

Workforce management and COVID-19

as at 25 March 2020

The outbreak of Novel Coronavirus (COVID-19) has recently been declared a worldwide pandemic by the World Health Organisation.

Beyond being a deep humanitarian challenge, the spread of the virus presents significant challenges for global and domestic organisations. Employers are preparing for scenarios encompassing sick employees, employees who may have been exposed to increased risk of infection, and risk of infection associated with working practices. In this guide we consider key issues in relation to work health and safety obligations, employee entitlements, and employers' capacity to direct and control employees.

Work health and safety obligations and COVID-19

Workplace health and safety laws impose a duty of care on organisations conducting a business or undertaking to eliminate or minimise risks to health and safety so far as is reasonably practicable. A statutory director has a personal obligation to take reasonable steps to ensure that their organisation is eliminating or minimising risks in an appropriate manner.

This duty of care extends to all aspects of an organisation's workplace and applies to employees, contractors, and members of the public affected by the organisation's undertaking (including through products or services provided by the organisation).

What practical measures should be taken to control risks?

While much remains unclear about COVID-19, organisations should take affirmative steps to identify, assess and (as far as reasonably practicable) control risks based on current public health advice, for example and at a minimum:

- suspending travel to countries and regions which are considered by CDNA (Communicable Diseases Network Australia) to pose a high risk of transmission;

- avoiding putting employees and other personnel at risk of exposure, by directing and ensuring that persons self-isolate in accordance with government advice;
- implementing practical measures to enhance personal and workplace hygiene and safety, such as good ventilation, disinfecting commonly-used equipment, providing hand soap and sanitizers, communicating relevant guidelines to employees and other workers, and directing employees experiencing relevant symptoms not to attend the workplace or interact with clients or other third parties in connection with work.

It may also be prudent to cancel participation in large-scale gatherings (e.g. events or conferences) where there is an elevated risk of exposure.

For workers that are at:

- increased risk from contact with suspected or confirmed cases of COVID-19 (e.g. the primary care and aligned health industries); or
- who may be interacting with people that are particularly vulnerable to COVID-19 (e.g. immune-compromised persons or those in aged care);

additional infection prevention and control practices should be implemented using best practice recommendations of applicable industry bodies.

Changing health advice

Relevant international and local agencies are changing travel and containment advice regularly. Employers need to keep up to date with the latest COVID-19 information and advice to ensure that they take action to address health and safety risks, and that such action is properly considered and appropriate.

As a practical measure, employers should establish a specific governance structure as a risk response, and set up a protocol to check for updates at regular intervals (at present, we recommend that this occurs at multiple points during a given day).

Employers have a general right to require employees to follow reasonable and lawful directions (and employees have an obligation to follow such directions). Directions that follow public health advice are likely to amount to reasonable and lawful directions where proportionate.

What should an employer consider if a worker is required to self isolate?

At present, government advice is that workers and others should not attend at a workplace and must self quarantine for 14 days if they have:

- recently travelled to an overseas destination considered high risk by the Department of Health; or
- been in close contact with a confirmed case of COVID-19.

Employees that are required to self isolate can be directed to work remotely where practicable, and where not otherwise unwell.

Directions not to attend work, working remotely and employee entitlements

If an employee is working, even remotely, the employee is entitled to be paid. For employees who are not working, the following issues arise

Do non-casual employees taking time off work to self isolate need to be paid?

Employees who are not in the workplace and not working will likely fall into one of the following categories:

- employees who are unwell due to contracting COVID-19;
- employees who are self isolating due to Government direction following travel or contact but are not currently unwell; or
- employees who are not unwell, but directed not to attend the workplace (and who are not working remotely).

An employee who is unwell may access their personal leave. Personal leave is discussed in more detail below.

An employee who is self isolating due to a government direction or due to contact is not fit to attend work and should be required to take paid personal leave during any imposed self isolation period.

An employee who is directed not to attend the workplace, but otherwise ready, willing and able to work must be paid their full remuneration without deduction to leave other than in special circumstances (see further below re stand-down). An employee's right to pay may be impacted in the future, where the Government is actively considering when employees should be given paid or unpaid leave as a result of mandatory business suspension.

What should an employer do if an employee decides to self isolate as a precaution?

Employees deciding to self isolate as a precaution (i.e. not because of potential exposure or otherwise due to a direction of an employer) need to make a request to work from home, or may otherwise access accrued annual or long service leave.

Can an employer shut down the workplace and place all non casual employees on annual leave?

One response that an employer may consider is a shut down of all or some of the operations and to direct employees to proceed on annual leave during the shut down period. This is similar to the Christmas/New Year shut down period common for many employers.

The right to direct an employee to take annual leave depends on whether the employee is covered by a modern award or enterprise agreement or is award/ enterprise agreement free.

If the employee is covered by a modern award or enterprise agreement, rules as to requirements to take leave will be set out in the modern award or enterprise agreement. If the modern award or enterprise agreement is silent on this issue, there is no general right to enforce the taking of accrued annual leave.

For award/ enterprise agreement free employees, the *Fair Work Act 2009* (Cth) provides that the employer may require an award/ enterprise agreement free employee to take a period of paid annual leave, if the requirement is reasonable. There is no minimum notice period or minimum length of leave that an employee may be required to take in these circumstances, however a reasonableness test must be met. For example, it is unlikely to be reasonable to require an employee to take in excess of four weeks annual leave, given that an employee accrues only four weeks of annual leave in each year of service.

Can an employer stand down non casual employees without pay due to COVID-19?

Stand down without pay is permitted by some modern awards and enterprise agreements in very limited circumstances. The *Fair Work Act* also includes the right to stand down without pay for employees who are not covered by a modern award or enterprise agreement.

Generally, stand down without pay is permitted where there is a stoppage of work for any cause for which the employer cannot reasonably be held responsible. Directing employees not to attend due to business downturn caused by COVID-19 is not likely to fall into this category.

It is common for employers to permit employees to access their accrued annual leave or long service leave during stand down periods, or to permit alternative employment, to allow for employees to have access to income. A modern award or enterprise agreement may require this type of back stop to protect employees' income levels.

Payment for employees who are exhibiting symptoms or caring for family or household members

Where non casual employees are exhibiting symptoms or caring for family members, they will be entitled to paid personal (i.e. sick or carers' leave) in accordance with the *Fair Work Act*. If an employee has exhausted paid personal leave entitlements, they can agree to take other forms of leave (such as annual or long service leave) or unpaid personal leave.

All employees, including casual employees, are also entitled to 2 days of unpaid carer's leave for each instance when a member of the employee's immediate family, or a member of the employee's household, requires care or support.

An employer is entitled to request evidence to substantiate the reason for personal or carer's leave. However, in light of the highly transmissible nature of COVID-19, employers should take a flexible approach and ensure that such requests are consistent with public health guidance and possible negative reactions from other employees at work, concerned about their risk of infection.

In any event, employers should carefully check the applicable modern award, enterprise agreement, employment contract or employer policy to help determine a particular employee's leave entitlements.

What is an employee's entitlement where schools or child care centres are closed?

If an employee's child is unwell, the employee may use their personal leave for carer's responsibilities.

Where the school or child care centre that an employee's child usually attends is closed, and an employee needs to stay home to care for their child but the child is not sick or under quarantine, the law is not clear on whether this meets the definition of a 'an unexpected emergency' under the National Employment Standards. However, it is arguable that a short period of time following school/centre may be a sudden emergency and therefore entitle an employee to paid carer's leave.

Whilst it may be possible for employees to work from home, employers should also have regard to the impact that caring for children whilst at home (because they cannot attend schools) may have on performance of work. Employers will need to be flexible in considering directions regarding work in such circumstances, and careful to avoid unlawfully discriminating against employees with caring responsibilities.

Work related and personal travel

Employees stranded overseas as a result of COVID-19

It is possible that an employee who has travelled overseas may be subject to quarantine restrictions, and unable to travel back to Australia. In these circumstances, and where it is not practical for an employee to work remotely, it may be appropriate for the employee to access paid leave or other leave types.

If an employee is quarantined whilst overseas on a work related trip, employers should consider continuing to pay the employee as usual (e.g. by placing the employee on special leave) without deduction to leave balances.

What about pending or future work related travel?

Organisations should be proactive in managing work related travel and closely coordinating ongoing decisions with the travel prohibitions set out by the Australian government and WHO. While employers can ban employees from work related travel, it is unlikely that similar bans can be imposed on private travel. However, an employer can consider imposing quarantine restrictions (i.e. working from home or special leave) following a return from private travel.

An employer can advise employees of the risks they assume by traveling to an affected area (including the risk of quarantine), and otherwise require employees to self report if they have travelled to an area with a known outbreak.

What should an employer do if a person is returning from overseas or has family in an heavily COVID-19 affected area?

While all employers should continue to adopt appropriate systems and preventive measures to reduce the risk of infection, they must be mindful to comply with all state and federal anti discrimination legislation. While following the government's advice in relation to isolation requirements for COVID-19 is unlikely to constitute discrimination against at risk employees, employers should ensure that they do not unlawfully discriminate against employees because of an illness or injury, or on the basis of race or ethnicity.

Discriminatory behaviour in employment, education, accommodation and the provision of goods or services may be unlawful, even where the discrimination arises from a genuinely held fear about COVID-19.

What next?

All employers should regularly check for advice and updates, as the government and health advice regarding COVID-19 is evolving rapidly. Employers should have effective risk and WHS governance controls with clear responsibility for checking currency of information, dissemination of instructions to employees (and where relevant, other workers).

This publication is only intended as a general guide. Decisions in individual cases will be highly fact specific and employers should adopt a flexible approach to situations as and when they arise.

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