

Coronavirus (COVID-19) and Australian workplace laws

When can employees be stood down without pay?

Employers and employees are encouraged to work together to find appropriate solutions that suit the needs of individual workplaces and staff.

Under the Fair Work Act, an employee can only be stood down without pay if they cannot be usefully employed because of a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

The most common scenarios are severe and inclement weather or natural disasters.

Whether the option of standing down employees is available is very fact dependent and an employer should exercise the option cautiously. The employer must be able to demonstrate that:

- there is a stoppage of work
- the employees to be stood down cannot be usefully employed (which is not limited to the work an employee usually performs)
- the cause of the stoppage must also be one that the employer cannot reasonably be held responsible for.

If an employer unlawfully stands down employees without pay, the employees will likely be able to recover unpaid wages.

Employers cannot generally stand down employees simply because of a deterioration of business conditions or because an employee has coronavirus.

Some examples of when employers may be able to stand down employees include:

- **if there was an enforceable government order or direction** requiring the business to close (which means there is no work at all for the employees to do, even from another location)
- **if a large proportion of the workforce was required to self-quarantine with the result that no useful work was able to be performed in the business by the remaining employees/workforce**
- **if there was a stoppage of work due to lack of supply for which the employer could not be held responsible.**

Employers are not required to make payments to employees for the period of a stand down but may choose to pay their employees.

Employees accrue leave as normal.

An employee is not taken to be stood down during a period when the employee is taking paid or unpaid leave that is authorised by the employer or the employee is otherwise authorised to be absent.

Other options that an employer may consider instead of a stand down include:

- seeking employees' agreement to take paid (or unpaid) leave for a period
- in limited circumstances, directing employees to take paid annual leave
- in limited circumstances, negotiating with employees to change regular rosters or hours of work
- terminating the employment of the employees, in which case the employer may have to provide redundancy pay.

Enterprise agreements and employment contracts can 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.

Employers need to balance their legal obligations, including those relating to anti-discrimination.

Can employees be directed not to travel?

- Employers can direct employees not to undertake work-related travel if this is necessary to meet workplace health and safety obligations or is otherwise a lawful and reasonable direction.
- Employers are unlikely to be able to direct an employee not to undertake private travel.

Where can I get information on health and safety in the workplace?

For information about health and safety in the workplace, including legal obligations of employers and employees, go to:

- the Australian Government **Department of Health** [☞] - for the latest information and advice about coronavirus
- **Safe Work Australia** [☞] - for information and referrals about managing the risks of contracting coronavirus in the workplace
- **your State or Territory workplace health and safety body** - who can also assist with **workers compensation** enquiries
- **Comcare (Commonwealth)** [☞] - for Australian Government employees and for employees of organisations which self-insure under the scheme
- **Smart Traveller's webpage on coronavirus** [☞]
- **Office of the Australian Information Commissioner (OAIC)** [☞] - for information on privacy obligations for private sector employers (including health sector providers) relating to coronavirus.

When can employers' direct employees to stay away from their usual workplace under workplace health and safety laws?

Safe Work Australia [☞] has information about when an employer can direct employees to stay away from their usual workplace under the model workplace health and safety laws.

-

Can an employer change an employee's regular roster or hours of work?

Employers need to consult employees about a change to their regular roster or ordinary

hours of work under their award or enterprise agreement. In particular, employers have to:

- provide information about the change
- invite employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities)
- consider their employees' views about the impact of the change.

Awards and enterprise agreements may also set out extra rules about changing rosters or ordinary hours of work.

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.

An employer and employee may agree to an 'individual flexibility arrangement', which allows them to vary terms in their award or enterprise agreement relating to when work is performed. Individual flexibility arrangements only apply to an individual employee, must be in writing, and are subject to a number of safeguards to ensure the agreement has been genuinely made and the employee is left better off overall.

What if an employer needs to let employees go? (Redundancy)

Some employers may need to make employees' positions redundant in response to a business downturn. If an employee's job is made redundant, their employer may have to give them redundancy pay.

The Fair Work Act has requirements that employers have to meet before they can terminate an employee's employment, such as providing notice of termination.

Under the Fair Work Act, an employee is protected from being dismissed because of:

- a temporary absence due to illness or injury
- being dismissed because of discrimination,
- a reason that is harsh, unjust or unreasonable
- or another protected right.

Employers are prohibited from exerting undue influence or undue pressure on employees in relation to making certain agreements or arrangements.

These protections continue to operate in relation to employees impacted by coronavirus.

What if an employer wants their employees to stay home as a precaution?

Where an employer directs a full-time or part-time employee not to work due to workplace health and safety risks, but the employee is ready, willing and able to work, the employee is generally entitled to be paid while the direction applies.

However, if an employee cannot work because they're subject to an enforceable government order or direction requiring them to self-quarantine, the employee isn't ordinarily entitled to be paid (unless they use leave entitlements).

Under workplace health and safety laws, employers must ensure the health and safety of their workers and others at the workplace as far as is reasonably practicable. Workers also have responsibilities under those laws.

If an employee is at risk of infection from coronavirus (for example, because they've recently travelled from overseas, or have been in close contact with someone who has the virus), employers should request that they work from home (if this is a practical option - see below) or not work during the risk period.

Employers should consider whether their obligations are impacted by any applicable enterprise agreement, award, employees' employment contracts or workplace policies, which may be more generous.

What happens if an employee or their family member is sick with coronavirus?

- **Employees who are sick with coronavirus cannot attend the workplace** for a period due to the workplace health and safety legal obligations that both employers and employees have.
- **Employers can direct employees who are sick with coronavirus not to come to work.** Employers can do this if they're acting reasonably and based on factual information about health and safety risks, which includes relying on the Australian Government's health and quarantine guidelines.
- **Full-time and part-time employees who cannot come to work because they're sick with coronavirus can take paid sick leave.**

If an employee needs to look after a family member or a member of their household who's sick with coronavirus, or suffering an unexpected emergency, **they're entitled to take paid carer's leave.**

An employer cannot require an employee to take sick or carer's leave. However, in these circumstances, the employee isn't entitled to be paid unless they use their paid leave entitlements.

Carers Leave

- Under the Fair Work Act, **casual employees** are entitled to 2 days of unpaid carer's leave per occasion.
- **Full-time and part-time employees can take unpaid carer's leave if they have no paid sick or carer's leave left.** Employers should consider their obligations under any applicable enterprise agreement, award, employees' employment contracts or workplace policies, which may be more generous.
- **An employee must give their employer reasonable evidence of the illness or unexpected emergency if their employer asks for it.**

This also applies to situations relating to coronavirus.

- Under the Fair Work Act, an employee is protected from being dismissed because of their temporary absence due to illness or injury.

When can employees work from home?

Working from home arrangements are usually agreed between an employer and employee. An employer who wants to direct an employee to work from home should review their obligations under any applicable enterprise agreement, award, employment contract or workplace policy. Employers should also consider the nature of the work involved and the suitability of the employee's home. Workplace health and safety laws still apply even when an employee is working from home.

Where employees are required to record their hours of work (for example, in relation to annualised wage arrangements under some awards), this needs to continue when they're working from home. Employers and employees are encouraged to discuss how this should occur.

More information:

- [your State or Territory workplace health and safety body](#)
- [Comcare \(Commonwealth\)](#) [☞] - for Australian Government employees and for employees of organisations which self-insure under the scheme.

What about casual employees and independent contractors?

Casual employees don't have paid sick or carer's leave entitlements under the National Employment Standards and usually are not entitled to be paid when they don't work (for example, if they miss a shift because they are sick due to coronavirus or because they are otherwise required to self-isolate).

Casual employees are paid a **casual loading** instead of paid leave entitlements. Employers should also consider their obligations under any applicable enterprise agreement, award, employees' employment contracts or workplace policies.

Independent contractors are not employees and don't have paid leave entitlements under the Fair Work Act.

However, there are special provisions that deem contract outworkers in the textile, clothing and footwear industry to be employees for the purposes of most protections under the Fair Work Act. Where these provisions apply, the contract outworker should be treated as an employee.

Employees is Stuck Overseas or Quarantined?

What if an employee is stuck overseas or is required to be quarantined or to self-isolate?

Employees should contact their employer immediately if they're unable to attend work because they cannot return from overseas, are required to enter quarantine or to self-isolate because of coronavirus.

The Fair Work Act does not have specific rules for these kinds of situations so employees and employers need to come to their own arrangement.

This may include:

- **working from home or another location** (if this is a practical option), noting they should review any applicable enterprise agreement, award, employment contracts or workplace policies
- **taking sick leave** if the employee is sick
- **taking annual leave**
- **taking any other leave available to them** (such as long service leave or any other leave available under an award, enterprise agreement or employment contract)
- **arranging any other paid or unpaid leave** by agreement between the employee and the employer.

Where an employer directs a full-time or part-time employee to stay home in line with advice, for example in line with the Australian Government's health and quarantine advice, and the employee isn't sick with coronavirus, the employee should ordinarily be paid while the direction applies.

However, if an employee cannot work because they're subject to an enforceable government order or direction requiring them to self-quarantine, the employee isn't ordinarily entitled to be paid (unless they use leave entitlements). **In this case, their inability to work is because of a government order or direction, not because of their employer.**

If an employee cannot work due to travel restrictions (for example, they are stuck overseas), they're not entitled to be paid (unless they use paid leave entitlements).

Employers should consider whether their obligations are impacted by any applicable enterprise agreement, award, employees' employment contracts or workplace policies, which may be more generous.

What if an employee wants to stay home as a precaution?

Employees who want to stay at home as a precaution (but who are not directed to by their employer or as a result of an enforceable government order or direction) need to come to an arrangement with their employer that best suits their workplace. This may include requesting to work from home (if this is a practical option) or taking some form of paid or unpaid leave, such as annual leave or long service leave. Normal leave application processes in the workplace apply. If the employee doesn't enter into an arrangement with their employer or use paid leave, they're not entitled to payment in these circumstances. You can find information on self-quarantine requirements on the Australian Government [Department of Health's website](#)²⁷.

Employees are encouraged to discuss their level of risk of contracting coronavirus with their doctor, workplace health and safety representative or the appropriate Commonwealth, State or Territory workplace health and safety body.

Employees who don't work because they have a reasonable concern about an imminent risk to their health or safety are not taking industrial action. This is provided they're not failing to comply with a direction to perform other appropriate and safe work.

What happens if an employee or their family member is sick with coronavirus?

Employees who are sick with coronavirus cannot attend the workplace for a period due to the workplace health and safety legal obligations that both employers and employees have.

Employers can direct employees who are sick with coronavirus not to come to work. Employers can do this if they're acting reasonably and based on factual information about health and safety risks, which includes relying on the Australian Government's health and quarantine guidelines.

Full-time and part-time employees who cannot come to work because they're sick with coronavirus can take paid sick leave. If an employee needs to look after a family member or a member of their household who's sick with coronavirus, or suffering an unexpected emergency, they're entitled to take paid carer's leave. An employer cannot require an employee to take sick or carer's leave. However, in these circumstances, the employee isn't entitled to be paid unless they use their paid leave entitlements.

Under the Fair Work Act, casual employees are entitled to 2 days of unpaid carer's leave per occasion. Full-time and part-time employees can take unpaid carer's leave if they have no paid sick or carer's leave left. Employers should consider their obligations under any applicable enterprise agreement, award, employees' employment contracts or workplace policies, which may be more generous.

An employee must give their employer reasonable evidence of the illness or unexpected emergency if their employer asks for it. This also applies to situations relating to coronavirus.

Under the Fair Work Act, an employee is protected from being dismissed because of their temporary absence due to illness or injury.

What if an employee cannot attend work because their child's school has closed due to concerns about coronavirus?

Employees who cannot come to work because they need to care for a child whose school has closed will ordinarily need to use paid leave entitlements to be paid for their absence.

Paid carer's leave is available to full-time or part-time employees where the employee needs to look after a family member or a member of their household who requires care or support because of a personal illness or unexpected emergency affecting the member.

A school closing on short notice and for a short period due to concerns about coronavirus (for example, because someone at the school has tested positive) is an unexpected emergency for this purpose.

Casual employees are entitled to 2 days of unpaid carer's leave per occasion. Full-time and part-time employees can take unpaid carer's leave if they have no paid sick or carer's leave left.

An employee must give their employer reasonable evidence of the unexpected emergency if their employer asks for it. This will also apply to situations relating to coronavirus.

Other arrangements that may be available include:

- working from home (if this is a practical option and consistent with any applicable award, enterprise agreement, employment contract or workplace policy) or other flexible working arrangements
- taking annual leave
- taking any other leave (such as long service leave or any other leave available under an award, enterprise agreement or employment contract)
- taking any other paid or unpaid leave by agreement between the employee and the employer.