to pay employees if I direct them not to attend work (for example an additional period away from the office after an overseas trip)?**

Yes, you do have to pay them – even if you cannot give them useful work otherwise. Where an employer does not have a stoppage of work but is directing a person not to attend work in order to protect the health and safety of other employees, it must pay the person who is told not to attend work.

### **Do I have to pay employees if there is a government-imposed lockdown?**

Depending on the circumstances of your workplace, you may be able to stand employees down without pay under the Fair Work Act (section 524). However, this only entitles employers to stand down an employee without pay if they cannot usefully be employed because of a stoppage of work for any cause for which employers cannot reasonably be held responsible.

If the government requires a stoppage of work (i.e. a society-wide lockdown), employers may be entitled to stand down employees without pay. Ensure you seek legal advice before taking any such steps.

You cannot stand down employees without pay due to a downturn in work/reduction in business (see 'Redundancy' below for information about what to do in such cases).

### **If an employee or their family member is sick with COVID-19, what do I have to do?**

An employee who is sick with COVID-19 must not attend work, due to your OHS/WHS duties. You can require them to obtain a medical clearance before attending work. However, ensure you avoid unlawful discrimination by acting reasonably, based on government and health practitioner advice at the time.

Permanent (full time and part time) employees can use any accrued paid personal leave if they are sick. They can use any accrued paid carer's leave if they need to care for a member of their family or immediate household who is sick. An employer can require production of a medical certificate or other reasonable evidence (such as a statutory declaration) to support a claim for paid personal/carer's leave.

If employees run out of paid personal leave and are still sick, they can take unpaid personal leave or elect to take paid annual leave (or long service leave in some States or Territories).

Casual employees are not entitled to paid personal/carer's leave. However, under the Fair Work Act, casual employees are entitled to 2 days of unpaid carer's leave per occasion. This does not prevent an employer from granting special leave for compassionate reasons but there is no legal obligation to do so.

#### **What happens when my employee cannot attend work because they are delayed or quarantined on or after an overseas trip? Do I have to pay them?**

Subject to the terms of any applicable enterprise agreement or workplace policy enforceable by employees, no you do not have to pay them. At common law or under the Fair Work Act, if an employee is prevented from attending work because they are delayed or quarantined on or after an overseas trip, you do not have to pay them. Other than casual employees (see above), they can use any accrued paid annual leave or, if they are sick, accrued paid personal leave.

#### **If an employee is required by law to self-isolate (e.g. after an overseas trip or exposure to a confirmed case of COVID-19), do I have to pay them?**

Again, subject to any enterprise agreement or workplace policy enforceable by employees, no. If an employee is required by law to self-isolate (e.g. after an overseas trip or exposure to a confirmed case of COVID-19), you do not have to pay them. Other than casual employees (see above), they can use any accrued paid annual leave or, if they are sick, accrued paid personal leave.

#### **Can I tell employees to stay away from work, whether or not they are sick?**

Yes, if you consider it is a reasonably necessary control measure to ensure health and safety in your workplace. However, except for casual employees, you would ordinarily need to pay them if they are not sick. If they are sick, they can use paid sick leave, if they have any.

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### What steps should I be taking to protect my workforce?

You must implement a workplace policy to deal with the risk of COVID-19 in the workplace, having regard to the requirements of your particular workplace.

At a minimum, this should include directing employees to observe government and health authority requirements as to self-isolation (not attending work) after returning from overseas or when sick in any way.

It should also include other recommended measures such as social distancing, hand washing/hand hygiene, and potentially working remotely if possible for your workplace.

There is now ample guidance online about these measure but seek legal advice if unsure or if you need assistance establishing a policy.

### I want to do something to help my employees if they have to self-isolate or need to stay home during a school closure. What can I do?

There are many things you can do – the only limits are creativity and resources. For example, you could create a 'Pandemic Leave Policy', for people needing to self-isolate due to suspected exposure, or for a primary carer who needs to stay home during school closures, capped at (say) 14 days.

However, it is important that anything you do still ensures health and safety, does not contravene or conflict with any applicable legislation, and does not create unexpected or undesired consequences for your business. If you want to create a certain type of leave policy, we can assist you in drafting the parameters.

### My employee says they do not want to attend work to protect themselves – are they entitled to be paid?

No, except in limited cases. This is if they have a reasonable concern that they would be exposed to a serious risk to their health and safety from an immediate or imminent hazard. For example, if they know someone in their workplace has just returned from overseas (especially a 'high risk' country) and you, the employer, have allowed that person to be at work, they *may* be able to argue that the workplace is unsafe.

The employee must inform you as soon as they can that they have ceased work. They must also then be available to carry out suitable alternative work, such as working from home. If they cannot be provided with any suitable alternative work and you cannot provide a safe workplace, ordinarily you would need to pay them.

If you are intending not to pay an employee, you should seek legal advice immediately, due to the significant adverse implications for your business if you get it wrong.

### **Do I have to allow employees to work from home? What are my obligations to employees when working from home?**

In certain cases, you would need to allow employees to work from home, for example:

- if you cannot provide a safe working environment otherwise
- if it would be safer for them to work from home

You may also be required to consider work from home arrangements for employees if their family/carer responsibilities mean they request flexible work arrangements. Whilst there is no entitlement to flexible work arrangements under federal workplace laws, state and territory anti-discrimination / equal opportunity legislation will generally require granting such a request, unless it would impose an unjustifiable hardship upon a business to do so.

Ensure you seek legal advice before denying an employee request to work from home.

If you allow employees to work from home, you must still ensure they have a safe working environment, as you would at their usual workplace. At a minimum, you should require them to complete a working from home safety checklist and provide it to you. Ensure you seek legal advice if you cannot obtain such a checklist.

### **Are casual employees and independent contractors entitled to be paid if directed not to attend work?**

No, they are not (unless the contract of an independent contractor says otherwise, which is unlikely).

### **Redundancy: if my business suffers a downturn or reduction in business, can I make employees redundant (let them go)? What do I have to do then?**

You can make employees redundant if you no longer require anyone to perform their job due to changes in your operational requirements. This would include a downturn in business due to COVID-19.

For all employees:

- employees with more than 12 months service are entitled to redundancy pay under the National Employment Standards in the Fair Work Act (and some may have a contractual entitlement which is more generous)
- employees whose employment is terminated for redundancy must also be given notice of termination or paid in lieu, under the National Employment Standards in the Fair Work Act (and some may have a contractual entitlement which is more generous)

For employees with unfair dismissal protection, you must ensure the dismissal is a case of 'genuine redundancy', which requires consultation with the employees (if they are covered by an award or enterprise agreement) and offering redeployment to another position, if it would be reasonable to do so.

Employees will not have unfair dismissal rights if:

- they earn over the current high income threshold (currently \$145,000) and are not covered by a modern award
- they have not served the minimum employment period under the Fair Work Act (6 months for an employer with 15 or more employees and 12 months for employees of employers with 14 or fewer employees)

Ensure you seek legal advice before dismissing any employees.

### **Can I ask my employees to take a pay cut or reduction in paid hours to help the company survive a business downturn caused by COVID-19?**

You can ask but not insist. You may wish to approach this on a company-wide basis. However, do so very cautiously and with legal advice, ensuring not to take adverse action against employees who refuse to take a pay cut. Doing so is likely to result in liability under the general protections provisions of the Fair Work Act.

As an alternative, you could ask employees if they wish to take voluntary redundancies.

If none of these work, you may need to consider involuntary redundancies (see above).

### Can I change employee rosters or hours?

Most employees' rosters or hours will be governed by a modern award or enterprise agreement and or a contract of employment. Generally, agreement will be required (and at the very least, consultation in accordance with an industrial instrument) before you can change employee rosters or hours.

### Can I refuse employee requests for annual leave or cancel annual leave requests?

Under the Fair Work Act, an employer must not unreasonably refuse a request for annual leave. For the same reason, an employer must not unreasonably cancel annual leave requests (or when employees are on annual leave – it would be particularly rare for this to be lawful).

However, there may be circumstances arising from COVID-19 (staff shortages or cash flow reasons, for example) where it would be reasonable to refuse annual leave requests when they are made or impose a blanket temporary ban on annual leave requests (though see 'indirect discrimination' below).

Ensure you seek legal advice before denying an employee requests for annual leave, if you are unsure of your rights to do so. You should certainly seek legal advice before cancelling annual leave whilst employees are on the leave.

You cannot direct employees to take annual leave, even if you cannot usefully deploy them to work. Some long service leave legislation entitles an employer to direct employees to take long service leave in certain circumstances, although usually advance notice must be provided.

### Can employees be directed not to travel overseas?

Employees can be directed not to undertake work travel (and indeed, in order to comply with your health and safety duties, you may need to direct employees not to undertake any air travel).

It would be rare for an employer to be able to lawfully direct an employee not to undertake private domestic or overseas travel. However, it may be reasonable to refuse a request for annual leave if this involves overseas travel, due to the potential business impact when the employee returns. Again, seek legal advice if unsure.

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### What about workers compensation claims?

If the Agent or Insurer accepts that employee has contracted they contracted COVID-19 in the course of their employment, they would be entitled to workers compensation payments for the period they are unfit for work. However, it will usually be very difficult for an employee to prove they contracted an illness at work (as opposed to a physical injury, for example). In any case, such workers compensation claims would ordinarily be of short duration and low claim cost, due to the short term nature of the virus.

### What legal protections do employees have here?

The Fair Work Act prohibits dismissal of an employee because of a *temporary absence* (of a kind prescribed by the regulations) due to illness or injury. The Fair Work Act's general protections provisions also protect employees against dismissal or other forms of adverse action because of various protected workplace rights (such as making complaints or inquiries in relation to employment or taking/proposing to take leave) and protected attributes (such as race or disability). These protections also operate in relation to employees impacted by COVID-19.

### Is direct and indirect discrimination a risk?

Yes, it is. You should ensure you take all necessary steps not to fall foul of anti-discrimination / equal opportunity legislation. The Australian Human Rights Commission has advised that it has already received complaints from workers of an ethnic, or perceived ethnic background. Conduct may be unlawful even if it arises from a genuinely held fear about COVID-19.

You should ensure you do not make (or allow to be made) any directions on the basis of an employee's race or ethnicity, such as a direction to work from home or a direction not to attend for work. You should also ensure that directions on the basis of an actual or perceived medical condition are made in accordance with anti-discrimination legislation. Due to the complexities of these issues it is not possible to summarise the obligations further here.

Further, employers must avoid indirect discrimination – that is, they must not impose policies, requirements or conditions which on their face appear equal, but with which a group of people with an attribute protected under anti-discrimination laws cannot comply, unless the policy, requirement or condition is reasonable in all the circumstances.

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## Where can I get more public information on health and safety in the workplace and workplace laws?

You can visit the Fair Work Ombudsman's website ([www.fairwork.gov.au](http://www.fairwork.gov.au)) or your State or Territory workplace health and safety regulator. Workplace health and safety regulators can also assist with workers compensation enquiries.

## Where can I get legal advice about workplace laws and OHS/WHS?

If you need legal advice about these or any other workplace law topics, please feel free to contact us on the details below.



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