

COVID – 19 FACT SHEET

Stand down

Unfortunately, given the circumstances surrounding the COVID-19 pandemic, it may be the case that some hospitality venues will have to close their doors in an effort to contain the spread of the virus.

The *Fair Work Act 2009* (Cth) provides for the standing down of employees in a limited number of circumstances. This fact sheet is provided to members to assist them in managing a stand down with employees.

Pursuant to section 524 of the *Fair Work Act 2009* (Cth) an employer may stand down an employee during a period which the employee cannot usefully be employed because of one of the following circumstances:

1. industrial action;
2. machinery or equipment breakdown for which the employer cannot reasonably be held responsible; or
3. a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

Employers cannot stand an employee down just because the business is quiet or there isn't enough work, there needs to be a stoppage of work which may apply to the whole business or part of a business AND the employees are not otherwise able to be usefully employed. Both elements must be satisfied otherwise, the legitimacy of the stand down will be questioned.

Further, there is no right to stand down an employee if there is useful work available which is within the terms and conditions of their employment – it need not be the work the employee usually carries out. Also, if there is work for some employees there will be no right to stand down all employees. Only those employees who cannot be usefully employed may be stood down.

It is important to note that an enterprise agreement or contract of employment *may* in some circumstances modify the position under the *Fair Work Act 2009* (Cth). In such cases, an employer would need to comply with the modified provision.

Stand down and COVID-19

The third category is most relevant to the situation involving COVID-19.

Examples of a stoppage of work for any cause for which the employer cannot reasonably be held responsible that may arise as a result of COVID-19 include:

- Biosecurity or other ministerial orders shutting down a geographical area in which a business is situated; or

- A significant number of employees being placed in isolation or quarantine necessitating shutdown.

Pay during stand down

In the event there is a stoppage of work, for which an employer cannot reasonably be held responsible for, and cannot usefully employ staff, the employer is not required to make any payments to the stood down employees for the stand down period.

During a stand down period, employees accrue leave in the usual way.

Employers may, if possible, consider other options rather than standing down employees. These include:

- Allowing employees take a period of paid leave such as annual leave or long service leave (if applicable); or
- Working at another location such as from home or another worksite.

An employee is taken not to be stood down if they take a period of paid leave. Put another way, if an employee is being paid annual leave (rather than being stood down without pay) the employee will be taken to be on annual leave, rather than being stood down.

In light of the current circumstances, we strongly recommend that members consider allowing employees to take any accrued annual leave or long service leave (if applicable) before moving to a stand down.

Casual employees and stand down

Casual employees cannot be stood down if the business is quiet but they can be sent home after they've worked their minimum engagement period.

Implementing stand down

We strongly encourage employers communicate with their staff and be as conciliatory as possible during this difficult time. If members have exhausted all other options and are considering standing down employees, we recommend taking the following steps:

1. Before speaking to employees:

- a. Review all employees' accrued annual leave and long service leave (if applicable) entitlements.
- b. Review any other applicable accrued entitlement including but not limited to TOIL and/or day in lieu entitlements.

It is important to be aware what accrued entitlements employees may ask to be paid during any period they are not able to be usefully employed.

2. Speaking to employees:



- a. Advise employees that the COVID – 19 crisis (e.g. Government has implemented a mandated shutdown of all hospitality venues) has resulted in the business having to consider standing down its employees.
- b. Advise all employees when stand down will commence.
- c. Provide written notice to the employees. See our template stand down letter.
- d. Ensure your employees in the business that you will be in regular contact with them during the stand down period and update staff when they can expect to return to work as soon as possible.

Further Information

For further information or clarification regarding stand down, please contact the Workplace Relations Team on (08) 9321 7701.

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