

Employers' responsibilities during COVID-19

Written by Lisa Qiu on 18 March, 2020

When the COVID-19 pandemic began to unfold and travel restrictions were confined to travellers coming from Wuhan/Hubei province, ground zero for the pandemic, employers were concerned about the type of leave that their employees should be paid should they be directed either by the employer or by the government, to self-isolate.

The advice provided at the time was that those who were directed by the government to self-isolate should have their absence from work processed as paid personal leave (sick leave and carer's leave), and if they had exhausted personal leave accruals, the leave could be unpaid. For those employers who were taking additional prudential measures by directing employees to self-isolate even if they had not travelled from Wuhan, the advice was that those employees should be paid "special leave" and should not be asked to dip into their personal leave or annual leave entitlements.

However, since then, the situation has progressed rapidly and it is becoming increasingly difficult to require employers to make "special leave" payments on a much broader scale, or for employees to go without pay, for an indefinite period of time.

Employers now have a whole gamut of factors they need to consider, and to consider quickly, in order to protect their employees whilst attempting to maintain business viability.

Employers should ensure they turn their minds to the following considerations to ensure they are adequately prepared for the COVID-19 pandemic which is likely to remain unresolved for the next few months:

- working from home
- travelling to work
- attendance at events
- overseas travel
- leave arrangements: paid, unpaid, special leave or annual leave?
- performance management and disciplinary action
- redundancies
- assistance for businesses

Working from home

Employers still have work health and safety obligations towards employees who are working from home. As more and more businesses are directing employees to work from home where possible, employers should ensure they have a working from home policy in place that is up to date, and accessible to all employees.

Employers' responsibilities during COVID-19 cont.

Employers should ensure that employees have safe, ergonomic workplaces set up from home and that employees are aware of which assets and resources will be provided by the employer. If employees are using their personal assets and resources for business purposes, the policy should also set out whether the employer will reimburse the employee for business related expenses, and if so, how these expenses are to be monitored and authorised.

During this unprecedented situation, employees may be left feeling quite uncertain and anxious, and working from home in an isolated environment can exacerbate these feelings. For those employees with dependents at home, such as the elderly or young children, attempting to work from home, while caring for others, and meeting the ongoing demands of their employer and clients, can easily become overwhelming, especially if the employee is also concerned about potentially losing their job in the face of increasing rates of unemployment and projections of economic downturn worse than the Global Financial Crisis (GFC).

Employers should therefore also take steps to ensure the mental wellbeing of their employees and this can include taking steps to check in with employees to see how they are doing and ensuring the additional responsibilities of those with carer responsibilities are considered and managed while also managing effective performance of the required work. Flexibility all round will be important.

Travelling to work

Where employees are unable to work from home or are required to travel into the office from time to time, employers should consider taking steps to reduce the need for employees to travel on public transport. This could include staggering start and finish times to avoid the need to travel during peak hours. If possible, it could also include making on-site parking available to more employees, to encourage employees to drive in to work.

Attendance at events

Many employers are cancelling scheduled face-to-face events, or making them available by live online streaming. Employers should take steps to ensure that all non-essential employee gatherings are cancelled or reduced in size, so as to encourage social distancing where possible.

Employers should also consider the safety of the attendees at their events and should consider what claims their public liability insurers will and will not cover in pandemic situations, should the events proceed, or losses be incurred for cancelled events. Potential attendees at business premises should be warned not to visit if they have any symptoms of cold, flu or the virus.

Overseas travel

As of yesterday 17 March 2020, The Department of Foreign Affairs and Trade has contacted all Australians overseas and have encouraged them to return to Australia as soon as possible. As more countries impose travel bans, it is prudent for employers to take steps to cancel all non-essential work-related overseas travel, until further notice. This is because if an employee is impacted by these travel bans and they were directed to travel overseas for a work related purpose, the employer is still responsible for the employee's safety and wellbeing while overseas, and this cannot be guaranteed in light of daily changes to travel bans. It would be unreasonable for an employer to direct an employee to travel overseas for a non-essential work event, in light of recent global travel bans.

Employers' responsibilities during COVID-19 cont.

Leave arrangements: paid, unpaid, special leave or annual leave?

As more employees are affected by the COVID-19 self isolation requirements, it is becoming more difficult for employers to pay "special leave" to each employee that is unable to attend work, whilst maintaining financial viability of the business. At the same time, employers are aware of the need for employees to continue to receive wages in order to meet personal financial stresses of mortgages, medical costs and basic food and health items.

For employees required to self isolate as a result of government action, who would therefore be on unpaid leave, but who have annual leave or long service leave or personal leave accruals, employers should consider allowing employees to use those sources of leave, by agreement (which should be recorded in writing, even if only by email. While personal leave is not applicable to an employee who is not sick or caring for a sick family member, under the strict terms of the Fair Work Act, in the context of a public health emergency, and quarantine resulting from that, bending the rules in a manner beneficial to an employee who has no other source of income continuance is unlikely to have negative consequences. This approach will assist employers in reducing the leave liability they have on their books, and will in any event, in the case of annual or long service leave, be payments that will need to be paid by the employer at the end of employment.

If businesses are forced to shut down or reduce operations, because of disruption to supply chains or other effects of the coronavirus emergency, section 524(1)(c) of the Fair Work Act 2009 (Cth) ("FW Act") enables an employer to stand down employees for a stoppage of work for any cause for which the employer cannot reasonably be held responsible and an employer is not required to pay an employee in these situations. However, this section applies only if the employee's employment contract or enterprise agreement, does not contain a clause in relation to shut downs. Employers should seek advice about section 524(1)(c) of the FW Act before relying on it. If the reason for closure is financial stress, that would result in redundancy rather than a stand-down.

Redundancies

The government is calling for businesses, where possible, to minimise the need for redundancies as businesses will still require positions to be filled, when the social and economic effects of the COVID-19 pandemic begin to ease. At this stage, it is unclear when that will be, although the current situation is forecast to carry on for a few months at least.

Many businesses in the tourism and aviation industry, as well as businesses that were struggling prior to the pandemic (including many businesses in the tourism industry already impacted by the bushfires), are facing potential insolvency and the need to implement redundancies in an effort to reduce costs in the face of decreasing revenue. Directors of corporations should be mindful of their ongoing obligations to prevent insolvent trading.

Employees who are covered by a Modern Award, are entitled to a consultation period before the redundancy is effected. As a matter of best practice, employers should follow a consultation period prior to any redundancy, regardless of if their employees are Award covered or not. The purpose of a consultation period is for the employer to inform the affected employees about the proposed redundancy, and to give the employee an opportunity to provide any information or solutions that may reduce the impact of the redundancy on them. Potential solutions could include:

- reduced hours or days
- utilising annual leave or long service leave

Employers' responsibilities during COVID-19 cont.

- shut down periods
- alternative duties
- considering financial assistance packages the employer might be entitled to from the government

Any redundancies should be implemented carefully as there is a risk of unfair dismissal/adverse action claims if implemented incorrectly.

Employers may revisit some of the options adopted during the early stages of the Global Financial Crisis (GFC) in 2008, by seeking agreement from the whole workforce, or a particular section of the workforce, to shift to reduced days or hours for a period, to try to weather the storm without redundancies.

Assistance for businesses

The government recently announced a Boosting cash flow for employers stimulus package, in addition to other economic stimulus packages to assist with the economic impact of COVID-19. Those businesses also effected by the recent bushfires may also have access to bushfire relief payments.

The package provides up to \$25,000 to small and medium sized businesses, with a minimum payment of \$2,000 for eligible businesses, being those with a turnover of less than \$50 million, that employ staff. The payment will be tax free.

These payments may assist employers with being able to hold onto staff rather than implement redundancies, and may also assist employers with "special leave" payments to employees. [Click here](#) for information on financial assistance for businesses.

Performance management and disciplinary action

Employers who were in the midst of performance managing or disciplining an employee, may find themselves wondering if and how they should proceed. The COVID-19 pandemic has heightened concerns amongst employees of job security and their personal wellbeing, as well as those of their family members. In these circumstances, the potential for an employee to feel aggrieved during a performance management or disciplinary process can be heightened, which can increase the likelihood of an unfair dismissal, general protections or workers compensation. Employers facing these situations should proceed carefully and obtain legal advice.

Detailed information about COVID-19 and employer obligations can be found on the Fair Work Ombudsman's website.

This article is a guide only and is based on advice at the time of writing, being 18 March 2020. Employers should seek legal advice about their specific circumstances. Please do not hesitate to get in touch with a lawyer in Coleman Greig's Employment Law team, who would be more than happy to assist you.

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Modern Award Variations in Response to COVID-19

Written by Shanni Zoeller on 6 Apr 2020

The COVID-19 pandemic has had, and will continue to have, a significant adverse impact on businesses, large and small. Such impacts are equally felt by employees, with many of them having to take pay cuts, work reduced hours or even worse, be made redundant. Over the last week or so, employers and employees alike have had to adapt to a new world almost overnight, and try to navigate through uncertainty that is changing by the minute.

The Fair Work Commission (FWC) has been extremely responsive in its approach to dealing with COVID-19, by varying some Modern Awards. Last Saturday, the FWC varied the Clerks – Private Sector Award 2010 (Clerks Award) which introduced greater flexibility for both employers and employees to work from home, reduce hours of work on a temporary basis and lessen restrictions around directions to take annual leave.

The FWC has now formed a provisional view that 103 Modern Awards will be varied to include an entitlement to unpaid 'pandemic leave' and the flexibility to take annual leave at half pay. However, the Hospitality Industry (General) Award 2010, the Clerks Award and the Restaurant Industry Award 2010 take priority.

What will the variations look like?

A. Unpaid Pandemic Leave

Employees can take up to two weeks of unpaid leave if he/she is required, by the government or medical authorities, to self-isolate or is prevented from working by measures taken by the government or medical authority in response to COVID-19.

Notice and evidence requirements will still apply.

Any pandemic leave taken counts towards continuous service.

It is clear from the above that such leave is intended on closing the gap that currently exists.

Many employees who have had to self-isolate in response to government mandates have had to forgo pay because:

- of their employment status (for example, casual employees);
- they have had to use their paid annual leave entitlement (as they don't strictly fall within the definition of personal illness or injury which gives rise to personal leave);
- the employee may have exhausted their personal leave entitlements; or,
- they do not have any paid leave entitlements and have had to take leave without pay.

Modern Award Variations in Response to COVID-19 cont.

It is proposed that the pandemic leave will be available to employees upfront regardless of their employment status, and will be available up until 30 June 2020, unless otherwise extended. Employees will not be required to use up other paid leave entitlement before accessing unpaid pandemic leave.

B. Annual Leave at half pay

The FWC, in its provisional view, has attempted to afford employers and employees more flexibility around taking annual leave. What the variations will mean is that employees will be able to take twice as much annual leave on half pay. In a practical sense, the employee can take two weeks of annual leave, but only be paid one weeks' worth of annual leave. This would include annual leave loading (if applicable under the Award). One week of annual leave will be deducted from the employees' accrual.

An agreement to take annual leave at half pay must be captured in writing and be kept as an employee record.

It is important to note that unpaid pandemic leave and annual leave at half pay constitute a workplace right under s 341(1)(a) of the Fair Work Act 2009 (Cth).

Long Service Leave in NSW

The NSW State Government has recently amended the Long Service Leave Act 1955 (LSL Act) which aims to give employers and employees more flexibility to access the leave during the COVID-19 pandemic.

These changes now allow employees to take LSL in shorter block periods, such as one day per week and without the employer being required to give them one month's notice to take the leave; it is now by mutual agreement in writing.

Please note that this will only apply for a six month period from 25 March 2020, after which, it will cease to operate unless it is extended.

What can be seen is that everyone is doing their part to afford employers and employees as much flexibility as possible to ride out this challenging, difficult and unpredictable time. Fingers cross that the COVID-19 pandemic is well and truly under control before the expiry of the six-month sunset clause.

If you have any questions, please do not hesitate to contact Coleman Greig's Employment Law Team.

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Modern Award Variations in Response to COVID-19

Written by Dominic Russell on 25 Mar 2020

New isolation and quarantine measures introduced to combat the spread of Coronavirus (Covid-19) has left businesses grappling with the problem of maintaining service delivery; both to their customers and by their employees.

The obvious solution most businesses are taking to the forced isolation of staff is to allow employees to work from home, because for most people that sit at a desk and work from a computer, working from home should be as simple as logging in. Unfortunately, this also means large numbers of people are suddenly shifting from working in controlled office environments using company owned equipment, to working in uncontrolled environments, and in a lot of cases, using their own equipment.

This article focuses on two important issues businesses need to consider when directing staff to work from home; work health safety and the protection of confidential information.

Work Health & Safety

Businesses are required under the Work Health & Safety Act to provide a safe work environment and safe systems of work within the workplace. So, what is classified as a workplace? Under the WH&S Act, a workplace is “a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.”

This means that for employees working from home, any home workspace becomes a workplace at law as soon as a worker goes there, or is likely to be there while at work, whether it's a home office, a dining room table or a sofa, and even includes amenities.

What should employers do to provide safe workplaces and safe systems of work?

Unfortunately, there is no simple answer to this because every individual has different needs, and lives in a unique environment. However, there are a few simple steps employers can take to make sure their staff can work from home safely, such as:

- check that staff have a suitable, quiet space to set up a workstation, including a proper chair and table to work from;
- find out what equipment staff have available to them that they can use at home. This might include having access to a proper computer or laptop, a good internet connection and phone reception;
- Find out whether staff have children at home, and what hours staff might be able to work from home effectively without interruption. This might result in staff working split shifts around periods where they have carer responsibilities; and
- identify any staff that may have a medical condition which might require specialised equipment or other support services and where necessary, obtain an OT assessment of their home workspace.

Another often overlooked factor is that businesses must not permit their staff to work in an abusive or harmful environment, whether at the office, or at home. Businesses therefore need to consider any staff that may be vulnerable to abuse or other harm while working from home. Although this will be a delicate issue for many, if you are considering directing 'at risk' employees to work from home, we recommend you seek advice before taking any action.

Modern Award Variations in Response to COVID-19 cont.

Businesses should circulate to all employees a clear and direct working from home policy that addresses work health and safety standards, including the businesses expectations around using proper equipment and maintaining a suitable working space and then actively engage with staff to ensure that employees can work safely and effectively from home.

Confidential Information

Unauthorised disclosure of personal and commercially sensitive information can have very serious ramifications for businesses and Courts are unlikely to assist a company that suffers or causes harm to others due to its own careless management of its information systems.

What is 'disclosure'?

When we think of disclosure, it is more common for people to think in terms of person to person communication. However, disclosure of information occurs when it is passed from one source to another. In the digital age, this means 'disclosure' can occur simply by transferring data from one electronic device to another.

What are the risks?

In practical terms, businesses lose control of information as soon as it passes from its own systems to devices that are outside its control. Businesses can impose contractual obligations on their staff to protect information, but in reality, contracts will often only provide a remedy after the damage has been done. Also, devices owned and operated by staff are less likely to have strong security software and protocols to prevent against viruses and cyber-attack. The type of damage that might occur through unauthorised disclosure of information could include:

Loss of data:

This might occur where company information is being stored on staff devices that are not properly backed up.

Waiver of confidentiality:

If companies direct or simply permit employees to copy data onto their personal devices without informing the employee that the data is confidential, it is possible that a company might lose rights over that information, including the right to prevent others from using it, including competitors.

Data breaches:

Data breaches occur when information held by a company is disclosed to a third party without authorisation. Data breaches can result in businesses becoming liable to others if the disclosure causes harm to the person or business about whom the information relates to.

If the information disclosed is sensitive personal information about an individual, and the unauthorised disclosure will likely result in harm to the person about whom the information relates, that company may have an obligation to self-report the disclosure to the Office of the Information Commissioner under the notifiable data breach provisions of the Privacy Act.

One of the most distressing matters I have been involved in professionally related to the inadvertent disclosure of information by a director to their teenage daughter who unwittingly shared that information with a friend. Unfortunately, the information was an investigation report into an incident of sexual violence committed against an employee by a senior manager. The culprit in this case was a family iCloud account.

Modern Award Variations in Response to COVID-19 cont.

Misappropriation of commercially sensitive information:

The deliberate or innocent copying of business information is much easier and much harder to trace if the devices and systems being used are outside the company's control.

In an ideal world, remote staff should be able to log in from home, do their work and then log off without any unauthorised or unintended transfer of data from the company's servers to their employee's devices. So, what are some factors that companies should look out for?

Use of company email on personal devices:

If email data can be stored locally on employees' personal computers and phones, it will be and once it is, it is no longer in the control of the company.

Synchronisation settings on phones and tablets:

Many businesses that provide phones to employees allow them to connect their devices to personal iTunes and Google accounts. This can result in files being uploaded (sometimes automatically) to personal cloud storage services such as iCloud, OneDrive or Dropbox. Like email, once data makes its way to an employee's personal cloud storage service, it is no longer in the control of the company.

Remote access software:

Businesses have a lot of options when it comes to remote access software. I am no IT systems expert, however as a lawyer that practices in this field, the most terrifying remote access software I have seen was one that allowed staff to literally drag and drop files between their office desktop and their personal desktop. On top of all the other security and accessibility considerations that are relevant to which software you choose to use, give some thought to how staff might deliberately or innocently use it improperly.

Confidentiality terms in employment contracts:

For many businesses, their employees will have contracts drafted that assume their place of work is the company office and so might not contain adequate terms to deal with the types of confidentiality issues that might arise in their new home working environment.

The current Coronavirus climate brings with it new and sudden challenges for businesses and employees alike.

If your business is affected by enforced isolation and quarantine measures, the Employment Law team can assist you with advice and assistance in safely transferring and mobilising your workforce to work from various home offices and ensure you have the correct employment policies in place. Please do not hesitate to contact a lawyer in Coleman Greig's Employment Law team, who would be more than happy to assist you.

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COVID-19 and Visa Holders

Written by Lisa Qiu on 1 Apr 2020

COVID-19 has presented us with some difficult challenges and much uncertainty. Amongst those who are in a particularly precarious situation are the 2 million individuals who currently hold Australian visas. Most temporary visa holders do not have access to Centrelink or Medicare entitlements and many have found themselves jobless and homeless, with limited means to return home in the face of increasing global travel restrictions and flight cancellations.

All temporary Australian visas have visa conditions associated with them. A breach of a visa condition could lead to cancellation of the visa by the Department of Home Affairs, which could result in a visa holder becoming an unlawful non citizen facing deportation.

Those who stay in Australia beyond the duration of their visa and do not hold a subsequent visa, are also unlawful. If an individual has, against their visa history, a visa cancellation or breach of a visa condition, this could have serious implications on their ability to apply for another Australian visa in the future, and could even affect their ability to apply for visas to other countries.

The Australian government and Department of Home Affairs have been quick to make changes to some visas, although further changes are still required.

Temporary Short Skill Visa (subclass 482)/Temporary Work (Skilled) visa (subclass 457)

Individuals holding a 457 or 482 visa cannot cease work for more than 60 continuous days and must only work in the occupation for which they have been nominated to work in.

Many businesses are looking at placing employees on unpaid leave, or otherwise changing their duties and working hours in order to get through this difficult period (see our previous Employment Law COVID-19 blog).

However, 457/482 visa holders may be in breach of their visa conditions if they are on unpaid leave for more than 60 continuous days, or otherwise, have their duties amended to such an extent that they are no longer working in the same role which they have been approved to work in. Employers should be mindful of this when making changes to employment arrangements and placing 457/482 visa holders on periods of unpaid leave.

For 457/482 visa holders who are made redundant, they will only have up to 60 days to find an alternative business to sponsor them and during these difficult economic times, business sponsors may be hard to come by, especially given the often high financial costs and paperwork involved in sponsoring an employee on a 482 visa.

The Department of Home Affairs has not yet made amendments to the visa conditions of 482 visa holders, although there have been calls from migration agents and lawyers to ease these conditions and reduce the costs and administrative process involved in sponsoring an employee on a 482 visa.

COVID-19 and Visa Holders cont.

Student visa: Working more than 20 hours a week

Student visa holders are not able to work more than 20 hours per week when their term is in session. However, in response to high demands for supermarkets to keep essential items in stock, the Department of Home Affairs has waived this restrictions for students working in certain roles and industries. For example, student visa holders who are employed by Coles, Woolworths or Aldi, as well as nursing students and those working in the aged care sector, have had this visa condition lifted, and are subsequently able to work more than 20 hours per week. Employers can also apply to the Department of Home Affairs to waive this condition for student visa holder employees.

Working holiday visa: Working more than 6 months

Individuals on working holiday visas are ordinarily not able to work with an employer for more than 6 months. However, the Department of Home Affairs lifted this work restriction condition in response to the bushfires and enabled working holiday visa makers to work for more than 6 months if their employer was an employer affected by the bushfires, and if they performed certain "specified work", including packing fruit and vegetables and manufacturing dairy produce. More information on what is classified as specified work, can be found [here](#).

Similar restrictions may be made to allow working holiday visa holders to work for an employer for more than 6 months during the COVID-19 pandemic. However, even in the absence of such a waiver by the Department, working holiday visa holders are able to request a waiver of this work condition by lodging a Form 1445 with the Department of Home Affairs and demonstrating why these are "exceptional circumstances" that justify the lifting of the 6 month work restriction. It would be useful to have a supporting letter from the employer when lodging the Form 1445.

No further stay condition

These conditions, often found on visitor visas, prevent the visa holder from applying for another visa while here in Australia. However, individuals can, and many have been, applying to the Department to waive the no further stay condition on the basis of compelling and compassionate grounds involving a major or significant change to the visa holder's situation, out of the visa holder's control. Arguably, COVID-19 and the current global travel bans would meet this threshold of compelling and compassionate grounds. The Department has dedicated additional resources to assist with the volume of no further stay waiver applications.

Tourist Visa: 3 month stay

The tourist/visitor visas usually allows visa holders to stay in Australia for only up to 3 months at a time. Given the current travel restrictions, there would be a number of tourist/visitor visa holders who could potentially be staying in Australia longer than 3 months. Currently, the visa period cannot be extended for individuals wanting to stay in Australia longer. Visa holders must apply for a new visa. If the visa has a no further condition attached to it, the individual can apply to have that condition waived on compelling and compassionate grounds as set out above. The Department has not yet made changes to lift this 3 month stay condition.

COVID-19 and Visa Holders cont.

Potential changes

The Migration Institute of Australia, the peak professional association body for Australian migration agents and lawyers, has made calls for the Department to further implement significant changes for the benefit of visa holders. These proposed changes include:

immediately waive all no further stay condition 8503 for all visa holders currently in Australia so they can apply for other visas create a COVID-19 specific fee-free visa solution which allows work rights and access to Medicare for the duration of the emergency consider extending temporary visas automatically until 30 October 2020 in the first instance immediately remove Labour Market Testing and Skilled Australia Fund levy requirements for employers looking to sponsor individuals on 482 visa As at the date of writing, being 31 March 2020, these proposals have yet to be agreed to by the Australian government.

Summary

Temporary Short Skill Visa

(subclass 482)/Temporary Work (Skilled) visa (subclass 457)

Condition

- Must not cease work for more than 60 continuous days.
- Must be in full time employment in the occupation for which they were nominated and approved to perform

Response

The Department may amend these conditions but have not yet

Student visa holders

Condition

- Must not work for more than 20 hours per week while study is in session

Response

The Department has waived this for students working for Coles, Woolworths, Aldi, in aged care, and for nursing students. Other employers can apply to the Department to have this work limitation waived

COVID-19 and Visa Holders cont.

Working holiday visa holders

Condition

- Cannot work for the same employer for more than 6 months

Response

The Department has waived this condition for those undertaking “specified work” for bushfire affected employers. The Department may make, but has not yet made, the same concessions for those working in certain roles in response to COVID-19. However, it should not be too difficult in this environment to be granted a waiver of this condition on application to the Department by the visa holder, with a supporting letter from the employer.

Tourist Visa

Condition

- Many are able to stay in Australia for only 3 months at a time, and have a “no further stay” condition, which means they cannot apply for another visa while here in Australia

Response

The Department may, but has not yet, waived these requirements although visa holders may apply to the Department to have a no further stay condition waived, therefore enabling them to apply for another visa while here in Australia.

If you need employment and business migration assistance, contact:

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