

COVID-19 Employer Guide

Managing the workplace in the face of the outbreak

March 2020

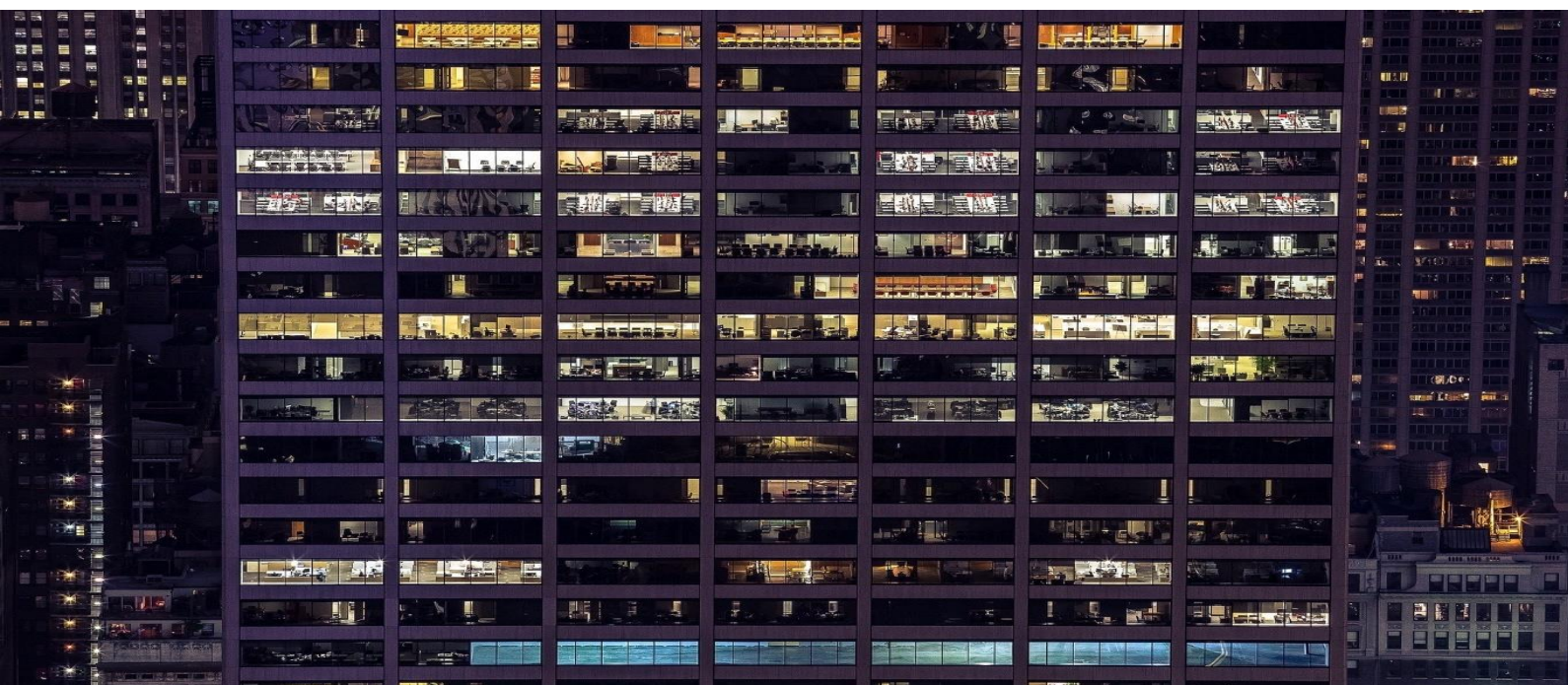


Edition 3

Current as at 25 March 2020

Index

Introduction	3
1. Understanding the risks to your workplace	4
2. Employer obligations	7
3. Working from home	11
4. Changing or scaling down operations	12
5. Business shut down	15
6. Discrimination and privacy	17
7. Resources and contacts	18



Introduction

COVID-19 Employer Guide



The spread of the novel coronavirus (COVID-19) will be the dominating news topic of 2020 so far. The Australian Government on the advice of health officials have implemented a range of changes to ordinary life in order to try to slow the outbreak of COVID-19 and stay ahead of the curve. It is therefore important for employers to now adequately to respond as COVID-19 continues to develop both in Australia and globally.

What then should employers do to manage through the COVID-19 outbreak? The focus of this information booklet is on managing and protecting your employees and your workplace and answering some of the workplace relations and work health and safety (WHS) questions that are coming up for employers.

To assist we have set out this information booklet in a way to address the key safety and employment issues, outlining the base position and then additional questions that may arise. Employers should, however, at all times be conscious of their particular legal obligations that will apply under the Fair Work Act 2009, respective State and Territory WHS legislation and workers compensation legislation, enterprise agreements, awards, contracts and policies and should seek further advice where necessary.

The content of this publication is for general informational purposes only, it may not be applicable to your organisation and does not constitute legal advice. You should seek advice before acting or relying on any of the content.



1. Understanding the risk to your workplace

Be alert, not alarmed!

Monitor the Department of Health [website](#) daily for up to date information about travel restrictions and situations in which isolation is recommended. This website also contains specific resources for workplaces and information for employers. For example employers should be aware of those who the Department of Health has identified as most at risk of serious infection: the elderly, those with chronic medical conditions, young children and babies, Aboriginal and Torres Strait Islander people and people with compromised immune systems.

1.1 Providing information to employees

Employees are likely to be very anxious about the COVID-19 pandemic and will likely have questions about what is happening to their working arrangements and employment.

Australia's model Work Health and Safety (WHS) laws require a person conducting a business or undertaking to ensure, so far as is reasonably practicable, the health and safety of their workers and others at the workplace. This includes providing and maintaining a work environment that is without risk to health and safety.

Employers also have a duty under WHS legislation to provide information to workers about health and safety in the workplace. You should provide regular updates to workers about the status of COVID-19 that are consistent with information provided by the [Department of Health](#) and [WHO](#).

Safety regulators in Australia have all published guidance material for employer responses to influenza pandemics generally and we recommend that you familiarise yourself with the guidance material in your jurisdiction (see Section 7 Resources for relevant state and territory details).

We recommend that you provide regular updates on COVID-19 to employees so that they feel informed and well supported and in return, stay motivated to assist and adapt through this time.

We recommend any updates address:

- the current status of the virus in Australia
- potential impacts on the workplace and changes to policies, and
- advice on good hygiene practices for work.

You might also be asked about whether employees will be stood down and/or paid in the event of a further spread throughout the community.

1.2 Workplace hygiene

Employers have a duty to provide and maintain, so far as is reasonably practicable, a working environment that is safe and without risks to the health of employees. This includes identifying risks to health or safety associated with potential exposure to COVID-19 – and taking measures to control these risks.

The current ban on non-essential, organised public gatherings of more than 100 people does not currently apply to workplaces. However, the principle of social distancing should still apply in the workplace.

Social distancing in the workplace includes:

- Stop handshaking
- Hold meetings via video conferencing or phone call
- Defer large face-to-face meetings
- Hold essential meetings outside in the open air (if possible and video/phone not suitable)
- Promote good hand and sneeze/cough hygiene and provide hand sanitisers for all staff and workers
- Take lunch at your desk or outside rather than in the lunch room
- Clean and disinfect high touch surfaces regularly
- Consider opening windows and adjusting air conditioning for more ventilation
- Limit food handling and sharing of food in the workplace
- Reconsider non-essential business travel
- Consider if large gatherings can be rescheduled, staggered or cancelled

Employers are taking various measures to control the health risks to their workforces, including:

- providing adequate facilities to enable good hygiene practices (e.g. soap, hand sanitiser, signage and reminders)
- limiting or banning non-essential work travel
- developing infection control policies and procedures, and
- directing employees to comply with quarantine measures, particularly following travel to high risk locations.

The Department of Health has published an [information sheet for employers](#). As the situation and corresponding medical advice is constantly changing, it is critical that employers keep up to speed with the latest information.

Employers should provide information and brief all employees and any contract staff in the workplace (such as cleaning staff), on relevant information and procedures to prevent the spread of COVID-19 (see section 1.3).

1.3. Managing and controlling the risk of COVID-19 in the workplace

Identifying and controlling risks to workers, and other persons connected to the workplace, arising from exposure to COVID-19 may involve:

- Closely monitoring official advice, such as updates from the [Department of Health](#) and the [WHO](#).
- Reviewing your policies and measures for infection control, including educating workers on best practice.
- Ensuring workers are aware of the isolation/quarantine periods in accordance with advice from the Department of Health.
- Providing clear advice to workers about actions they should take if they become unwell or think they may have the symptoms of COVID-19.
- Monitoring the latest travel advice on the [smartraveller.gov.au](#) website for anyone planning to travel for work.
- Considering whether work activities put other people at risk.
- Contingency planning to manage staff absences and plans to manage increased workloads.
- Providing workers with information and links to relevant services should they require support.

Workers also have a duty to take reasonable care for their own and others' health and safety. This includes ensuring good hygiene practices, such as frequent hand washing, to protect against infections.

Coronavirus Health Information Line
Operates 24 hour a day, seven days a week
1800 020 080

1.4 Workers compensation

Workers' Compensation schemes are governed by the Commonwealth, States and Territories.

Arrangements differ across schemes however there are common threshold requirements that would apply in the case of COVID-19:

- that the worker is covered by the scheme, either as an employee or a deemed worker
- that they have an injury, illness or disease of a kind covered by the scheme, and
- that their injury, illness or disease arose out of, or in the course of, their employment.

Safe Work Australia notes "Compared to work-related injuries, it is more difficult to prove that a disease was contracted in, or caused by, particular employment. In the case of a virus such as COVID-19, establishing the time and place of contraction may become increasingly hard. Whilst the spread of COVID-19 is contained, it may be easier to establish whether contraction is work-related, for example, if in the course of their employment a worker travels to a high-risk area with a known viral outbreak or interacts with people who have contracted the virus. However, once the virus becomes more wide-spread in the local community, establishing the degree of contribution of a worker's employment to their contraction of the virus will inevitably be more difficult.

Whether a claim for workers' compensation for contracting COVID-19 is accepted will be a matter for the relevant workers' compensation authority, applying their jurisdictions' workers' compensation laws. Workers' compensation authorities will consider each claim on its merits, with regard to the individual circumstances and evidence."



If you would like to review the different scheme wording and thresholds relating to “disease”, this can be found [here](#).

Employers should be very careful to guard against the risks of employees contracting COVID-19 at the workplace and should ensure that any mitigating steps they take in response to COVID-19 are measured.

Where employers are concerned about this issue we strongly recommend they seek specific legal advice based on their circumstances.

1.5 Supporting general mental health and wellbeing during COVID-19

1.5.1 Coping with anxiety and stress

The Australian Psychological Society has produced a fact sheet with tips for coping with coronavirus anxiety.

Key messages include:

- Learn the facts: Constant media coverage about COVID-19 can keep us in a heightened state of anxiety. Try to limit related media exposure and instead seek out factual information from reliable sources.
- Keep things in perspective: When we are stressed, it is easy to see things as worse than they really are.
- Take reasonable precautions: Being proactive by following basic hygiene principles can keep your anxiety at bay.
- Practise self-care: To help encourage a positive frame of mind, it is important to look after yourself.
- Tips for talking with children about the coronavirus.

The full fact sheet can be accessed [here](#).

1.5.2 Maintaining your mental health during social isolation

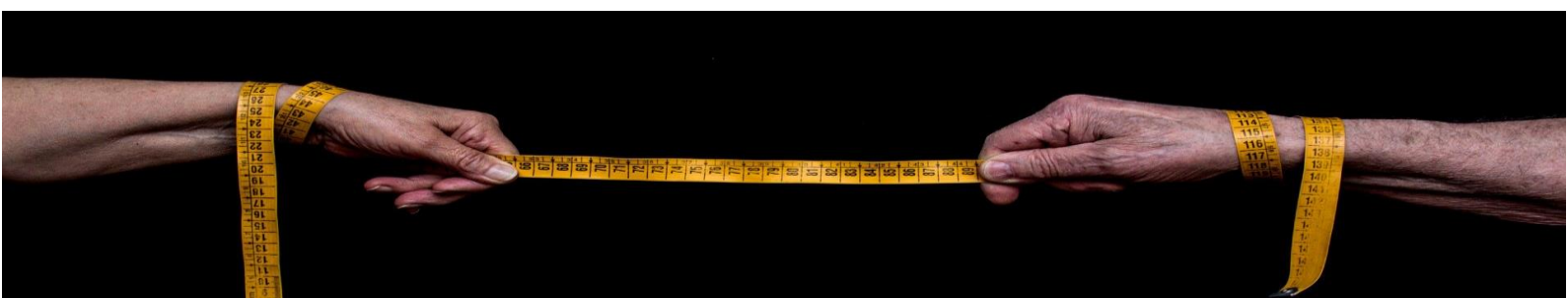
The Australian Psychological Society has produced a fact sheet with tips for maintaining your mental health during social isolation.

To help control the spread of COVID-19 across the country, all Australians have been asked to practice social distancing. In some cases, people are required to, or may choose to, self-isolate. Understandably, the challenges associated with social distancing and isolation, including separation from loved ones, loss of freedom and reduced income, are leading some people to experience feelings of anxiety, boredom, frustration and fear.

Key messages include:

- Stay connected using technology: Positive social connections are essential for our mental health and can help us cope in times of stress.
- Avoid difficult situations: Limit conflict with those you are isolated with by following some simple tips.
- Structure your day: While in isolation it is beneficial to plan out your days to restore a sense of purpose and normality to your daily life.
- Helping your child through self-isolation: Set a daily routine, maintain social relationships virtually, have fun with hobbies or craft activities at home.
- Seek additional support when needed: Telehealth services are available for GP support, psychology sessions or general counselling.

The full fact sheet can be accessed [here](#).





2. Employer obligations

2.1 Managing employees and leave entitlements

2.1.1 What do I do if an employee is feeling unwell and suffering flu like symptoms?

According to the WHO [website](#) the most common symptoms of COVID-19 are fever, tiredness, and dry cough. Some patients may have aches and pains, nasal congestion, runny nose, sore throat or diarrhea. These symptoms are usually mild and begin gradually.

If an employee presents with these symptoms they should be directed to follow advice from the Australian Government and seek urgent medical attention if they suspect they have contracted the COVID-19 virus.

The health and safety of staff and those they come into contact with must be an employer's top priority. This should dictate the approach any employer takes to responding to employees that may have come into contact with the COVID-19 virus.

An employee can (of course) avail themselves of their accrued sick leave if they take time off work due to being ill with the COVID-19 virus.

Under the Fair Work Act, national system employees (other than those engaged on a casual basis), are entitled to 10 days paid sick (personal) leave for each year of service. This entitlement accrues on a progressive basis during each year of service and many employees will have an accrual in excess of 10 days.

There is no limit on the number of days of accrued leave that can be taken as personal leave.

2.1.2 What do I do if an employee is required to self-isolate under Federal or State law for 14 days because they have returned from overseas or interstate?

The Australian Government has imposed a universal precautionary self-isolation requirement on all international arrivals in Australia (effective as at 11:59pm Sunday 15 March 2020).

This means that all employees - whether they be citizens, residents or visitors - will be required to self-isolate for 14 days upon arrival in Australia because of their possible or actual exposure to the COVID-19 virus.

Similarly, Queensland, Western Australia, South Australia, Northern Territory and Tasmania all require new entrants to self-isolate for 14 days (with some exceptions for "essential workers" such as healthcare and defence).

Self-isolation means staying in your home, hotel room or provided accommodation and not leaving for the period of time that you are required to isolate for (currently 14 days). Only people who usually live in the household should be in the home. No visitors should be allowed.

The Department of Health has issued isolation guidance which can be accessed [here](#).

Technically an employee is not entitled to take sick/carer's (personal) leave under the Fair Work Act unless they are absent from work due to either a personal injury or illness, a need to care for a member of their immediate family or household who is sick or injured or due to a family emergency.

This means that an employee returning from travel who is required by government to self-isolate, but is not yet sick themselves cannot avail themselves of sick (personal) leave. This is because, to qualify for personal

leave, an employee must be “not fit for work” because of an illness or injury affecting them. It is unlikely that this pre-requisite will be met by persons who are not yet diagnosed as ill but merely require isolation.

On a practical level, however, it may make sense for employers to look to utilise practical solutions during the employee’s absence due to government imposed quarantine so that employees do not suffer from a loss of pay during the isolation period where possible, such as:

- allowing the employee to work from home (where feasible), during the quarantine period;
- allowing the employee to avail themselves of other leave available to them (such as annual leave, long service leave or any other leave available under an award, enterprise agreement or contract of employment); or
- any other paid or unpaid leave by agreement between the employee and the employer (e.g. personal leave or discretionary paid leave).

Note: Employers should be aware they may attract the risk of breaching the National Employment Standards in the Fair Work Act if they allow an employee to use personal leave where the employee is not in fact ill, even where the employee agrees to this approach.

Always be sure to also check any applicable modern awards, enterprise agreements, employment contract terms and company policies – as they may contain additional rules or entitlements which may apply to your workplace and employees.

2.1.3 What do I do if an employee has been in contact with someone who has or may have COVID-19?

If an employee has been “in contact with” someone who has or may have COVID-19 they may also be required to self-quarantine because of their possible or actual exposure to the virus.

“In contact with” is defined as requiring:

- Greater than 15 minutes face-to-face contact in any setting with a person who has tested positive for COVID-19 in the period extending from 24 hours before onset of symptoms in the confirmed case; or
- Sharing a closed space for 2 hours or more with a person who has tested positive for COVID-19, in the period extending from 24 hours before onset.

Similar to the position at 2.1.2, employees in these circumstances who need to quarantine but are not yet sick themselves cannot avail themselves of sick (personal) leave. This is because, to qualify for personal leave, an employee must be “not fit for work” because of an illness or injury affecting them. It is unlikely that this pre-requisite will be met by persons who are not yet diagnosed as ill but merely require isolation.

Again however we suggest discussing the matter with your employees and trying to utilize the practical solutions set out at 2.1.2 so that employees do not suffer from a loss of pay during the isolation period where possible.

2.1.4 What happens if an employee’s immediate family member contracts the COVID-19 virus?

An employee may use paid personal leave to take time off to care for an immediate family member or household member who is sick or injured or to help during a family emergency.

The amount of accrued paid carer’s leave that can be taken is not capped, subject to the employee’s accrued balance of personal leave at the time.

If an employee exhausts their accrued paid personal leave they may also access up to two days’ unpaid carer’s leave (or a longer period with the agreement of their employer) in order to care for a family member with a personal illness or injury or to help during a family emergency.

2.1.5 What if an employee cannot attend work because their child’s school or childcare centre has been closed due to COVID-19?

An employee may use paid personal leave to take time off to help during a family emergency. Previous case law around the meaning of a “family emergency” suggests that it is likely to include providing care to a child whose school has been forced to close with little or no notice as a result of COVID-19. Therefore, an employee in this circumstance will likely also be able to access their paid personal leave for this purpose.

The amount of accrued paid carer’s leave that can be taken is not capped. However, the circumstance of a school closing with little or no notice is unlikely to continue to exist for longer than a few days, after which time an employee will need to move to using their annual leave entitlement (or some other form of leave available to them) in order to be paid for any absence from work to care for a child.

Note: Casual employees are entitled to 2 days of unpaid carer's leave per occasion. Full and part time employees who have exhausted their accrued paid personal leave may access up to two days' unpaid carer's leave (or a longer period with the agreement of their employer) in order to provide care where their child's school has been forced to close with little or no notice.

2.1.5 What if an employee may have contracted COVID-19 but they still wish to attend work?

If an employee maintains that they are able to work (but are not sick and not able to work from home) then employers face a difficult scenario: the employee says they are fit to work, but the employer has concerns that the employee is not fit to work (perhaps because they may have been exposed to COVID-19 through travel or close contact with someone who has tested positive) without posing unacceptable safety risks to the workforce. Remembering that employers have a duty to provide and maintain, so far as is reasonably practicable, a working environment that is safe and without risks to the health of employees. As well as workers having a duty to take reasonable care for their own and others' health and safety.

The best means of resolving this impasse is to first discuss the issue with the employee and then if necessary direct the relevant employee to undergo testing if testing is available.

Employees can be directed to obtain medical clearance, which may include being tested for COVID-19, provided this is reasonable and based on factual information about health and safety risks.

Once the test is undertaken, if the employee is cleared, they are able to return to work (best practice would dictate the employer pays the employee for the relevant period). If the employee tests positive, then they can be permitted to take personal leave for the duration of their absence.

2.1.6 What about casual employees?

Casual employees are entitled to not attend work when they are unwell or injured. However, they are not entitled to any additional payment of sick leave for any shifts they do not work as they have already been paid an additional loading in lieu of other entitlements including sick leave. This means that a casual employee who is diagnosed with COVID-19 may be required to refrain from presenting to work without a legal entitlement to additional payments.

Furthermore, where shifts to casual employees are reduced either on account of business downturn or because the employee has been required to isolate (due to contact or recent travel), the employees will not be entitled to payment during this period.

Casual employees are entitled to 2 days unpaid carer's leave to take time off to care for an immediate family member or household member who is sick or injured or to help during a family emergency.

2.2 Employee directions

2.2.1 Can you send an employee home if you observe COVID-19 virus symptoms?

Employers have a legal responsibility to ensure the health and safety of those in the workplace, including visitors. Where an employer holds a reasonable belief that an employee is posing a health risk – such as showing symptoms of the COVID-19 virus – it would not be unreasonable to send the employee home on sick (personal) leave on the basis that they are unfit to work safely and without risk to the health of others in the workplace.

Employers should ask the employee to seek medical advice / testing and a clearance before returning to work. If the employee maintains they are able to work, consider whether it is practical for the employee to work from home for part or all of the period prior to obtaining the test results.

Once the test is undertaken, an employee may return to work if they are cleared. If the employee tests positive, see section 2.1.1 regarding any pay and leave obligations and entitlements that may apply.

During the COVID-19 outbreak, it may also be prudent to remind employees of their obligation to take reasonable care not to adversely affect the health and safety of other persons, and ask that they notify their employer immediately if they are suffering flu-like symptoms.

2.2.2 What if you wish to direct an employee to not attend work but the employee is not showing signs of COVID-19 and is not required to isolate themselves under a federal or state government direction (and not subject to a stand down)?

If an employer directs an employee not to attend work, despite them being fit and able to do so (and not subject to any government isolation requirements) then we suggest best practice is for that employee to continue to get paid.

In this situation, it is also important to check and consider whether you can simply issue this direction (e.g. pursuant to the employee’s contract or as a reasonable and lawful direction based on factual information about health and safety risks) – or whether you need employee agreement. Again, also check any applicable industrial instruments (such as enterprise agreements, awards), contract terms and company policies – and seek specific advice.

2.2.3 Work related travel

Employers should make sure that travel policies clearly address where an employee can travel to, the reasons for travel and permission required.

Employees should be informed that travel policies are constantly under review and may be subject to regular change, particularly as state border arrangements change.

Employers should also carefully check any insurance cover for work-related travel.

2.2.4 Can you give directions about non-work related employee travel?

Employers must be mindful not to give directions to employees that might extend to or impact the personal or private activities of the employee and which would not otherwise affect their work. Only in exceptional circumstances would it be regarded as reasonable for an employer to direct an employee how to conduct themselves outside the workplace and have the right to extend its supervision over the private lives of employees. In considering this issue, a court will look at whether there is a significant connection between the outside activity and the employee’s employment.

It is possible that the current COVID-19 circumstances may give rise to such a sufficient connection, given subsequent quarantine at federal and state government’s direction that an employee will now likely be subject to, meaning an employer may be in a position to potentially direct staff with respect to non-work related travel.

At a minimum employers should inform employees that when making travel plans (including interstate travel) they should understand the isolation requirements which they may be subject to on arrival and return.

2.3 Visitors to workplaces

Taking extra precautions in allowing visitors to enter the workplace is important for employers in limiting exposure to COVID-19 in the workplace.

Employers have the right to ask visitors to provide information in advance as to whether they have flu-like symptoms, have been in contact with anyone infected with COVID-19, or travelled to a high-risk area.

If a visitor answers affirmatively to any of these questions, employers should strongly consider their work health and safety obligations and should request the visitor not come to the workplace until they have been asymptomatic for 14 days or can provide a clearance letter from a physician.

Employers may also ask any visitor to provide their contact information in the event that COVID-19 develops in the workplace and the visitor may have been exposed to the COVID-19 virus.



3. Working from home

Reducing face-to-face contact is an excellent measure to mitigate the impact of COVID-19. The Federal Government is encouraging business to adjust work places to enable staff to work from home where possible. With this however, comes a number of practical implications to consider.

Firstly not every position and every activity can be conducted from an employee's home, but in an increasingly service based economy / IT based jobs perhaps can more than ever before.

It is also important to remember that regardless of where your employees work, you are still responsible for their physical health and safety while at work, as well as their mental wellbeing.

3.1 When can employees be directed to work from home?

Employers are entitled to issue reasonable and lawful directions to their employees which is likely to include a direction to work from home (in line with the Government's request) in instances where the nature of work involved is suitable to be conducted from an employee's home. Employers should however also review their obligations under any applicable enterprise agreements, awards, contracts and policy (such as consultation clauses) prior to issuing such a direction.

Where employees are required to record their hours of work (for example, in relation to annualized wage arrangements under some awards), this currently needs to continue when employees are working from home.

3.2 Ensuring the health and safety of your staff working from home

In Australia, WHS laws still apply to businesses if workers are required to work from locations other than their usual workplace, for example from their home. Employers must still ensure, so far as is reasonably practicable, the health and safety of their workers. The worker also has a responsibility to take reasonable care for his or her own health and safety, including complying with reasonable instructions given by the employer or any policy and procedures provided.

Prior to moving staff to work-from-home, employers should have a discussion with their staff to make sure

their work area at home meets WHS standards, which would involve a safety assessment of the work area prior to the employee working from home.

Some key things to consider during an assessment include the following:

- Workstation set up
- Work hours and breaks
- Physical environment (i.e. noise, heat, cold, lighting, security, electrical safety, home hygiene and home renovations, first aid etc.)
- Any manual tasks the worker has to carry out
- Psychosocial risks (i.e. isolation, reeducated support, fatigue, online harassment).

After doing such an assessment, you should come to an agreement with the employee about any controls and preventative measures that need to be put in place.

It is also important to consider whether workers have the correct equipment to work from home. It may be for instance that at present only some staff have the technological capacity to work remotely. Considering what is needed to expand this capacity will involve consideration of available technology, cyber-security, cost factors and work, health and safety implications.

3.3 Expectation around working remotely

Employers should make sure that employees are aware of any on-going obligations around issues and policies such as confidentiality and safe work practices whilst working at home.

3.4 Insurance

It is important to remember that while employees are not working at their standard workplace, it is still an employer's responsibility to provide a safe work environment. Therefore, if an employee sustains an injury in the course of their work while at home, it is an employer's responsibility to ensure they are covered by workers compensation insurance. Bear in mind that psychological injury is also claimable under workers compensation.

4. Changing or scaling down operations

The following section addresses the worst-case scenarios and suggests some contingency strategies that business may be considering to limit the impact of COVID-19.

4.1 Varying hours or rosters

As a result of the spread of COVID-19 some employers may be considering varying operations, for example to reduce the risk of exposure for employees by altering start and finishing times or to address changes in demand patterns of consumers.

An employer's ability to vary hours and/or rosters will largely depend upon the applicable industrial instrument (e.g. enterprise agreement or award) or contract that applies to their employees.

For example some employers whose workforces are covered by an award or enterprise agreement may be restricted from altering work arrangements without first consulting with employees (and potentially also union/s). Changes to an employee's start and finish times (for example, in order to avoid crowds during peak hours) might be possible under the span of hours provisions in an award or enterprise agreement. Some awards and enterprise agreements also allow the span of hours to be varied by agreement. Reducing a permanent employee's ordinary hours usually requires the employee's agreement.

We therefore strongly recommend if you are considering making certain variations to your operations that you get advice on your specific options and obligations prior to making any changes.

4.2 Reducing operations

As a result of the potential further spread of COVID-19 some employers may be forced to consider scaling down operations. For example by:

- placing a freeze on new hires;
- reducing any supplementary labour such as contractors or labour hire workers;
- reducing employee hours; or
- providing annual or long service leave in advance or at half pay.

An employer's ability to make such changes will largely depend upon the applicable industrial instrument (e.g. enterprise agreement or award) or contract that applies to their employees.

We therefore strongly recommend if you are considering scaling down your operations that you seek advice on your specific options and obligations prior to making any changes.

4.3 Redundancies

Some employers may decide that things have gotten so financially stringent that they are compelled to reduce the size of their workforce and as a result need to make some staff redundant.

Before making any employees redundant it is important to first consider:

- whether there are any options for redeployment within the business or associated entities; and
- your consultation obligations under any enterprise agreements or modern awards.

Most employees (who have at least one year of service with the employer) will be entitled to receive a minimum redundancy payment in accordance with the Fair Work Act (a general exception applies to employers with fewer than 15 employees in most (but not all) industries). This payment is in addition to a period of notice and payment for untaken annual leave.

The amount of redundancy pay employees are entitled to will be based upon their continuous service, as well as any terms in any applicable enterprise agreement or award.

It is possible for employers to ask the Fair Work Commission to reduce an amount that would otherwise be payable on redundancy if:

- the employer finds other acceptable employment for the employee; or
- the employer cannot afford the full redundancy amount.

If as an employer you are considering redundancy of 15 or more staff, you must also give written notice to the Department of Human Services of the proposed dismissals.

Before taking steps to make an employee redundant we strongly suggest getting advice on your specific circumstances.

5. Business shut down

From 22 March 2020, the Federal Government and state and territories agreed to dramatically ramp up restrictions to control the spread of COVID-19. This ramp up has included closing business where large amounts of people tend to congregate, raising the risk of COVID-19 transmission. As a result, many businesses across the country have already been forced to close due to these enforceable government directives.

As the COVID-19 pandemic continues to take a worsening course many businesses still operating may be also be in a situation where they are forced to close due to a lack of stock or customers. This may include situations in which businesses are unable to trade due to a lack of vital supplies or stock becoming unavailable (for example medical and allied businesses that may require masks to safely work).

The following section addresses both of these scenarios with respect to an employer's ability to stand down their employees without pay.

5.1 Stand down where a business IS subject to an enforceable government directive to close

Under the Fair Work Act employers have the right to temporarily stand down employees without pay during a period in which the employees cannot be "usefully employed" because of a stoppage of work for any cause for which the employer cannot reasonably be held responsible. (The other circumstances are industrial action and breakdown of machinery or equipment).

"Usefully employed" means that the employment will result in a net benefit to the employer's business by reason of the performance of the particular work done by the employee.

On 22 March the Prime Minister announced that the Federal government in conjunction with the states and territories would direct pubs, licensed and registered clubs, cinemas, casinos, nightclubs, places of worship, gyms and indoors sporting venues to close. Restaurants and cafes had their trade restricted to takeaway and home delivery.

On 24 March, the Prime Minister announced this list would be extended to include auction houses, food courts in shopping centres, some markets, beauty services, tanning services, tattoo parlours, waxing salons, nail salons, libraries, museums, galleries, amusement parks, swimming pools, indoor exercise activities, wellness centres and play centres.

As a result of these enforceable government directions where a business has been directed by the government to close, under the Fair Work Act, employees can be stood down because of a stoppage of work for which the employer cannot reasonably be held responsible and for which employees cannot be usefully employed.

Employers are not required to pay employees during the period of a stand down. Employees do however accrue leave as normal during a stand down.

Note: Enterprise agreements and employment contracts can sometime have different or extra rules about when an employer can stand down an employee without pay, for example, a requirement to notify or consult. Employers should consider whether their obligations are impacted by any applicable enterprise agreement, award, employees' employment contracts or workplace policies prior to issuing a stand down even where it is as a result of an enforceable government direction to close.

5.2 Stand down where a business is NOT currently subject to an enforceable government directive to close

While the regulator, the Fair Work Ombudsman, states on its website that employers cannot stand down an employee "just because the business is quiet or there isn't enough work", (in our view) the COVID-19 outbreak could and is resulting in situations that meet the requirements for stand down under the Act, for example where a business imports and sells overseas goods which they are unable to currently receive or where a large proportion of the workforce has been forced to self-quarantine with the result that the remaining employees/workforce cannot be usefully employed.

There will however be no right to stand down if there is useful work available for the employee to do which is within the terms of the employee's contract of employment. It need not be work the employee normally carries out.

It is an essential part of stand down that the decision is a unilateral one of an employer to withhold work and payment even when employees are prepared to perform all duties.

Employees can be stood down for the period of time while the business is dealing with the issue AND employees cannot be usefully employed.

Situations where stand down does NOT apply:

- Where an employer refuses to pay an employee in response to the employee's refusal to work (e.g. for safety reasons) in accordance with the contract of employment.
- If an enterprise agreement or contract of employment (rare) makes provision for stand down. In these circumstances the provisions in the agreement or contract will apply as opposed to the Fair Work Act. They may have different or extra rules about when an employer can stand down an employee without pay.
- An employee is taking authorised leave (paid or unpaid) or is otherwise authorised to be absent from their employment.
- If there is work available for some employees you cannot stand down all employees. Only those employees who cannot be usefully employed may be stood down.

In the event of a valid stand down under the Fair Work Act, an employer does not need to pay wages to stood down employees, but an employee accrues leave in the usual way (as though they have worked). Continuity is also not broken.

The Federal Governments new Jobseeker payment is also available to "permanent employees who are stood down".

Even though stand down periods are unpaid, an employer may wish to consider some of the following options prior to ceasing employee pay outright:

- Options for redeployment to other parts of the business where available.
- Allowing employees to take paid leave (such as annual leave or long service leave) if requested.
- Allowing employees alternative leave arrangements such as extended annual leave at half pay or early long service leave (if permitted under any applicable award, enterprise agreement or contract).
- Special provisions for employees with insufficient accrued leave to cover the period of shut down (for example, allowing staff to purchase leave which is then dedicated on a pro rata basis from their annual wage).

Stand downs are likely to be closely scrutinised and can be challenged by an employee or union in the Fair Work Commission if not implemented strictly in accordance with legal obligations, so we strongly recommend seeking advice prior to implementing a stand down.



6. Discrimination and privacy

6.1 Discrimination, bullying

Employers should be careful to balance their health and safety obligations to ensure the health and safety of all employees against a risk of practices which unlawfully discriminate against employees or harass them (for example on the grounds of race or disability).

It is likely in our view that contracting COVID-19 would be characterized as a 'disability' for the purposes of anti-discrimination laws.

Whilst arrangements based on risk assessments which are critical to discharging an employer's work health and safety obligation to ensure a safe workplace are likely to be defensible, employers should be alert and aware that conduct may be unlawful even if it arises from a genuinely held concern about COVID-19 (e.g. changes to the provision of services for certain types of customers).

Employers will be vicariously liable for the conduct of their employees who discriminate against or harass other employees, unless the employer can show it has taken reasonable steps to avoid the conduct.

Reasonable steps include:

- having a policy which deals with discrimination and unlawful harassment;
- having a procedure to handle complaints of unlawful discrimination and harassment;
- conducting training on those policies and procedures;
- directing employees not to engage in any kind of discrimination or harassment; and
- acting promptly in relation to any complaints of unlawful discrimination in accordance with the appropriate policies and procedures and then taking actions to avoid such conduct occurring again.

Employers can minimise the risk of unlawful discrimination claims by ensuring that any decisions made as to a workers' attendance or requesting medical clearance are consistent with publications of the Department of Health and communicating this with employees.

6.2 Privacy considerations

Most employers will need to collect personal information from staff members and workplace visitors to control the risks posed by the COVID-19 pandemic, but they must still comply with privacy laws and the Australian Privacy Principles (APPs) in Schedule 1 of the Commonwealth Privacy Act 1988.

In relation to the coronavirus, employers can collect, use and disclose personal information for the purpose of ensuring all necessary precautionary steps are taken for the individual the information is taken from or any other individuals who might be at risk. However, you must collect "as little information as is reasonably necessary", in line with Department of Health advice on identifying COVID-19 risk factors and controlling the spread of the communicable disease.

You may inform staff that a colleague or visitor has or may have contracted COVID-19 but you should only use or disclose personal information that is reasonably necessary in order to prevent or manage COVID-19 in the workplace.

Depending on the circumstances, it may not be necessary to reveal the name of an individual in order to prevent or manage COVID-19, or the disclosure of the name of the individual may be restricted to a limited number of people on a 'need-to-know basis'.

An employer doesn't need to obtain an individual's express or implied consent to collect personal health information where, for example, the collection relates to preventing serious health and safety threats.

An employee's sick leave records aren't protected by the Privacy Act where those records are used or disclosed for a purpose directly related to the relevant employment relationship.

Where employees are working remotely or from home we strongly recommend employers implement stringent security measures to protect personal information during remote work. This include ensuring all laptops and other devices have updated operating systems and anti-virus software, and strong passwords; workers use work email accounts instead of personal ones; and multi-factor authentication for remote access systems and resources are in place.

7. Resources and contacts

7.1 Key resources

The following are links to government and public health organization websites that have reliable up-to-date information about the status of the COVID-19 in Australia and globally:

Commonwealth Department of Health – [Coronavirus \(COVID-19\) health alert](#)

Service Australia (formerly Centrelink) – [Affected by coronavirus \(COVID-19\)](#)

World Health Organisation – [Coronavirus disease \(COVID-19\) outbreak](#)

Fair Work Ombudsman - [Coronavirus and Australian workplace laws](#)

Safe Work Australia – [Coronavirus \(COVID-19\) Advice for PCBUs](#)

Smartraveller – [Coronavirus \(COVID-19\)](#)

Worksafe Victoria – [Exposure to coronavirus in workplaces](#)

SafeWork NSW – [Coronavirus](#)

WorkCover QLD – [Coronavirus \(COVID-19\) workplace risk management](#)

NT Worksafe – [Getting your workplace ready for COVID-19](#)

WorkSafe Tasmania – [Novel coronavirus \(COVID-19\)](#)

SafeWork SA – [Coronavirus \(COVID-19\) workplace information](#)

Coronavirus Health Information Line
Operates 24 hour a day, seven days a week
1800 020 080

7.2 Key contacts

If you need further assistance in dealing with the implications of COVID-19 the Australian Chamber of Commerce and Industry is here to help and can be contacted on (03) 9668 9950.

