

COVID-19 & Employment Law Frequently Asked Questions

1. Where can I get information on health and safety in the workplace?

The best organisation to refer to for workplace entitlements such as taking sick leave and annual leave is the Fair Work Ombudsman.

For information about health and safety in the workplace, including legal obligations of employers and employees, go to:

- a. The Australian Government Department of Health – for the latest information and advice about Coronavirus;
- b. Your State or Territory Public Health Unit's website – for local Coronavirus response activities and advice
- c. SafeWork Australia – for information and referrals about managing the risks of contracting Coronavirus in the workplace
- d. Your State or Territory workplace health and safety body – who can also assist with workers compensation enquiries
- e. ComCare (Commonwealth) – for Australian Government employees and for employees of organisations which self-insure under the scheme;
- f. Smart Traveller webpage on the Coronavirus

2. What happens if me or a member of my family is sick with Coronavirus?

Employees who are sick with the Coronavirus cannot attend the workplace for a period due to the workplace health and safety obligations that both employers and employees have.

Employers can direct employees who are sick with the Coronavirus not to come to work and to get medical clearance from a doctor before returning to work. Employers can do this if they are acting reasonably and based on factual information about health and safety risks, which includes relying on the Australian Government's health and quarantine guidelines.

Full-time and part-time employees who cannot come to work because they are sick with Coronavirus can take paid sick leave.

If an employee needs to look after a family member or a member of their household who is sick with Coronavirus, or suffering from an unexpected emergency, they are entitled to take paid carer's leave. An employer cannot require an employee to take sick or carer's leave.

However, in these circumstances the employee is not entitled to be paid unless they use their paid leave entitlements.

Under the *Fair Work Act 2009* (Cth), casual employees are entitled to 2 days of unpaid carer's leave per occasion.

Full-time and part-time employees can take unpaid carer's leave if they have no paid sick or carer's leave left. Employers should consider their obligations under any applicable enterprise agreement, award, employees' employment contracts or workplace policies.

An employee must give their employer evidence of the illness or unexpected emergency if their employer asks for it. This will also apply to situations relating to Coronavirus.

Under the *Fair Work Act 2009* (Cth), an employee is protected from being dismissed because of their temporary (that is up to 3 months in any 12-month period) absence due to illness or injury.

3. What can I do if I have to look after my kids?

If childcare centres and schools are shut down to contain the outbreak of the virus, employees will be unable to attend work due to their caring responsibilities. Where the employee or their child are not unwell, the worker is not entitled to paid sick leave or carer's leave. An employee will only be able to access carer's leave where the childcare centre or school has been closed at short notice, as an 'unexpected emergency'. In such instances, the employee will be able to take paid carer's leave but only for a limited period until the 'emergency' passes. After this limited period has expired, employees may be required to request unpaid carer's leave to continue caring for their children at home.

4. What if I am stuck overseas or am required to be quarantined or to self-isolate?

Those quarantined employees or workers required to self-isolate are prohibited from attending work. On 15 March 2020, the NSW Government issued an order under the Public Health Act 2010 (NSW) to make it an offence punishable by 6 months prison and/or a fine of up to \$11,000 for those overseas travellers entering NSW who fail to self-quarantine for 14 days.

The *Fair Work Act 2009* (Cth) does not have specific rules for these kinds of situations so employees and employers need to come to their own arrangement. This may include:

- a. Working from home or another location (if this is a practical option);
- b. Taking sick leave if the employee is sick;
- c. Taking annual leave;
- d. Taking any other leave available to them;
- e. Arranging any other paid or unpaid leave by agreement between the employer and employee;
- f. The employee being unable to work remotely but the employer paying the employee their normal wage, despite the employer being required to do so.

Where an employer directs a full-time or part-time employee to stay home in line with advice, and the employee is not sick with Coronavirus, the employee should ordinarily be paid while the direction applies.

If an employee cannot work due to travel restrictions (i.e. stuck overseas), they are not entitled to be paid (unless they use paid leave entitlements).

5. What if I want to stay home as a precaution?

Employees who want to stay at home as a precaution need to come to an arrangement with their employer that best suits their workplace, such as making a request to work from home or to take some form of paid or unpaid leave, such as annual leave or long service leave.

Normal leave application processes in the workplace apply.

If the employee does not enter into an arrangement with their employer or use paid leave, they are not entitled to payment in these circumstances.

Employees are encouraged to discuss their level of risk of contracting Coronavirus with their doctor, workplace health and safety representative or appropriate workplace health and safety body.

Employees who do not work because they have a reasonable concern about an imminent risk to their health and safety are not taking industrial action. This is provided that they are not failing to comply with a direction to perform other appropriate and safe work.

6. What if my employer wants me to stay home as a precaution?

Under workplace health and safety laws, employers must ensure the health and safety of their workers and others at the workplace as far as is reasonably practicable. Workers also have responsibilities under those laws.

If an employee is at risk of infection from Coronavirus, employers should request that they seek medical clearance from a doctor and work from home, or not work during the risk period.

Employees can be directed to obtain medical clearance, which may include being tested for Coronavirus, provided this is reasonable and based on factual information about health and safety risks.

Where an employer directs a full-time or part-time employee not to work due to workplace health and safety risks but the employee is ready, willing and able to work, the employee is generally entitled to be paid while the direction applies.

Employers should consider whether their obligations are impacted by any applicable enterprise agreement, award, employees' employment contracts or workplace policies.

Under the *Fair Work Act 2009* (Cth), an employee can only be stood down without pay if they cannot be usefully employed because of equipment breakdown, industrial action or a stoppage of work for which the employer cannot be held responsible. The most common scenarios are severe and inclement weather or natural disasters.

Standing down employees without pay is not generally available due to a deterioration of business conditions or because an employee has the Coronavirus. Enterprise agreements and Employment Contracts can have different or extra rules about when an employer can stand down an employee without pay. Employers are not required to make payments to employees for the period of a stand down but may choose to pay their employees. Any employer that does not pay their employees during a stand down period may be subject to critical political, union and media attention. The ACTU is compiling a list of such employers, and unhappy employees may wish to contact their union to update them of their employer's actions.

7. When can I work from home?

Working from home arrangements are usually agreed between an employer and employee. An employer who wants to direct an employee to work from home should review their obligations under any applicable enterprise agreement, award, employees' employment contracts or workplace policies.

Employers should also consider the nature of the work involved and the suitability of the employee's home. Workplace health and safety laws still apply even when an employee is working from home.

Where employees are required to record their hours of work (e.g. under annualised wage arrangements), this needs to continue when they are working from home.

8. What about casual employees and independent contractors?

Casual employees do not have paid sick or carer's leave entitlements under the National Employment Standards and usually are not entitled to be paid when they do not work. Casual employees are paid a casual loading instead of paid leave entitlements. Employers should also consider their obligations under any applicable enterprise agreement, award, employees' employment contracts or workplace policies.

Independent contractors are not employees and do not have paid leave entitlements under the *Fair Work Act 2009* (Cth). However, there are special provisions that deem contract outworkers in the textile, clothing and footwear industry to be employees for the purposes of most protections under the *Fair Work Act 2009* (Cth). Where these provisions apply, the contract outworker should be treated as an employee.

9. What if my employer needs to let me go or reduce my working hours?

Some employers may need to make employees' positions redundant in response to a business downturn. If an employee's job is made redundant their employer may have to give them

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redundancy pay. The *Fair Work Act 2009* (Cth) has requirements that employers have to meet before they can terminate an employee's employment, such as providing notice.

If an employer seeks to vary employee's work rosters, they should review any applicable enterprise agreement, award, employment contracts or workplace policies. Particularly for full-time and part-time employees, an employer is usually required to seek employee's agreement to change their rosters.

Under the *Fair Work Act 2009* (Cth), an employee is protected from being dismissed because of a temporary absence due to illness or injury. Regulation 3.01 of the *Fair Work Regulations 2009* (Cth) sets out when a temporary absence due to illness or injury will be protected.

Regulation 3.01(2) of the *Fair Work Regulations 2009* (Cth) provides that a prescribed kind of illness or injury exists if the employee provides a medical certificate for the illness or injury, or a statutory declaration about the illness or injury within 24 hours after the commencement of absence or such longer period as is reasonable in the circumstances.

The *Fair Work Act 2009* (Cth) also includes protections against being dismissed because of discrimination, a reason that is harsh, unjust or unreasonable, or another protected right. These protections continue to operate in relation to employees impacted by Coronavirus.

If you are dismissed, you have 21 days to file either an Unfair Dismissal Application or General Protections Application Involving Dismissal with respect to your dismissal.

10. Can I be directed not to travel?

Employers can direct employees not to undertake work-related travel if this is necessary to meet workplace health and safety obligations or is otherwise a lawful and reasonable direction. Employers are unlikely to be able to direct an employee not to undertake private travel.

11. Coronavirus and Work Health and Safety laws

The model Work Health and Safety (WHS) laws require a person conducting a business or undertaking (PCBU) to ensure, so far as is reasonably practicable, the health and safety of their workers and others at the workplace. This includes providing and maintaining a work environment that is without risk to health and safety and adequate facilities for workers in carrying out their work, so far as is reasonably practicable.

To comply with the model WHS laws, a PCBU must identify hazards at the workplace and the associated risks and do what is reasonably practicable to eliminate those risks, or whether this is not reasonably practicable, to minimise those risks.

Whether a control measure is reasonably practicable to implement involves consideration of what is able to be done to manage a risk and whether it is reasonable in the circumstances to do so. The likelihood of the risk occurring, the degree of harm that might result and the availability and



suitability of a control measure are key considerations in determining what measures are reasonable.

12. Can I refuse to come to work under WHS laws?

In some circumstances a worker has the right to stop or refuse to carry out unsafe work. A worker has the right to cease work if there is a reasonable concern that the worker would be exposed to a serious risk to their health and safety from an immediate or imminent hazard. A worker must inform you as soon as they can that they have ceased work. A worker must also then be available to carry out suitable alternative work, such as working from home.

Health and Safety representatives can direct a worker in their work group to cease unsafe work. HSRs can do this if:

- a. They have a reasonable concern that a worker would be exposed to a serious risk to health and safety from an immediate or imminent hazard; and
- b. They have already consulted and attempted to resolve the issue with the business or undertaking from whom the workers are carrying out work.

13. Workers Compensation and COVID-19

Compared to work-related injuries, it is more difficult to prove that a disease was contracted in, or caused by, particular employment. In the case of a virus such as COVID-19, establishing the time and place of contraction may become increasingly hard. Whilst the spread of COVID-19 is contained, it may be easier to establish whether contraction is work-related, for example, if in the course of their employment a worker travels to a high-risk area with a known viral outbreak or interacts with people who have contracted the virus. However, once the virus becomes more widespread in the local community, establishing the degree of contribution of a worker's employment to their contraction of the virus will inevitably be more difficult.

Whether a claim for workers' compensation for contracting COVID-19 is accepted will be a matter for the relevant workers' compensation authority, applying their jurisdictions' workers' compensation laws. Workers' compensation authorities will consider each claim on its merits, with regard to the individual circumstances and evidence.

14. I am experiencing discrimination because of COVID-19, what can I do?

Discrimination is currently a topical issue stemming from the community's fear and concern around Coronavirus. In the circumstances, discrimination occurs when a person is treated less favourably or unfairly on the basis of an illness, impairment or disability.

If you are experiencing discrimination because of a diagnosis of Coronavirus, please contact us to discuss your matter further.

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15. Privacy issues arising from COVID-19

Employers may wish to request information about their employees' health, and they may intend to disclose the identity of affected employees to others in the workplace.

Private health information is strictly regulated in Australia, and breaches may undermine trust within the employment relationship as well as result in penalties.

Specific privacy laws will depend on the jurisdiction in which the employer is based. If your employer has disclosed your private information without your consent, please contact us.

Further information

If you would like more information on employment matters relating to COVID-19, please visit the Fair Work Ombudsman webpage on Coronavirus and Australian workplace laws:

<https://www.fairwork.gov.au/about-us/news-and-media-releases/website-news/coronavirus-and-australian-workplace-laws>.

If you require legal advice in relation to your employment, please visit www.mels.org.au/contact and send us a web enquiry or call us on 8002 1203.

