FAIR WORK LAWYERS

Coronavirus

Implications for Employers

Coronavirus (COVID-19) has been recognised globally as a public health emergency. Federal and State governments have (and continue to) take strong steps to attempt to prevent it spread and this these impact on all walks of life, including employment.

This update is intended to provide an insight into the complex and often competing legal concepts relating to employment. These are developing, on a daily and even hourly basis. It is important to note that every circumstance is different and specific advice should be sought in relation to each specific circumstance. This is only intended as broad background information.

A complicated set of legal obligations

Prior to considering some common circumstances, we turn to the complex legal principles. This update is drafted with South Australian private sector clients in mind. Many of the principles are applicable nationally, but some laws, such safety, workers compensation and some anti-discrimination laws are State-based and so different considerations may apply elsewhere.

Work Health and Safety

First and foremost employers should consider their primary duty of care to minimise safety risks associated with infection including, but not limited to, assessing risk and putting in place appropriate controls to manage the risk. It is not the intention of this circular to deal with safety matters in detail.

Where workers work in places where there are multiple PCBUs, all PCBUs must coordinate, cooperate and consult. This is especially important in places where there is a high risk of infections (eg. travelers from known regions) or exposure to people who are at high risk of complications. NB: this update does not extend to consideration of what actions might compromise a business' insurance coverage (ie. public liability etc.) if the business fails to take appropriate safety precautions.

In all cases, workers must be consulted about safety matters in accordance with legislation.

Workers must also ensure that their actions and omissions do not adversely affect their own, or others, health and safety and comply with the employer's policies in relation to safety.

Being 'ready, willing and able' to work

Underpinning much of the below analysis are basic principles applicable to employment contracts. A full-time or part-time employee who is 'ready, willing and able' to perform the work they are contracted to perform is entitled to be paid for that time. This is true even if the employer directs them to not attend work. Casual employees do not have the same rights to payment but do have some rights, such as relating to discrimination and dismissal (see below).

On the other hand, employees may be under express contractual or other obligations to act safely and/or to avoid risks to others. Even if the contract is silent terms of this nature would likely be implied into the employee's contract. If an employee cannot provide the service required by their contract of employment, they are not entitled to payment.

Workers compensation

If an employee contracts a disease arising from employment they are entitled to compensation. While short-term absences are not likely to lead to significant premium impacts, long term absences arising from complications may. While the employee must prove on the balance of probability that work was the cause, this can be proved circumstantially. Proven exposure at work (including at other places where employees work) increase this risk. It is to be noted that taking appropriate steps to minimise the risk of infection (although required to meet safety obligations) is not a defence as it is a 'no fault' scheme.

Disability Discrimination laws

Action taken in relation to safety does not permit a *carte blanche* to the employer to act. Diseases are considered a disability and anti-discrimination laws may apply. However, it is noted for cases of proven Coronavirus, neither Federal or State laws would apply to reasonable actions taken to protect public health or otherwise where the action is based on the inherent requirements of a position.

Can I direct a specified worker not to attend work?

As noted above, in general a full time or part time employee who is ready, willing and able to work is entitled to payment, even if directed to not attend work.

Contractual or other terms

If the employee is covered by a contract of employment, award or enterprise agreement that permits or enables such directions, this would override this first principle position. There may be other mechanisms available, such as being able to direct RDOs or TOIL, that can be used instead of directions to not attend work.

Reasonable suspicion of illness

If an employee is demonstrating signs of illness then the employer is entitled to require them to attend a medical examination. An employee must comply with a lawful direction to attend. The entitlement to payment during this process would be dependent on the ultimate finding as to whether the employee was in fact 'able' to work.

Existing policies, such as fitness for work, may assist in clarifying these obligations, particularly where the policies have contractual force. It may wise to review and, if necessary, update policies.

Employee returning from sick leave

If an employee is returning from sick leave after flu like symptoms, the employer could reasonably require the employee to provide confirmation that they did not have Coronavirus or, if they did have it, are no longer infectious prior to returning to work.

Employee returning from annual leave

If an employee has travelled to an area where there is, based on up to date advice from a competent State or Federal authority, a requirement or recommendation to self-quarantine, then it is likely that they are not "able" to work insofar as meeting the condition to work without undue risk to others' safety and could be directed.

If the up to date advice is that there is an elevated risk but not an actual recommendation or

requirement to self-quarantine the situation is less clear. If applicable lawful arrangements (ie. contract, policies etc.) do not permit a direction to prove fitness for work, the employer would have to rely on a combination of circumstances in order to demonstrate that they employee is not ready, willing and able to perform work.

Targeting based on ethnic or national origin is *prima facie* discriminatory. If a decision is made in good faith based on up to date advice, it appears this would not be discriminatory as the action would not be because of the national or ethnic origin but because of the advice.

Precautionary Isolation

Subject to any overriding provision it appears that an employee who is isolated at the direction of the employer due to fears of Coronavirus where that is not based on a reasonable belief (for example government advice) would be entitled to payment and that period of isolation would not be deducted from any leave entitlements.

Employee self-isolation

Employees are not able to unilaterally self-isolate unless they qualify for personal leave. If this was based on up to date advice or any direction from a government then it would be self-evident that they were unable to work. However, if an employee is seeking self-isolate independent of such advice the employee would only be entitled to do this if they qualify for leave. In either case, the employee must comply with notice and evidence requirements to claim paid personal leave.

An employer can direct an employee to undertake an independent medical examination when seeking to return from such an absence. An employee who is concerned that they may have Coronavirus should report to their employer and seek instruction.

Employees required to care for others

Carer's leave

An employee who is required to care or support a member of their immediate family or household is entitled to access carer's leave (including limited unpaid carer's leave for casuals or people with insufficient accrual). If the person they are caring for is a confirmed case of Coronavirus then it is likely that employee will require a further period of isolation which would be dealt with according to the above principles.

School closure

It is likely that an emergency of the nature of a school closing would amount to a circumstance where an employee could access personal leave and in the absence of any accruals (or in the case of casuals) up to two days unpaid carer's leave.

Employee travel and leave arrangements

Work-related travel

Work-related travel should be risk-assessed as a health and safety issue and in consultation with affected employees. This update does not cover this issue in detail.

Can I cancel already approved leave?

There is no direct mechanism to cancel annual leave once it has been approved. Reasonable discussions and negotiations with the employee may lead to a sensible outcome.

Can I refuse a request for annual leave?

By default, annual leave is taken by agreement but employers must not unreasonably refuse a request. Awards/enterprise agreements or common law contracts for award/agreement free employees may modify this position (within reason).

Refusing a request on operational grounds is likely reasonable. Coronavirus is an unprecedented circumstance but *prima facie* a refusal on the basis of a belief, reasonably formed based on up to date information, that the leave would prevent them from working on their return may be reasonable.

A middle-ground position to this may be to reach agreement with an employee intent on exposing themselves to this risk to agree in advance to taking a further period of paid/unpaid leave should adverse consequences arise.

What about work from home?

Work from home may be considered as an alternative to achieve productivity and must be considered as a 'reasonable adjustment' where applicable. However, it is important to remember that the same principles apply to working from home – that is, assessing and controlling risks to safety.

Can I temporarily close my business?

A unilateral decision to close down a business (or part of a business) on the basis of the potential risks associated with Coronavirus would be no different to a precautionary direction to an employee, albeit that it is on a larger scale. This means that an employer who intended to do this would need to either pay their employees for the duration of the absence or, in a worst case, engage in a process of redundancies.

What is stand down?

According to default rules, an employer may stand down employees if they cannot be usefully employed due to "a stoppage of work for any reason the employer cannot reasonably be held responsible". The default rules do not apply to any employee covered by an award, enterprise agreement or contract of employment that provides different rules for the specified circumstance, in which case those rules apply (and may provide broader rights).

An employee is not entitled to payment while stood down. The default provisions require that employees "cannot be usefully employed". This means the employer must actively consider whether there is useful work (ie. work of net value to the employer), even if not the employee's normal duties. It would also, among every other consideration, require exploration of work from home or other options before being satisfied that the employee 'cannot' be usefully employed.

Note: an employee cannot be stood down while taking authorised paid or unpaid leave.

Client's businesses affected

Where a client, customer or supplier closes their business and this directly impacts on work it would likely fall into the category of stand down. This is because there is a stoppage of work, it arises from a decision from an external source and the employer cannot reasonably be responsible (unless, of course, they were an active and operative participant in the decision).

Loss of business due to the response to Coronavirus

There is a clear tension whether stand down applies in these circumstances. While it is suggested that stand-down does not apply where there is slackness of trade, this is not a settled position. However, even if it is the case that slackness of trade does entitle a stand down, if there is an identifiable cause that leads to a stoppage of work – such as upstream or downstream stoppages in a supply chain arising from the *response* to Coronavirus – it seems likely that a stand down situation would arise in the same way as a direct decision of a client, customer or supplier.

Coronavirus case at the workplace

This is perhaps the most controversial circumstance. While the stoppage is plainly for a cause beyond the employer's control, there is an inherent tension between the right to stand down and a stoppage of work under safety legislation. It would appear the difference here is that where there are circumstances within the employer's control or not. This would appear to at least implicitly import obligations on the employer to take all reasonable steps to prevent the infection and, in the event of infection, to take all reasonable steps to bring those circumstances to an end.

If the stoppage was required by government direction then it would be clearer that this was a permissible stand down situation.

What to do in a stand down situation

The initial notification of a stand down is reasonably straightforward. Employees should be clearly advised – in writing preferably – of the fact of the stand down and the circumstances relied on promptly. An employee is not stood down until they have been notified of it.

It is likely that a decision to stand down would be considered 'major workplace change' and accordingly trigger consultation obligations for employees covered by awards or enterprise agreements. While there is some discretion in drafting consultation clauses in enterprise agreements, the model consultation provision (or close variations) apply to award employees.

Consultation would need to consider ways to mitigate the effects of the stand down, including this such as taking leave, accrued RDOs, whether available work would be shared, the potential for redundancies and any other matters.

How long can stand down last?

As with many aspects of the response to Coronavirus, if the current reaction prevails for any significant time we will enter unchartered territory. There is no defined end point for stand down. On its face it can continue as long as the applicable circumstance prevails. However, as the one of the qualifying requirements is that the employer must not be reasonably responsible for the stoppage, there is the suggestion if the employer fails to take steps to end the circumstances that

over time this failure could lead to a finding that the stoppage was no longer out of their control.

The Fair Work Commission can deal with stand down disputes under the default rules, and enterprise agreements disputes are deal with through the agreement's dispute resolution procedure, which is also usually through the Fair Work Commission. There is no obvious way to dispute a contractual stand down other than via the contract's own disputes procedure (if any) or an underpayment claim.

Lay offs

For construction clients it is noted that where there are daily hire employees who are in receipt of BIRST or equivalent and, where relevant, portable long service leave, those employee's conditions contemplate intermittency.

For other employees, redundancy would need to be considered, whether this is for casual employees or permanent employees.

For casual employees who are protected from unfair dismissal it is noted that a significant change to the way work is customarily performed by them due to Coronavirus may be considered a termination and if so the relevant procedures must be followed even if there are no redundancy payments applicable or there is a risk of an unfair dismissal claim.

For permanent employees consideration would also need to be given notice of termination and severance pay (where applicable).

Award annual close down

Some awards (or enterprise agreements) may enable an employer to close down all or part of its business and direct employees to take annual leave during this time. Awards contain different provisions in relation to this and usually require a period of notice prior to taking the leave. Advice should be sought in relation to this issue.

Ongoing / updated requirements

The impact of the Coronavirus remains uncertain and could continue to escalate. This may mean further restrictions and so it is important to stay up to date with the best information from reliable sources. It is equally important to remember that if/when restrictions begin to ease that responses that are reasonable based on advice may become unreasonable (and in some cases unlawful) if/when those restrictions ease.

Business considerations

In assessing those situations, and also in considering how future circumstances of similar effect might be mitigated, some of the matters that may be looked at are:

- Discuss and forward plan with staff to minimise disruption within the workplace and, where practicable, to accommodate employee personal circumstances
- Consider contracts of employment and/or enterprise agreements and policies and procedures to understand how responses might apply to your circumstances

- Review existing workplace policies, especially relating to safety where necessary
- Put in place contingency plans are in place to ensure business continuing in the event of significant effects from Coronavirus (such as work from home, key persons etc.)

Need more information

It is important to remember that every circumstance is different and specific advice should be sought in respect of any specific situation. This is not intended to be legal advice in relation to any specific circumstances.

If you would like further information about the implications of the Coronavirus on employers' rights, responsibilities and duties, please contact the team at Fair Work Lawyers.

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