

COVID-19 and Employment Law

Answering Your Questions

4 April 2020

Ward Keller's Employment Law partner [Kaliopi Hourdas](#) joined [Leon Loganathan](#) and Peter Gowers on their [Territory Story podcast](#) this week to facilitate a Q & A session to answer your questions about how Employment Law has been affected by COVID-19. We hope that the following Q & A answers any queries and concerns you may have.

General Questions

1. Can employees be stood down without pay because of COVID-19?

For some employers, the answer is "yes, but only in certain circumstances", and for other employers, the answer is simply no.

The Fair Work Act does have stand down provisions that apply in certain circumstances.

An employer may, under the Fair Work Act, stand down an employee during a period in which the employee cannot usefully be employed because of a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

This is the part of the stand down provisions that employers are relying on to stand down employees because of COVID-19. There are other circumstances where the stand down provisions apply; however, from the clients I have assisted since COVID-19 came to Australia, it is the stoppage of work provision that is most commonly considered.

Standing employees down without pay is not straightforward, and employers must consider the requirements under the Fair Work Act and the requirements of any applicable award or enterprise agreement. For example, there might be consultation requirements in an applicable award or enterprise agreement — that is, the obligation to consult in relation to major workplace change or a change in working hours. Personally, I would also make sure there are no relevant requirements in any written contract of employment.

Employers must ask themselves "has there actually been a stoppage of work?" In my experience, when you really look into the employer's situation, the common answer to this question is that there has not been a stoppage of work but there has been a downturn. Employers must be aware that even a significant downturn in work does not amount to a stoppage for the purpose of meeting the requirements of the Act.

Employers must also look to the reason for the stoppage of work. Is the stoppage due to COVID-19?

Examples given by the Fair Work Commission of when employers may be able to stand down their employees without pay during COVID-19 include:

- the business has closed because of an enforceable government direction relating to non-essential services (which means there is no work at all for employees to do even from another location).

- a large proportion of the workforce is in self-quarantine, meaning the remaining employees can't be usefully employed.

Lack of supply does not mean lack of customers. One example of lack of supply is the lack of goods or materials required for a business to continue to operate. The lack of supply must be causally connected to COVID-19.

The big question too is "can the employee be usefully employed?" The Act specifically requires that an employee cannot usefully be employed. If the employee can usefully be employed but the employer goes ahead with standing down the employee without pay, the employer will be in breach of the Act.

2. What does "usefully employed" mean?

"Usefully employed" can mean many things. "Usefully employed" can mean one thing in one business and something very different in another business. It is a question of fact that should only be determined in light of the employer's circumstances.

The starting point is, to look at the employer's business and then to look at the employee's job.

For example, a private practice law firm can usefully employ its lawyers by having them work from home, but it cannot usefully employ its lawyers by having them cleaning the office. One, because that is not the key business of the employer, and two, because that is a significant variation to the job of the lawyer.

3. Do employees accrue entitlements while stood down without pay?

Yes. The National Employment Standard, or NES, continues to apply and entitlements continue to accrue during a period of stand down.

The NES covers entitlements such as parental leave, annual leave, paid personal leave and unpaid carer's leave.

Further, the employee's continuity of service is not broken by any period of stand down, which is important in relation to the accrual of long service leave.

4. When can't an employer stand down an employee?

Firstly, if an employer cannot satisfy the requirements of the Fair Work Act, they cannot legally stand down their employees.

An example given by the Fair Work Ombudsman is:

A business that manufactures and distributes computer screens employs 8 full-time employees in its manufacturing division.

5 of the employees in the employer's manufacturing division need to self-quarantine for 14 days because of an enforceable government direction.

This means that for those 14 days, the remaining 3 employees can't continue manufacturing computer screens because they don't have enough manufacturing employees on site to safely operate the machinery.

However, they can be re-assigned to help the packaging division pack and distribute computer screens.

As these manufacturing employees can be usefully employed, the employer cannot stand them down without pay.

It is important to note that if an employer cannot meet the requirements of the Fair Work Act (that is, the circumstances of the stand down do not come within the provisions of the Act), the employer will be at risk of a dispute application being made to the Fair Work Commission or could also be at risk of other claims.

Further, the risks to the employer increase if there are requirements under an applicable award or enterprise agreement and the employer breaches those requirements too. The same goes for a breach of any requirements in a contract of employment.

5. Do employees have a right to work from home?

Employees can work from home by agreement with their employer.

It is a matter for agreement rather than an enforceable entitlement.

It is important to note that if an employee can perform their job from home, but the employer chooses to stand down an employee, the employer will very likely be in breach of the Act.

Employers should also check what any applicable award or enterprise agreement says about working from home requests or arrangements.

Employers should also be aware that technology is not on their side and often technology makes it very possible for employees to work from home.

Whether an employee can work from home will depend on a number of factors, including:

- the operational requirements of the business.
- whether arrangement would enhance or maintain productivity.
- the suitability of the position for working from home.
- the result of any home-based work health and safety assessment.
- the suitability of the residence (security, confidentiality, internet, etc.).
- whether there will be any significant additional expenses incurred by the employer to facilitate the employee working from home.
- whether the employee has demonstrated the ability to work independently and without supervision to achieve required outcomes.

6. Do employees accrue entitlements while working from home?

Yes, they definitely accrue entitlements such as annual leave and paid personal leave.

7. What work health and safety considerations should employers consider when employees are working from home?

Both the employer and the employee have obligations under the relevant occupational health and safety and workers compensation legislation.

The employer's duty of care for health and safety applies to all employees who are working from home while performing work-related duties.

The employee will be covered by relevant workers' compensation legislation for injuries sustained out of or in the course of performing work-related duties at home. Of course, this does not include any personal or non-work-related tasks performed while working from home.

The employee must maintain the home worksite to a safe standard that complies with existing occupational health regulations and requirements.

Employers should consider how they will deal with reporting requirements for any incidents occurring during work hours while the employee is performing work-related duties at home.

Employers should also consider:

- access requirements for the purpose of conducting an occupational health and safety assessment.
- reporting requirements for any changes to the home worksite, including contact details.

8. Can the employer make employees redundant?

Yes, they can. COVID-19 does not change the redundancy provisions in the Fair Work Act. In fact, most of the employers I have spoken to over the last couple of weeks have needed advice regarding making employees redundant rather than advice in relation to stand downs.

Employers can make employees redundant during COVID-19. However, much like whether an employee can be stood down without pay, the employer must meet the requirements of the Act and any applicable award or enterprise agreement.

Employers must ensure any redundancy is a genuine redundancy and must ensure the process followed to carry out the redundancy complies with the requirements in any applicable award or enterprise agreement. It is not as straightforward as saying there has been a downturn in work therefore a redundancy is genuine.

9. How can employers be proactive in managing their workforce over the next six months?

My advice to employers is:

- Do not panic.
- Before making any changes in the workplace, take the time to properly assess where your business was at prior to COVID-19, assess what your business looks like now, assess where your customers are coming from now, try to forecast where your customers are going to come from over the next six months, think about ways you can adapt (there have been some great stories of local restaurants converting to takeaway and delivery), make sure you get advice (speak to your accountant, speak to your bank), access every government assistance available to you.
- Communicate with your employees.
- Talk to employees about what is going on.
- Ask your employees to take their accrued annual leave or, if they have any, their long service leave.
- Think about where you want your business to be at the end of the six months. Think about utilising your employees so that especially those employees who are going to help you get your business back to normal are going to be with you when that time comes;
- If you think you need to reduce your employee numbers, think about the accrued entitlements that will need to be paid out. Seek advice.

Disclaimer: The advice provided in this article is of a general nature only and should not be substituted for obtaining your own independent legal advice. If you have any further queries, please contact Ward Keller on (08) 8946 2999 or wardkeller@wardkeller.com.au for further advice.

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