

HR Issues Arising from COVID-19 – What to Do?

*With many businesses experiencing a sudden down-turn as a result of the COVID-19 virus, an immediate concern is how to manage staffing levels without falling foul of Australia's employment laws. The reality is that in many industries, for a number of months ahead, companies will need to reduce staffing levels to manage their wages burden. Employers cannot afford to put their head in the sand regarding this issue, and difficult decisions will need to be made by most employers at some stage. **The purpose of this article is to set out some of the practical legal principles that employers should take into account so as to protect themselves from disputes and claims.***

Neither the Fair Work Act which governs employment laws in Australia, nor the standard terms of employment contracts used by most employers, specifically contemplate having to deal with a global pandemic. Employee rights to paid annual leave, long service leave and personal leave are not specifically framed from the perspective of forced reductions in working hours due to an external event beyond anyone's control. **What are the rules if we need to reduce hours of work for a limited period of time, with an expectation of an upswing in the fortunes of the business activity later in 2020?**

Rules around Employment Contracts and the Fair Work Act

Employment contracts are like any other contract. The parties are bound to the terms unless they both agree to change them. Accordingly, in most circumstances, an employer cannot simply declare unilaterally that employees are not to work as many days or hours, or that their pay is to be cut.

However, section 524 of the Fair Work Act provides specific relief from this general limitation in three situations. Employers can stand down workers during periods of industrial action, where there has been a breakdown of machinery due to no fault of the employer, or lastly in circumstances where there has been, "a *stoppage of work for any cause for which the employer cannot reasonably be held responsible.*"

There is no doubt that in the context of the COVID-19 pandemic, where a business has a sudden drop in activity that means that many employee functions do not need to be performed for a period, satisfies section 524. Accordingly, businesses will lawfully be able to stand down workers during this period.

Respective Dialogue

A word of caution - stand down powers should be used sparingly. The heart of any successful business is its workforce – the men and women who execute the vision of the business owners and connect the company to its suppliers and customers. Simply standing staff down without discussion may be very unwise in many situations, particularly if business owners are wishing to retain staff loyalty during this difficult period. Ideally, there needs to be a respectful, consultative process, in which

employees are provided with an honest assessment of the economic position of the business in light of COVID-19, and for there to be a mature discussion and negotiation around changes to contractual arrangements to help the business get through.

An important commercial reality to remind staff of, when having these discussions, is that in most industries there will not be any employment opportunities elsewhere. Employees are in a vulnerable position, and so as to preserve their employment, their best bet will usually be to agree to a temporary reduction in working hours or days, with a commensurate drop in income, until the most difficult part of the Coronavirus season has passed. **We are therefore recommending that employers enter into open and honest dialogue with staff about the likely impact of COVID-19** on their business and to seek employee buy-in regarding the sensible reduction in staffing levels, to provide the business with the best chance of survival, thereby securing everyone's long term employment.

What happens if employees refuse to engage in any negotiation?

Section 524 allows employers to take unilateral action to stand employees down. Where staff refuse to negotiate or give way to your reasonable requests to drop their hours, employers may have no alternative to take this step. However, standing down staff will only ever provide temporary financial relief to businesses.

If the impacts of the pandemic continue to be felt by businesses over an extended period, a wise course for many employers will be to rationalize staff numbers permanently by making some positions redundant. This is less of a burden than it may seem for small businesses, where less than 15 employees are working, where the redundancy payment otherwise provided for under Section 119 of the Fair Work Act is not required.

Employees will need to be given notice of the impending termination by reason of redundancy or to be paid in lieu of that notice period. If contemplating redundancies, employers should read the terms of any applicable awards carefully, because they will contain consultation processes which must be followed before individual positions are declared redundant.

Employee Entitlements

A common question that is raised relates to employee entitlements to top up their income if they temporarily reduce their working hours. It is certainly appropriate to top up people's income through payment of accrued annual leave entitlements, where staff request such an arrangement. Personal Leave (Sick Leave) and Compassionate Leave should only be paid in circumstances where an employee or a member of their family is sick, requiring the employee to stay at home. If the employee is at home without being ill due to self-exclusion laws, and they have no accrued entitlements, then unfortunately leave without pay may be the only solution.

Rules around Long Service Leave

The rules regarding Long Service Leave vary from state to state, but the basic principle is that Long Service Leave should only be taken in large chunks, either taking all of the Long Service Leave at one time or in substantial portions such as a

month at a time. Although we expect that many flexible employers will agree to grant payment of Long Service Leave to staff to supplement their salaries during a reduced working regime, we caution that there are two risks with this. The first risk is that if the employee ends up not continuously working for the employer for 10 years and leaves the company at their own volition, they will not have been entitled to that Long Service Leave, leaving the employer out of pocket. The other risk is that by paying small amounts of Long Service Leave to employees rather than paying it in large chunks, employers are not compliant with Long Service Leave legislation. An employer could potentially be prosecuted for this, although the likelihood of this is extremely remote.

Communicate with your team

Whatever temporary arrangements are implemented in workplaces, shrewd employers will keep their staff up-to-date with any changes to the economic situation. It may be appropriate to commit to weekly or fortnightly updates, so that employees receive the clear message that as soon as the clouds clear, their employment will return to normal.

Many employers are unaware of the potential of employing staff on fixed-term contracts. During periods of uncertainty such as during the current COVID-19 season, it is possible for employers to offer short term fixed contracts to new employees to take them through this period, particularly in industries where there is an anticipated temporary upswing in work, such as in medical, legal and food supply and logistics.

Difficult conversations are happening at every workplace across Australia. In our experience, dealing honestly and openly is the best policy as employees will otherwise become uneasy and anxious, which can only serve to undermine company morale. The good news is that there are practical processes that can be put into place to manage staffing numbers during periods such as this and in most cases we expect that staff will cooperate with reasonable requests to reduce hours to trade through this difficult period.

This information was provided by Atkinson Vinden Lawyers. They have been providing businesses with employment advice for over 40 years and are available to answer any requests for HR advice. They can be contacted at the following:

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