

Lockdowns due to COVID-19 – stand down, annual leave and personal/carer's leave issues

SUMMARY

The lockdowns in various States due to the COVID-19 pandemic raise some important issues that employers need to be aware of regarding:

- stand down;
- annual leave;
- personal/carer's leave; and
- the meaning of an 'unexpected emergency' for the purposes of carer's leave entitlements.

Stand down provisions in the FW Act

Section 524 of the *Fair Work Act 2009* (**FW Act**) gives an employer the right to stand down employees without pay in certain circumstances. There are various requirements that must be met before an employer can stand down its employees. These requirements are complex to apply in practice and there is a considerable amount of case law about the meaning of the expressions used in section 524.

If a stand down is held by a Court or the Fair Work Commission to not meet the requirements of the FW Act, the employer will have an obligation to pay the employees who were invalidly stood down. Therefore, it is essential for employers to carefully consider whether the requirements are met before proceeding to stand down any employees.

Section 524 of the Act states: (underlining added)

Employer may stand down employees in certain circumstances

- (1) *An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:*
 - (a) *industrial action (other than industrial action organised or engaged in by the employer);*
 - (b) *a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;*
 - (c) *a stoppage of work for any cause for which the employer cannot reasonably be held responsible.*
- (2) *However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:*
 - (a) *an enterprise agreement, or a contract of employment, applies to the employer and the employee; and*

(b) *the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.*

Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.

Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).

(3) *If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.*

In the context of the COVID-19 pandemic, key questions that would need to be asked in considering whether there is a right to stand down employees include:

1. Can the employees that the employer is proposing to stand down be ‘usefully employed’?
2. Has there been a ‘stoppage of work’ for the relevant employees, or just a significant slow-down? A stand down relates to circumstances where there is a stoppage of work for the relevant employees, not just a slow-down.
3. Is the stoppage of work for a cause that ‘the employer cannot reasonably be held responsible’?
4. Will the stoppage of work be temporary? Stand downs are not able to continue for an excessive, indefinite period.

Some enterprise agreements contain limitations on an employer’s right to stand down employees, so any relevant provisions in an applicable enterprise agreement need to be considered as well as the provisions of section 524 of the FW Act.

Can an employer stand-down an employee who is on annual leave?

No, an employee who is on annual leave cannot be stood down during the period of the leave.

Can an employee access personal/carer’s leave while stood down?

No, an employee who is stood down is not able to access their accrued personal/carers leave under the Act.

Do employee entitlements accrue during a stand down?

Leave entitlements under the National Employment Standards (NES), such as personal/carer’s leave and annual leave, still accrue while an employee is stood down without pay. The period during which an employee is stood down must also be counted when calculating employee entitlements under the NES relating to notice of termination and redundancy pay.

Communication with employees

Employers should contact their employees to notify them of any requirement to stand them down and to potentially discuss other possible approaches to dealing with the current situation. Some potential alternate options for employers to consider are identified below.

It is also advisable that employers provide employees with written confirmation of any decision to stand them down.

What alternate options to stand downs may be available?

Employers may wish to consider permitting their employees to take paid leave instead of standing them down. This could take the form of:

- allowing employees to take accrued annual leave;
- providing annual leave 'in advance'; or
- allowing employees to access accrued long service leave.

It is important to consider the relevant provisions in the FW Act, long service leave laws, any relevant award, and any relevant enterprise agreement to ascertain what flexibilities are available and what requirements apply.

The COVID-19 Disaster Payment

The COVID-19 Disaster Payment (CDP) is for employees who are unable to earn income from work because of a lockdown, stay at home order or the like.

Employees may be eligible for a payment of \$600 if the job they cannot work in involves 20 hours or more of work per week, or a payment of \$375 per week if the job is for between 8 and 20 hours per week. The CDP is included in a person's taxable income.

The CDP is available to people who live in, work in, or have visited, a Commonwealth-declared COVID-19 hotspot or a location subject to a State or Territory restricted movement order. To be eligible a person must have had paid employment and cannot attend work as a consequence of a lockdown or a restricted movement order.

All of the following conditions must be met, amongst others. An eligible person must be:

- over 17 years old;
- an Australian resident or eligible working visa holder;
- not in receipt of an income support payment (e.g. JobSeeker); Parental Leave Pay or Dad and Partner pay;
- not in receipt of Pandemic Leave Disaster Payment (which is payable to people required to quarantine or look after a person who is required to quarantine), a State or Territory pandemic payment, or a State small business payment for the same period.

Individual members of the same household can be eligible. People can be eligible even if they were eligible only on one day of the relevant period. With eligibility dependent on decisions taken

by Federal and State Governments about lockdowns and hotspots, it is important to check what locations were affected during the relevant period.

More information is available on the [Services Australia website](#).

Can an employee take personal/carer's leave if the employee cannot attend work due to a school closure and their need to care for children?

Section 97 of the FW Act includes an entitlement for an employee to take any of their accrued paid personal/carer's leave to provide care or support to a member of the employee's immediate family or household who requires care or support because of 'an *unexpected emergency affecting the member*'. Notice and evidence requirements apply.

An '*unexpected emergency*' is not defined in the FW Act. The Macquarie Dictionary defines 'unexpected' as: '*unforeseen; surprising*'. The Macquarie Dictionary defines an 'emergency' as '*an unforeseen occurrence; a sudden and urgent occasion for action*'.

There would be little doubt that if a school closed in the middle of a particular day and a parent had to leave work to pick up a child to care for them, this would be an '*unexpected emergency*'. It might also be the case that if a school closed suddenly and the school closure lasted for two days while the school was thoroughly cleaned that this would be an '*unexpected emergency*'. However, in Ai Group's view, the idea that an ongoing school closure is an '*unexpected emergency*' is not correct.

The decision of the FWC in [Daniel Moore v Ballarat Health Services \[2020\] FWC 6758](#) supports this interpretation.

The view of the Fair Work Ombudsman on this issue is set out on its website. The following extract is relevant:

Unexpected emergencies

Whether particular circumstances amount to an employee needing to provide care or support due to an unexpected emergency depends on the individual situation. For example, a school or childcare centre closing on short notice and for a short period because someone tested positive is an unexpected emergency.

An employee has to give their employer reasonable evidence of the unexpected emergency if their employer asks for it. This will also apply to situations relating to coronavirus.

Example: Employee needs to care for a child during childcare centre closure

Alastor has just received an email from his daughter's childcare centre. They let him know that the centre is closing immediately for 48 hours. This is because a child at the centre has tested positive to coronavirus. Alastor immediately contacts his employer. He tells them he'll need to stay at home during the closure to care for his daughter.

They discuss whether he could work from home. They decide that, given Alastor needs to actively care for his daughter, he is unable to work at his normal capacity.

Alastor's employer lets him know that he can take paid carer's leave. This is because the closure of the childcare centre on short notice is an unexpected emergency. Alastor forwards the email from the child care centre to his employer as evidence.

Do you require further advice?

For further information or assistance, please contact Ai Group.

Ai Group has set up a [special section on our website](#) to provide access to Ai Group advice and assistance relating to the COVID-19 pandemic and the recovery from the pandemic.

A handwritten signature in black ink, appearing to read 'S. Smith'.

Stephen Smith
Head of National Workplace Relations Policy