

INDUSTRIAL CIRCULAR: 4/2020

Date: 23 March 2020

Subject: The Corona Virus (Covid 19) – some legal questions answered

The Coronavirus (COVID-19) pandemic has raised many questions for employers. It is important to stay abreast of government regulation in this area as it will impact the decisions you make as a business and the currency and relevancy of our comments below.

We strongly recommend regularly monitoring the information provided by the Australian Government Department of Health, and the advice from the State or Territory governments in which your business operates.

Rigby Cooke, an Associate Member of the VTA have prepared the following FAQ's based on the most common questions received from employers in recent days. This document sets out an employer's minimum legal obligations from a general employment law perspective. This advice is subject to any relevant terms in applicable awards, enterprise agreements, policies and specific employment contracts.

- 1. If an employee is required to self-isolate in accordance with Australian government travel restrictions or restrictions for people who come into close contact with a proven case of COVID-19, do we have to pay them during the 14 day self-isolation period?**

Legal requirements

No - because the self-isolation requirements are imposed by the government and not the employer, subject to the following:

- If the employee becomes unwell or is required to care for an immediate family or household member who is unwell, see Q3.
- Full time/part time employees are entitled to be absent on public holidays without loss of pay.

- 2. If an employee is well, but is required to remain away from work in accordance with an employer requirement that exceeds government requirements, do they have to be paid? If so, can we require them to take their leave entitlements?**

Legal requirements

Employers can lawfully direct employees to remain away from work where this is reasonably necessary to protect the health and safety of themselves or



others, even where there is currently no government requirement that they self-isolate. Examples include:

- where there are grounds to believe the employee may have been exposed to someone with the virus; or
- where the employee is living with someone who has returned from overseas and is in self-isolation.

However, if the employee is otherwise ready, willing and able to attend for work, they are entitled to be paid as normal and cannot be forced to take their leave entitlements.

Casual employees are only entitled to be paid for rostered shifts and subject to relevant minimum engagement period requirements.

3. If an employee is unwell or required to care for a child or other immediate family or household member who is unwell, what leave can they access?

Legal requirements

Under the National Employment Standards (NES), full time and part time employees are entitled to access their accrued personal/carer's leave. If this is insufficient, they can be required to take unpaid leave.

Casual employees (and permanent employees who have exhausted their paid carer's leave entitlements) are entitled to 2 days of unpaid carer's leave per occasion.

Employees are also entitled to 2 days compassionate leave (paid for full time/part time employees, unpaid for casuals) if an immediate family or household member dies or suffers a life-threatening illness (which may include COVID-19). This is a separate entitlement to personal/carer's leave.

Employers may require a medical certificate or other reasonable evidence of the entitlement to take personal/carer's and compassionate leave (eg a statutory declaration) and impose reasonable notification requirements on employees.

Employees cannot be dismissed or otherwise subjected to adverse action because of a temporary absence from work due to illness. Anti-discrimination protections also apply.

4. If an employee is required to stay at home to care for their child because the child's school has closed, can they access their carer's leave entitlements?

A school closure on short notice and for a short period due to COVID-19 concerns (eg someone at the school has tested positive) is an "unexpected emergency", which qualifies under the NES as carer's leave (see Q3). If the government mandates school closures (or schools decide to close) for an extended period, this may need to be re-assessed.

5. Can an employer require employees to undergo temperature checks?

Given a pandemic has been declared, depending on the nature of the workplace/employee's role and any particular health and safety risks for employees or those they come into contact with (e.g. in an aged care setting), it may be lawful and reasonable to require employees to submit to a temperature **check before** commencing work (including because employees also have responsibilities under health and safety laws).

This should be done following consultation with employees/any relevant health and safety committee, in accordance with any relevant Australian Standards, and should be conducted discreetly in a non-intrusive way. Privacy laws also apply in relation to the collection, handling and use of an employee's health information.

6. Can an employer require employees to provide a medical clearance or produce a negative test result before returning to work if they are showing COVID-19 symptoms or may have been exposed to COVID-19?

Given the current pandemic, it is a lawful and reasonable direction to require anyone showing COVID-19 symptoms (fever, flu-like symptoms such as coughing, sore throat and fatigue, or shortness of breath) to remain away from work until they are no longer symptomatic, even if those symptoms are mild or the employee does not fall into a recognised risk category (i.e. they have not recently travelled overseas or come into close contact with a confirmed case).

It is also a lawful and reasonable direction to require such an employee to seek medical attention and provide a clearance from their doctor. However, employers need to recognise that GP's are currently difficult to access due to the pressure on the health system, may not accept COVID-19 related appointments, and cannot provide conclusive opinions about infection status on medical certificates.

Given the global shortage of test kits, tests are restricted to specific risk categories e.g. someone develops a respiratory illness within 14 days of returning from overseas or having been in close contact with a confirmed COVID-19 case. Employers can (and should) require that these employees be tested and remain away from work whilst awaiting their test results. Their entitlement to payment during this period will depend on their circumstances.

7. If an employee chooses not to attend work as a precaution but this is not required by the government or employer, can they do so, and should an employer be required to pay them?

Legal requirements

Employees may have reasonable grounds for not attending work even if they are not unwell (for example if they have a weakened immune system). However, if they are not required by the government or their employer to remain away from work, they are not entitled to be paid, subject to the following.

Employers must ensure they meet their health and safety obligations and in certain cases, even if there is no government requirement to self-isolate, it may be necessary based on a risk assessment to direct employees not to attend work (and pay them as normal as per Q2).

If the employee becomes unwell or is required to care for an immediate family or household member who is unwell, see Q3. Full time/part time employees are entitled to be absent on public holidays without loss of pay.

8. What can an employer do if business suffers a significant downturn in demand and/or revenue as a result of the pandemic?

Options include:

- Reducing casual staff numbers/hours;
- Freezes on wage increases (subject to award minimums), discretionary bonuses /payments and recruitment;
- Asking full time/part time employees to voluntarily take paid or unpaid leave or reduce their working hours on a temporary or ongoing basis (but you cannot force them to do so, unless outlined below);
- Directing employees to take their accrued annual leave; For award-covered employees, this is limited to close down periods (refer to the relevant award for limitations and minimum notice requirements) or where an employee has excessive accrued leave (generally defined as at least 8 weeks with forced leave capped at 25% of the leave balance). For non-award employees, under the NES the direction must

be 'reasonable'. This is not defined but examples include close down periods and where an employee has excessive leave. It is not necessarily as restrictive as in awards. Employers may be able to require (award or non-award) employees without enough accrued annual leave to take unpaid leave during a close down period in limited circumstances, but specific advice should be obtained.

- Consider restructuring, including voluntary or forced redundancies where positions are no longer required due to changes in your operational requirements (subject to applicable consultation, notice/ redundancy pay, redeployment and other legal obligations);
- Directing employees to take accrued LSL. This is only available in limited circumstances. For example, under the Victorian LSL Act, an employer must provide 13 weeks' notice; and
- In very limited circumstances, standing employees down (see Q9).

9. In what circumstances can employees be 'stood down' without pay?

In limited circumstances a business may be able to rely upon the stand down provisions in the Fair Work Act 2009 (Cth) (or an equivalent provision in an applicable enterprise agreement or employment contract). Section 524 permits an employer to stand employees down without pay "during a period in which the employee cannot usefully be employed because of...a stoppage of work for any cause for which the employer cannot reasonably be held responsible."

Employers who are considering relying on s524 are strongly urged to seek specific advice as the bar is very high. Section 524 is likely to apply if a government authority mandates the closure of your business or your landlord locks down your building due to COVID-19 (to the extent that employees cannot still be usefully employed). The issue is more complex if you decide to close or stand employees down because of a downturn in trade due to the pandemic. Please contact the VTA for specific advice if you are contemplating this.

10. Can an employer require employees to disclose that they intend to travel overseas or come into close contact with someone who is high risk?

Yes, this is a lawful and reasonable direction and is also consistent with employees' obligations under health and safety laws.

11. If an employee is stuck overseas, are they entitled to be paid?

If the employee was on a work-related trip, they are entitled to continue to be paid until they are able to return to Australia.



If the employee was on a personal trip, they are not entitled to be paid. Employers should consider and discuss with the employee what options are available to minimise the impact on them and the business including working remotely where possible or allowing them to access their accrued annual leave or LSL.

If whilst overseas the employee becomes unwell or is required to care for an immediate family or household member who is unwell, see question 3.

12. Can an employer decline to approve annual leave or LSL requests, including if an employee intends to travel overseas?

Legal requirements

An employer must not unreasonably refuse a request by an employee to take accrued annual leave. In the current circumstances, it would not be unreasonable to refuse a request if the employee intends to travel overseas or to approve the request on condition that the employee takes unpaid leave during any subsequent self-isolation period (or if they become stuck overseas).

It may also be reasonable to refuse leave requests if, as a result of COVID-19, you are experiencing staff shortages or cash flow issues.

Generally, an employer cannot withdraw approval for leave when it has previously been granted.

13. If employees insist on wearing a face mask at work can we direct them not to where there is no health authority requirement to do so?

Currently the advice from health authorities is that it is unnecessary for anyone who is not unwell to wear a mask (other than limited exceptions in certain industries/roles).

Employers are entitled to set reasonable standards of dress and, in customer facing roles for example, it would be reasonable to require that employees do not wear a face mask to work where there is no health authority advice or requirement to do so as this could cause unnecessary concern amongst customers and damage your business' reputation. If the employee is uncomfortable remaining at work, the employer should discuss their options which may include them accessing their accrued entitlements or taking unpaid leave.



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Consistent with its health and safety obligations and advice from health authorities, employers should ensure they are taking all recommended precautions to minimise the risk of infection (including implementing hygiene and social distancing measures and any special requirements for particular industries or occupations).

The VTA acknowledges the excellent work involved in the preparation of these questions and answers by Simone Caylock, a Partner, and her colleagues in the Employment Law Team, at Rigby Cooke Lawyers.

For any further information or details around the matters mentioned herein, please contact Paul Ryan, our industrial adviser on (03) 9646 8590, or email reception@vta.com.au