

COVID-19: (AUSTRALIA) STAND DOWN WHAT DOES IT ALL MEAN?

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**This information is accurate as of 11.00 am Wednesday 25 March 2020 and is subject to change as this situation evolves.*

Over the past two weeks we have assisted many of our clients in dealing with the heartbreaking reality of shutting down their businesses. What we have seen to date is employers which have taken whatever steps they could to try and mitigate the effects on their employees and employees who have accepted these life changing events with understanding and dignity. Even two weeks ago, the thought of an employer standing down their workforce was unimaginable. Now, it is a daily reality for many of our clients. Stand down is an alternative to redundancy, it is saying to your employees "We are shutting down now because we have to, but we will be back and we want you to be around when we re-open". It's an important message to be sending to your employees at the moment.

We set out below some of the key questions we are getting from employers. We are focussing on stand down because that's what many of our clients are facing.

CAN I STAND DOWN MY EMPLOYEES?

If your business has been required to close because of the current government requirements and there is no useful work for your employees to do, you are able to stand down your employees. You should check your employees' contract of employment and any applicable award or enterprise agreement to see if there are any special rules you have to follow.

WHAT IF THERE HAS JUST BEEN A DOWNTURN IN WORK BECAUSE THERE ARE LESS PEOPLE AROUND?

For the statutory stand down provisions to be triggered there must be a "stoppage of work" for which the employer cannot be reasonably held responsible. Ordinarily a downturn is not a stoppage. However, it is likely that as further shutdown restrictions come into place, many employees will satisfy the requirements for a stoppage. If you are uncertain please call us and we would be happy to talk through your specific circumstances.

WHAT IS THE EFFECT OF A STAND DOWN?

Standing your employees down is a bit like hitting the pause button. Employees won't need to come to work and perform their duties and employers won't need to pay their employees. However, the employees will remain employed for the period of the stand down and this period will count as service for the purpose of accruing entitlements such as annual leave.

WHAT IS THE BENEFIT OF STAND DOWN?

The stand down provisions are actually there to protect employees. Without the stand down provisions many employers would be making employees redundant right now.

In the current unprecedented circumstances the stand down provisions allow employers to effectively preserve an employee's role. Yes it's true that for, what is likely to be the next few months, employees who are stood down won't get paid by the employer. But when the government requirements are lifted and there is no longer a "stoppage of work" employees will be able to return to their previous role without any interruption in service.

The other benefit of stand down is that while employees are stood down they will be able to access government entitlements in the form of a JobSeeker Payment (formerly NewStart). That is they are considered "unemployed" for the purpose of social security rules and will be able to apply for the JobSeeker Payment currently \$565.70 per fortnight for a single person with no children and with effect from 27 April 2020 the additional corona virus supplement of \$550 per fortnight. The government has put the corona virus supplement in place for exactly this reason, to provide some form of protection for all those employees who have been stood down.

DO I HAVE TO GIVE NOTICE OF STAND DOWN?

There is no official requirement to give notice of a stand down. You may have formal consultation requirements in your applicable award or enterprise agreement. Many of our clients are discussing these matters with their employees prior to standing them down where this is possible. There's not much either party can do to avoid a stand down but these discussions are a useful way to check in on your employees, assure them that this situation is temporary and you want them back and talk to them about whether they would like to access their accrued leave.

WHAT IF MY EMPLOYEE WANTS TO ACCESS THEIR PAID LEAVE ENTITLEMENTS?

It is perfectly fine for employees to ask to access their accrued entitlements at this time. If an employee makes such a request and your business can afford to make those payments, we think it is a practical way to assist employees during this difficult time. Technically while an employee is on leave they are not on stand down. The easiest way of dealing with this is generally to allow employees to use up their accrued leave as a starting point and if the closure of your business continues, then employees can apply for government benefits.

However, an employer is not required to agree to a request to take accrued leave where they have reasonable grounds to do so. Where cash flow is an issue and employers cannot afford to pay staff to be on accrued leave while there is a stoppage of work, an employer may decline a request to take annual leave or consider reaching agreement with employees to take leave at half pay.

CAN I REQUIRE MY EMPLOYEES TO TAKE LEAVE?

In certain limited circumstances, employers can require employees to take accrued leave. Whether or not you can do this will depend on the specific terms of the applicable award, enterprise agreement the employee's employment contract and your leave policies. Ultimately based on what we have seen over the past two weeks, we think the preferred approach is to first try and agree a position with your employees that will work for both of you. This agreement should be recorded in writing. The outcome is probably going to be the same but in this time

of extreme uncertainty for employees, having some control over how and when they take their leave can go a long way.

WHAT IF I STILL HAVE SOME WORK FOR MY EMPLOYEES TO DO BUT IT IS MUCH FEWER HOURS THAN BEFORE?

If you have work for your employee, ie they can be usefully employed, this will not be treated as stand down. We know plenty of retail clients for example who have had to close their doors but have offered employees some admin work to complete at head office. Even if this is a temporary solution to help mitigate against the effects of a business closure, it provides some short term assistance. Of course, this may not be an option for many employers particular as government mandated restrictions continue to increase. Providing some temporary alternative work or reduced hours for a short period does not prevent an employer standing down that employee if that work no longer continues to be available.

WHERE DOES REDUNDANCY FIT INTO ALL OF THIS?

Redundancy is different to stand down. Stand down is temporary and employees remain employed. Redundancy is a decision that the employee's position is no longer required, it will result in the termination of the employee's employment. Some employers may be making changes to their business as a result of the current pandemic that will be ongoing, for example, permanently shutting down retail operations and opening an online business. In those circumstances the position of the permanent employees working in the bricks and mortar store would be redundant. Compare that to restaurants where for most they are shutting their doors temporarily and we hope will be back in operation in a few months. In those circumstances, stand down is probably the more appropriate option.

The Federal Government announced further shut down requirements last night (25 March 2020). Further restrictions are expected. We will continue to update our information to keep you informed. Stay safe.

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