COVID-19 and employment law

March 2020

The issue of stand down and other employment law considerations flowing from COVID-19

Employers are needing to manage their employees in an environment where there is a significant reduction in workload and business revenue, while at the same time supporting each other and managing their customers, suppliers, shareholders, financiers, unions and other key business stakeholders.

For some employers, continuing the employment relationship may be difficult during this COVID-19 period. What options does an employer have to manage employees?

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Stand down employees without pay

For employees not covered by an enterprise agreement or contract of employment that provides for stand down, the *Fair Work Act 2009* (Cth) gives employers the right to stand down without pay in limited circumstances.

Generally, stand down without pay is permitted where there is a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

For employees covered by an enterprise agreement, the right to stand down will be determined by the terms of the enterprise agreement. If the enterprise agreement is silent on this issue, there is a strong argument that there is no right to stand down employees covered by the enterprise agreement.

The law on the right to stand down is unclear, in particular whether standing an employee down due to business downturn caused by COVID-19 is permitted. The Fair Work Ombudsman has taken the view that economic downturn may not be sufficient. However, with recent introduction of social isolation obligations, such as limiting social gatherings to less than 100, this may mean the right to stand down may arise depending on the nature of the business, and in particular the capacity of a business to operate notwithstanding these types of restrictions.

Standing an employee down means an employer is not obliged to pay the employee during the stand down period. However, the employee remains employed and continues to accrue annual and personal leave entitlements during the stand down period. It also means that there has been no event of redundancy requiring payment of redundancy pay and payment in lieu of notice.

There is no limit on the period of a stand down. The stand down can operate for as long as the stoppage of work is something the employer cannot reasonably be held responsible for.

Any stand down direction should be recorded in writing, specifying the reasons for the stand down and making clear the provisions on which the employer is relying to effect stand down.

Direct employees to take annual leave (shut or close down)

For employees covered by a modern award or enterprise agreement, directing employees to take annual leave during a full or partial shut down where the employer closes all or part of the business is only permitted in accordance with the modern award or enterprise agreement.

This often requires minimum notice to the employees and the time period of the shut down may be limited by the modern award or enterprise agreement.

For award/enterprise agreement free employees, the employer may implement a full or partial shut down where it is reasonable. What is reasonable will vary from employer to employer, and may be impacted by whether the employer has previously implemented a shut down during another period, such as the Christmas closure many employers have in place. The length of time of the shut down must also be reasonable. It is unlikely that a shut down that extends for great than 4 weeks would be reasonable given employees only accrue 4 weeks annual leave each year of service.

Employers may use a partial shut down as a strategy. For example, it may close one site one week and a second but different site in the second week. The whole of the business does not need to be closed before the employer has the right to direct an employee to take annual leave.

Use of annual leave or long service leave by agreement

It is always open for the employer and employee to agree that the employee will take annual leave or long service leave. Where an employee does not have sufficient annual leave or long service leave accrued, it may also be possible for the employee to take leave in advance by agreement.

Payment of annual leave/long service leave at half pay

Although an employer and employee may be willing to enter into an arrangement for payment of annual leave or long service leave at a reduced rate so that the period of paid leave can be extended, a simple agreement for 'half pay' may breach the National Employment Standards (NES) or State and Territory long service leave legislation.

However, an employer may be able to achieve the desired outcome in a compliant manner. For example, granting an employee 50% annual leave and 50% leave without pay would result in the employee being paid 50% of their wage or salary, and would comply with the requirement in the NES.

Rules about taking long service leave differ between State and Territory jurisdictions. Employers should be careful to check relevant legislation and seek confirmation that any half pay arrangements are compliant.

Unpaid leave

Outside of stand down rights (and any other similar right in an enterprise agreement), an employer does not have a general right to direct an employee to take unpaid leave due to business downturn. Directing an employee to take unpaid leave is likely to amount to constructive dismissal, and may trigger a claim for redundancy pay (where the direction to take unpaid leave may be taken to suggest that an employee's job is no longer required).

However, an employer can agree with an individual employee to take unpaid leave for a period, including by way of working in alternating week on/week off roster patterns to spread reduced work over a larger number of employees (see further below).

Employers need to be careful in approaching employees regarding unpaid leave. Any agreement in respect of unpaid leave must be genuine, without coercion or undue pressure. Employers may be exposed to claims that they have breached general protection laws where employees believe that they have been coerced or pressured to enter into arrangements that compromise their entitlements.

Change of employment status

For some employers, it may be attractive to move their permanent (full-time or part-time) workforce to a casual basis.

There is no unilateral right for an employer to change an employee's status from permanent to casual, although this may be done by genuine agreement between an employer and an individual employee, free from pressure or coercion.

Great care is needed if an employer seeks agreement to convert permanent employees to casuals. There is a real risk that a request to convert may suggest that an existing permanent position is no longer required, and has become redundant. An employee may perceive a request to convert as an admission by the employer that their position is no longer required and they are entitled to redundancy pay.

Raising the potential for conversion may be best pursued where redundancy is a real risk in any event, or as a raft of potential measures put to employees to voluntary consider as part of consultation over the potential impact of downturn.

Reducing an employee's hours of work or changing rosters

As with a change of status of an employee, any change to working hours cannot be done unilaterally except as provided by a relevant modern award, enterprise agreement or contract of employment.

If the employer wants to change a roster, for example because the employer has decided to reduce opening hours, there is likely to be a minimum notice period under the modern award, enterprise agreement or company policy before a changed roster can commence.

There are also likely to be consultation obligations with employees and their unions about a change to rosters arising under an applicable modern award or enterprise agreement.

Redundancy

Where:

- an employer no longer requires an employee's position to be performed by anyone (other than due to the customary and ordinary turnover of labour), and
- the employee's employment terminates as a result,

the employee will be entitled to redundancy benefits.

Where there is redundancy termination scenario, an employer is required to pay redundancy pay at least equivalent to the minimum standard set out in the NES. Modern awards, enterprise agreements, contracts of employment and company policy may provide for greater redundancy pay entitlements than those set out in the NES. It is important to check these instruments before proceeding with redundancy processes.

The employer must also give the employee notice of termination or payment in lieu of notice of termination, again at least equivalent to the NES and any modern award, enterprise agreement or contract of employment obligation.

The provision of notice or payment in lieu of notice is in addition to the minimum redundancy payments under the NES. Whilst notice can be worked out, redundancy benefits cannot – the latter are lump sum payment benefits to compensate for loss of longevity of employment. Notice and redundancy entitlements are mutually exclusive benefits.

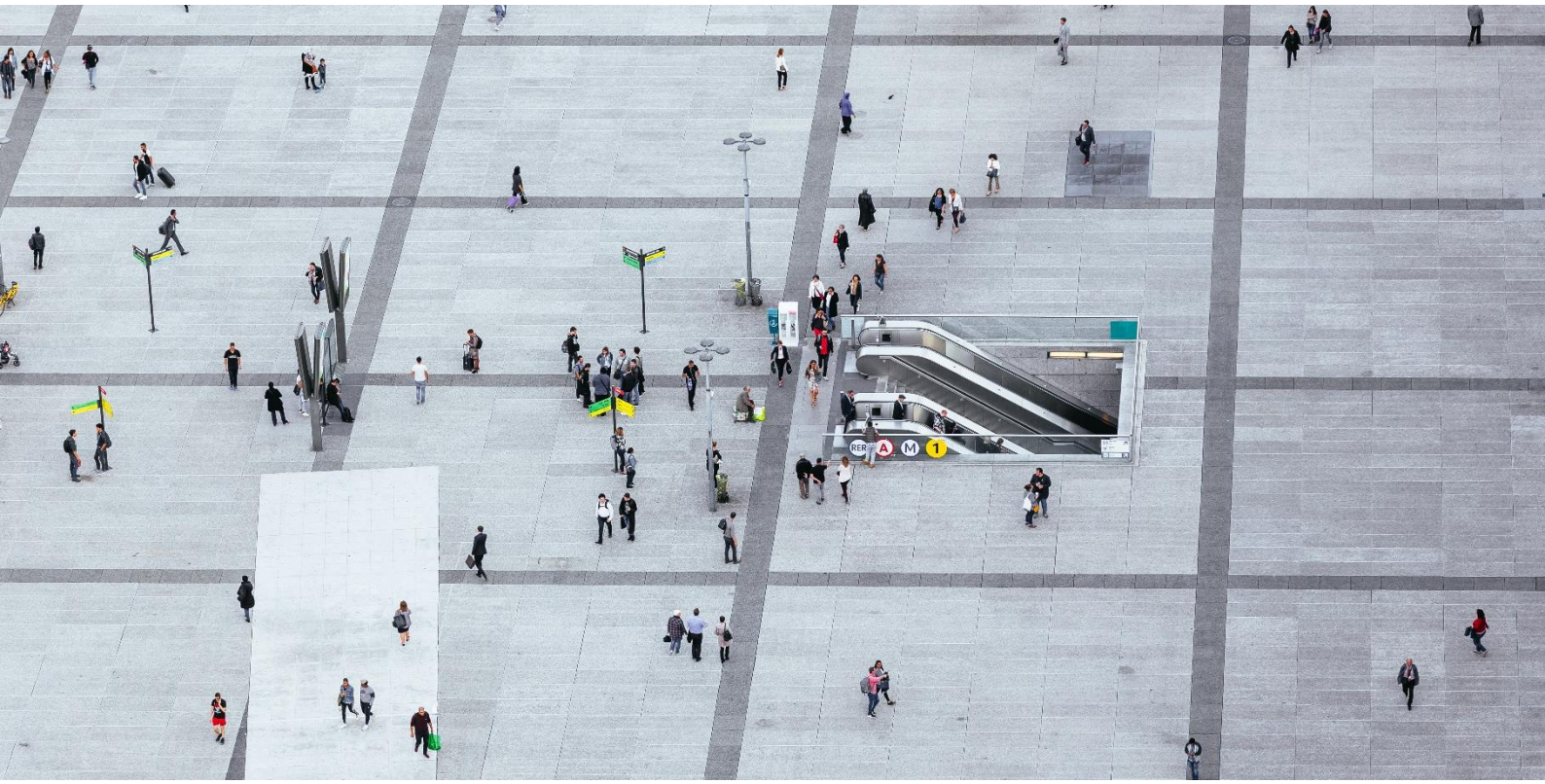
Before termination of employment on redundancy grounds, an employer must comply with any consultation obligations arising under an applicable modern award, enterprise agreement or company policy.

Any arrangements entered into between an employer and employee to vary rights, such as 'half pay' leave or unpaid leave, should be recorded in writing.

The law about directing employees to use their annual leave or long service leave, stand down, hours of work and redundancy is complex and there is the potential to breach the Fair Work Act or continue to have pay obligations to employees if not applied correctly. There are also consultation obligations with employees and their unions that may arise. Employers should seek specific advice about their proposed decisions.

We recommend that employers regularly check for government advice and updates, as the employment law issues and COVID-19 evolves.

This publication is intended to provide initial guidance only. Decisions in individual cases will be highly fact-specific and employers should adopt a flexible approach to situations as and when they arise.



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