

What to do with your staff

By Fordham

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With further shutdowns being announced by the Federal Government on an almost daily basis, what should you be aware of regarding what you can and can't do with your staff?

If COVID-19 spreads to a point where the government feels it is necessary to direct employers to close their workplaces (as they already have for some industries) or restrict movement of people

more generally which may force the closure of workplaces, direction is provided for employers within the Fair Work Act.

Under the Fair Work Act employers have the right to temporarily stand down employees without pay during a period in which the employees cannot be “usefully employed” because of a stoppage of work for any cause for **which the employer cannot reasonably be held responsible** (e.g. a biosecurity hazard such as the spread of COVID-19).

The regulator, the Fair Work Ombudsman, states on its website that employers cannot stand down an employee “just because the business is quiet or there isn’t enough work”, the COVID-19 outbreak may result in a situation that meets the requirements for stand down under the Act (as per Australian Chamber of Commerce and Industry guidance).

There will be no right to stand down an employee if there is useful work available for the employee to do, which is within the terms of the employee’s contract of employment. It need not be work the employee normally carries out.

In the event of a valid stand down under the Fair Work Act, an employer does not need to pay wages to employees stood down, but an employee accrues leave in the usual way (as though they have worked). Employment continuity is also not broken (i.e. they are still ‘employed’).

Situations where stand downs do **NOT** apply:

- Where an employer refuses to pay an employee in response to the employee’s refusal to work (e.g. for safety reasons) in accordance with the contract of employment.
- If an enterprise agreement or contract of employment (a rarity) makes provision for a stand down. In these circumstances the provisions in the agreement or contract will apply as opposed to the Fair Work Act. They may have different or extra rules about when an employer can stand down an employee without pay.
- An employee is taking authorised leave (paid or unpaid) or is otherwise authorised to be absent from their employment.
- If there is work available for some employees, you cannot stand down all employees. Only those employees who cannot be usefully employed may be stood down.

Even though stand down periods are unpaid, an employer may wish to consider some of the following options prior to ceasing employee pay outright:

- Options for redeployment to other parts of the business where available.
- Allowing employees to take paid leave (such as annual leave or long service leave) if requested.
- Allowing employees alternative leave arrangements such as extended annual leave at half pay or early long service leave (if permitted under any applicable award, enterprise agreement or contract).

- Special provisions for employees with insufficient accrued leave to cover the period of shut down (for example, allowing staff to purchase leave which is then dedicated on a pro rata basis from their annual wage).

Stand downs are likely to be closely scrutinised and can be challenged by an employee or union in the Fair Work Commission if not implemented strictly in accordance with legal obligations, so we strongly recommend seeking legal advice prior to implementing a stand down.

We appreciate that this is a very fluid, fast-paced, difficult and stressful time for all business owners, and their staff. Should you have any queries in relation to any of the enclosed, please do not hesitate to contact your [Fordham Partner](#).

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