

Not for Profit – Employer Guide Coronavirus (COVID-19)

This is a general guide intended to provide not-for-profit employers with some practical guidance for dealing with COVID-19. This guide does not take into account individual employment agreements, enterprise agreements and awards which may apply to your workforce and alter the position set out below. If you require specific advice in this regard, please contact us.

While this guide is intended to help businesses comply with their minimum legal requirements in response to COVID-19, there may, of course, be other moral and reputational considerations for an employer when deciding on an appropriate response. We are seeing a wide and imaginative range of immediate and temporary steps being taken by employers in particular in response to the COVID-19.

1. Work Health and Safety Considerations

Work Health and Safety Duties

Under Work Health Safety legislation (**WHS Legislation**) in Australia, although there is specific legislation in individual state and territories, all Employers and/or Persons Conducting a Business or Undertaking (**PCBU**) owe a primary duty of care to ensure, so far as reasonably practicable, the health and safety of their workers and other persons while at work. In practical terms, this requires Employers/PCBUs to:

- (a) identify and manage risks to the health and safety of workers and others in their workplace resulting from COVID-19;
- (b) provide information, training, instruction and supervision that is necessary to protect employees from the risks of COVID-19 in the workplace; and
- (c) provide and maintain a safe workplace environment, which limits so far as reasonably practicable, the risks to health and safety at work associated with COVID-19.

In relation to the management of risks, Safe Work Australia has recognised that Employers/PCBUs will not be able to completely eliminate the risk of workers contracting COVID-19 while at work. Employers/PCBUs must, however, still do everything reasonably practicable to minimise that risk by implementing appropriate control measures. These could include:

- (a) directing workers to self-isolate in accordance with Australian Government [Guidelines](#) where they meet the applicable criteria (i.e. where they have been in contact with a confirmed case);
- (b) sending regular information briefs to workers which promote good hygiene practices and providing personal hygiene products such as hand sanitiser, tissues and cleaning supplies;
- (c) ensuring that the workplace is sanitised regularly;
- (d) discouraging non-essential work-related travel;
- (e) encouraging workers to conduct meetings via video conference or telephone, rather than face to face;
- (f) rescheduling work-related travel or in person meetings where possible; and

- (g) considering alternative working arrangements where it is possible for workers to work remotely (see more on working from home below).

Employers/ PCBUs should remind workers that they also owe duties under the WHS Legislation to take reasonable care for their own health and safety and that of others at the workplace. This includes practising good personal hygiene.

The situation is constantly developing and Employers/PCBUs should monitor the following sources for official information and updates regarding COVID-19:

- Australian Government Department of Health and Human Services;
- DFAT Smart Traveller website;
- State and Territory government updates; and
- WHS Regulators.

Working from Home

The Employer's/PCBU's duty to ensure the health and safety of workers continues to apply when they are working remotely. Employers/PCBUs need to take steps to assess the suitability of the worker's home environment for work, ideally prior to the worker commencing remote work. Practically, this may include:

- (a) asking the worker to provide a photograph of their workspace for assessment;
- (b) providing a short self-assessment checklist for the worker to complete in relation to setting up their workspace and identifying hazards (i.e. trip hazards and ergonomic issues); and
- (c) offering, where appropriate, for the worker to take some essential work equipment home (i.e. a comfortable office chair).

Click [here](#) for the Federal Government's guidelines on WHS obligations for people who are working from home.

The reality is that more people are working from home than is usual. These guidelines aim to eliminate or reduce risks that one would try and manage under normal circumstances. Accordingly, in most cases, reminding your staff to follow the best ergonomic practice possible under the circumstances, managing their fatigue and monitoring their mental health through regular contact, is probably adequate.

2. Impact of COVID-19 on Wages

The Fair Work Commission has published guidelines for employers on Australian workplace laws and COVID-19 generally which can be viewed [here](#).

A range of modern awards are also being amended urgently by the Fair Work Commission, even without applications by parties in some instances.

The Clerks Private Sector Award 2010, which will have application for the administrative services provided in not-for-profits, has been amended to include a new Schedule I which includes the following provisions:

I.1 The provisions of Schedule I are aimed at preserving the ongoing viability of businesses and preserving jobs during the COVID-19 pandemic and not to set any precedent in relation to award entitlements after its expiry date.

I.1.1 Schedule I operates from 28 March 2020 until 30 June 2020. The period of operation can be extended on application to the Fair Work Commission.

I.2 During the operation of Schedule I, the following provisions apply:

I.2.1 Operational flexibility

- (a) As directed by their employer, where necessary an employee will perform any duties that are within their skill and competency regardless of their classification under clause 15–Classifications and Schedule B–Classifications, provided that the duties are safe, and that the employee is licensed and qualified to perform them.
- (b) An employer must not reduce an employee's pay if the employee is directed to perform duties in accordance with clause I.2.1.

I.2.2 Part-time employees working from home

Instead of clause 11.5 (Part-time employment), an employer is required to roster a part-time employee who is working from home by agreement with the employer, for a minimum of 2 consecutive hours on any shift.

I.2.3 Casual employees working from home

Instead of clause 12.4 (Casual employment), an employer must pay a casual employee who is working from home by agreement with the employer, a minimum payment of 2 hours' work at the appropriate rate.

I.2.4 Ordinary hours of work for employees working from home

- (a) Instead of clause 25.1(b) (Ordinary hours of work (other than shiftworkers)), for employees working from home by agreement with the employer where an employee requests and the employer agrees, the spread of ordinary hours of work for day workers is between 6.00 am and 11.00 pm, Monday to Friday, and between 7.00 am and 12.30 pm on Saturday.
- (b) Day workers are not shiftworkers for the purposes of any penalties, loadings or allowances under the award, including for the purposes of clause 28.
- (c) The facilitative provision in clause 25.2 (Ordinary hours of work (other than shiftworkers)), which allows the spread of hours to be altered, will not operate for the employees referred to in clause I.2.5(e).

I.2.5 Agreed temporary reduction in ordinary hours

- (a) An employer and the full-time and part-time employees in a workplace or section of a workplace, may agree to temporarily reduce ordinary hours of work for the employees in the workplace or section for a specified period while Schedule I is in operation.
- (b) At least 75% of the full-time and part-time employees in the relevant workplace or section must approve any agreement to temporarily reduce ordinary hours.
- (c) For the purposes of clause I.2.5(a), ordinary hours of work may be temporarily reduced:

- (i) For full time employees, to not fewer than 75% of the full-time ordinary hours applicable to an employee immediately prior to the implementation of the temporary reduction in ordinary hours.
- (ii) For part-time employees, to not fewer than 75% of the part-time employee's agreed hours immediately prior to the implementation of the temporary reduction in ordinary hours.
- (d) Where a reduction in hours takes effect under clause 1.2.5(a), the employee's ordinary hourly rate will be maintained but the weekly wage will be reduced by the same proportion.
- (e) Nothing in Schedule I prevents an employer and an individual employee agreeing in writing (including by electronic means) to reduce the employee's hours or to move the employee temporarily from full-time to part-time hours of work, with a commensurate reduction in the minimum weekly wage.
- (f) If an employee's hours have been reduced in accordance with clause 1.2.5(a):
 - (i) the employer must not unreasonably refuse an employee request to engage in reasonable secondary employment; and
 - (ii) the employer must consider all reasonable employee requests for training, professional development and/or study leave.
- (g) For the purposes of clause 1.2.5(a), where there is any reduction in the ordinary hours of work for full-time or part-time employees in a workplace or section during the period Schedule I is in operation, all relevant accruals and all entitlements on termination of employment will continue to be based on each employee's weekly ordinary hours of work prior to the commencement of Schedule I.
- (h) For the purposes of clause 1.2.5(a), the approval of employees shall be determined by a vote of employees. In order for the vote to be valid, the employer must comply with the following requirements:
 - (i) Where any of the employees are known to be members of the Australian Services Union or another organisation, the ASU or other organisation shall be informed before the vote takes place.
 - (ii) Prior to the vote of employees, the employer shall provide the employees with the contact details of the ASU, should they wish to contact the ASU for advice; and
 - (iii) The employer must notify the Fair Work Commission by emailing clerksaward@fwc.gov.au that the employer proposes to conduct a vote under Schedule I. The employer shall provide the work email addresses of the employees who will be participating in the vote, to the Commission. The Commission will then distribute the ASU COVID-19 Information Sheet to the employees prior to the vote. The Commission shall list the name of the business on a register which will be accessible to the ASU, upon request, for the period when Schedule I is in operation.
 - (iv) The vote shall not take place until at least 24 hours after the requirements of clause 1.2.5(h)(i), (ii) and (iii) have been met.

1.2.6 Annual leave

- (a) *Employers and individual employees may agree to take up to twice as much annual leave at a proportionately reduced rate for all or part of any agreed or directed period away from work, including any close-down.*
- (b) *Instead of clauses 29.6, 29.7 and 29.8 (Annual leave), an employer may direct an employee to take any annual leave that has accrued, subject to considering the employee's personal circumstances, by giving at least one week's notice, or any shorter period of notice that may be agreed. A direction to take annual leave shall not result in an employee having less than 2 weeks of accrued annual leave remaining.*

1.2.7 Close down

- (a) *Instead of clause 29.5 (Annual leave), and subject to clause 1.2.7(b), an employer may:*
 - (i) *require an employee to take annual leave as part of a close-down of its operations by giving at least one week's notice, or part of its operations, or any shorter period of notice that may be agreed; and*
 - (ii) *where an employee who has not accrued sufficient leave to cover part or all of the close-down, the employee is to be allowed paid annual leave for the period for which they have accrued sufficient leave and given unpaid leave for the remainder of the closedown.*
- (c) *Clause 1.2.7(a) does not permit an employer to require an employee to take leave for a period beyond the period of operation of Schedule I.*
- (d) *Where an employee is placed on unpaid leave pursuant to clause 1.2.7(a), the period of unpaid leave will count as service for the purposes of relevant award and NES entitlements.*

In addition, on 8 April 2020, the Fair Work Commission varied the 99 modern awards to include a section on unpaid pandemic leave, as follows:

Schedule X – Additional measures during the COVID-19 pandemic

X.1 Subject to clauses X.2.1.(d) and X.2.2(c), Schedule X operates from 8 April 2020 until 30 June 2020. The period of operation can be extended on application.

X.2 During the operation of Schedule X, the following provisions apply:

X.2.1 Unpaid pandemic leave

- (a) Subject to clauses X.2.1(b), (c) and (d), any employee is entitled to take up to 2 weeks' unpaid leave if the employee is required, by government or medical authorities or acting on the advice of a medical practitioner, to self-isolate and is consequently prevented from working, or is otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic.
- (b) The employee must give their employer notice of the taking of leave under clause X.2.1(a) and of the reason the employee requires the leave, as soon as practicable (which may be a time after the leave has started).
- (c) An employee who has given their employer notice of taking leave under clause X.2.1(a) must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason given in clause X.2.1(a).

- (d) A period of leave under clause X.2.1(a) must start before 30 June 2020, but may end after that date.
- (e) Leave taken under clause X.2.1(a) does not affect any other paid or unpaid leave entitlement of the employee and counts as service for the purposes of entitlements under this Award and the National Employment Standards.

NOTE: The employer and employee may agree that the employee may take more than 2 weeks' unpaid pandemic leave.

X.2.2 Annual leave at half pay

- (a) Instead of an employee taking paid annual leave on full pay, the employee and their employer may agree to the employee taking twice as much leave on half pay.
- (b) Any agreement to take twice as much annual leave at half pay must be recorded in writing and retained as an employee record.

- (c) A period of leave under clause X.2.2(a) must start before 30 June 2020, but may end after that date.

EXAMPLE: Instead of an employee taking one week's annual leave on full pay, the employee and their employer may agree to the employee taking 2 weeks' annual leave on half pay. In this example:

- the employee's pay for the 2 weeks' leave is the same as the pay the employee would have been entitled to for one week's leave on full pay (where one week's full pay includes leave loading under the Annual Leave clause of this award);² and
- one week of leave is deducted from the employee's annual leave accrual.

NOTE 1: A employee covered by this Award who is entitled to the benefit of clause X.2.1 or X.2.2. has a workplace right under section 341(1)(a) of the Act.

NOTE 2: Under section 340(1) of the Act, an employer must not take adverse action against an employee because the employee has a workplace right, has or has not exercised a workplace right, or proposes or does not propose to exercise a workplace right, or to prevent the employee exercising a workplace right. Under section 342(1) of the Act, an employer takes adverse action against an employee if the employer dismisses the employee, injures the employee in his or her employment, alters the position of the employee to the employee's prejudice, or discriminates between the employee and other employees of the employer.

NOTE 3: Under section 343(1) of the Act, a person must not organise or take, or threaten to organise or take, action against another person with intent to coerce the person to exercise or not exercise, or propose to exercise or not exercise, a workplace right, or to exercise or propose to exercise a workplace right in a particular way.

The above leave clause came into effect on 8 April 2020 and will operate until 30 June 2020. The determination does not take effect regarding a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.

So, the rules are changing rapidly. To achieve strict compliance, you will need to keep an eye on your modern award on a daily basis. Don't trust the old copy you might have lying on your desk.

Directions to take annual leave

Where an employer's workforce is covered by a modern award, that award will usually set out the circumstances in which an employer can direct an employee to take accrued annual leave.

Under most modern awards, an employer can issue a direction to employees that annual leave be taken in circumstances only where the employee has an **excessive leave accrual**. If you require specific advice on award coverage, please contact us.

An employee will usually have an *excessive leave accrual* if the employee has accrued **more than 8 weeks paid annual leave**. The usual process for issuing a direction to take leave is as follows:

- (a) The employer should first try to reach an agreement with the employee as to how to reduce or eliminate the excessive accrual.
- (b) If no agreement is reached (including because the employee refuses to confer with the employer on the matter), the employer may direct the employee in writing to take one or more periods of paid annual leave.
- (c) The employer's direction must not:
 - (i) result in the employee's remaining accrued annual leave entitlements being less than 6 weeks;
 - (ii) require the employee to take a period of paid annual leave of less than one week;
 - (iii) require the employee to take a period of paid annual leave beginning less than 8 weeks or more than 12 months from the date the direction is given to the employee; and
 - (iv) be inconsistent with any other leave arrangement agreed by the employer and the employee,

otherwise it will have no effect.

Long Service Leave (LSL)

Employers and employees can agree for the employee to take LSL in advance in Victoria, New South Wales and South Australia, but not elsewhere.

In NSW, the Long Service Leave Act, 1955 was amended on 23 March 2020 to insert the following provision:

15A COVID-19 pandemic—special provisions

- (1) *This section has effect for the prescribed period and prevails to the extent of any inconsistency with any other provision of this Act.*
- (2) *An employer may, under section 4(3A), give a worker a period of long service leave that is less than one month if the worker agrees to that lesser period of leave.*
- (3) *An employer may, under section 4(10), give a worker less than one month's notice if the worker agrees to that lesser period of notice.*
- (4) *In this section—*
prescribed period means the period—
 - (a) *starting on the commencement of this section, and*

- (b) ending on—
 - (i) the day that is 6 months after the commencement, or
 - (ii) the later day, not more than 12 months after the commencement, prescribed by the regulations.

This provision allows for periods of LSL of less than one month to be taken by agreement, and to allow for a period of less than a month's notice for the taking of LSL if the employee agrees to a lesser period of notice.

Personal (sick) leave

Employees may take personal leave in accordance with the National Employment Standards (NES) under the *Fair Work Act 2009* (Cth) (**FWA**) where they are legitimately sick. They should usually be referred to the employer's applicable leave policy for evidentiary requirements in this regard.

An employer cannot unilaterally direct an employee to take personal leave if they are not sick.

In circumstances where employees have exhausted their personal leave balance, they may take unpaid leave until they are fit to work again.

Similarly, employees with family members who are unwell are entitled to take paid carer's leave, and casual employees may take unpaid carer's leave.

Leave without pay

An employer and an employee can agree to a period of leave without pay. However, an employer cannot compel an employee to take leave without pay unless the employee is sick and has run out of paid personal leave.

Other options - reducing wages and hours of work

Employers may consider getting an employee to agree (in writing) to a temporary pay cut or reduction in working hours (with a pro-rata reduction in pay). They cannot do so unilaterally, however this may be a suitable or preferable option for employees where the employer's only other options are to make the position they occupy redundant, stand them down without pay, or for the employee to instead agree to take paid annual leave.

Any reduction in wages will still need to ensure pay is maintained at above any applicable modern award rate. This is a potential trap if employees agree to a wage cut and the effect is that they then earn less than the legal minimum. Employers and employees cannot properly make such an agreement, and to give effect to such an arrangement will equate to an offence under the FWA.

Again, if you are seeking specific advice in this regard, please contact us.

3. Standing down employees without pay

Section 524(1) of the FWA provides that an employer may stand down an employee without pay during a period in which the employee cannot be usefully employed because of one of the following circumstances:

- (a) industrial action (other than industrial action organised or engaged by the employer);
- (b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown; or

- (c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

Employers should be mindful that a mere downturn in trade is unlikely to constitute a 'stoppage of work' for the purposes of section 524(1)(c) of the FWA. Employers would need to be satisfied that:

- (a) these issues are caused by COVID-19 (or caused by some other factor which is entirely out of the employer's control); and
- (b) are significant enough to constitute a 'stoppage of work'.

Section 524 requires an **individual** assessment to be made in relation to whether or not an employee can be usefully employed during a particular period because of a stoppage of work. Employers should consider whether the employees it proposes to stand down can be usefully employed in any other capacity in the business.

If employees are stood down in accordance with section 524(1)(c), those employees could also ask to use their paid annual leave.

Employers should be mindful that if they decide to stand down any employees, that decision may be disputed by the employee under section 526(3)(a) of the FWA. Any such dispute would be dealt with by the Fair Work Commission on application.

Enterprise agreements in particular may contain provisions that override or modify the stand down provisions in the Act.

4. Redundancy

If all other options have been considered and affected employees consulted, an employer may make positions redundant if they are no longer required to be filled.

5. Government Assistance

The Government is introducing a wage subsidy program to support both employees and businesses. The JobKeeper Payment is designed to help businesses affected by COVID-19 to cover the costs of their employees' wages, so that more employees can retain their job and continue to earn an income.

JobKeeper Payment

Summary

Under the JobKeeper Payment, businesses and not-for-profits significantly impacted by the Coronavirus outbreak will be able to access a wage subsidy from the Government to continue paying their employees. This assistance will help businesses keep people in their jobs and restart when the crisis is over. This means employees can keep their jobs and continue to earn an income.

The JobKeeper Payment is a temporary scheme open to businesses impacted by the Coronavirus. The JobKeeper Payment will also be available to the self-employed.

The Government will provide \$1,500 per fortnight per eligible employee for up to 6 months.

The JobKeeper Payment will support the maintenance of the connection between employers and employees. These connections will enable business to reactivate their operations quickly – without having to rehire staff – when the crisis is over.

Eligibility

Employers (including not-for-profits) will be eligible for the subsidy if, at the time of applying:

- their business has an annual turnover of less than \$1 billion and they estimate their turnover has fallen or will likely fall by 30 per cent or more (15 per cent for charities: see below); or
- their business has an annual turnover of \$1 billion or more (or is part of a consolidated group for income tax purposes with turnover of \$1 billion or more) and they estimate their turnover has fallen or will likely fall by 50 per cent or more; and
- their business is not subject to the Major Bank Levy.

Self-employed individuals will be eligible for the JobKeeper Payment where they meet the relevant turnover test outlined above.

For charities registered with the Australian Charities and Not-For-Profit Commission, they will be eligible for the subsidy if they estimate their turnover has, or will likely fall by 15 per cent or more relative to a comparable period.

The Australian Government and its agencies, State and Territory governments and their agencies, foreign governments and their agencies, local governments and wholly-owned corporations of these bodies are not eligible for the JobKeeper payment. Non-government schools and private vocational education providers are eligible.

For further advice, please contact us.

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