

## ACWA MEMBERS INFORMATION

### **CORONAVIRUS - YOUR OBLIGATIONS AS AN EMPLOYER**

Employing staff can be challenging even in good times, but when something comes along that you don't see very often, knowing what to do can be difficult and present real risks for employers. Now consider the difficulties that might arise when something comes along that we have never seen before. The uncertainty and risks are multiplied. That is the situation that we currently find ourselves in with the Coronavirus or Covid-19, depending on your preference. For the purpose of this article we are going with Coronavirus.

#### **The Disclaimer**

Given that we have never faced this issue before, and it seems that it was not considered when the provisions of the *Fair Work Act 2009* ('the Act') were drafted, providing certainty as to what might happen is not possible. Accordingly, this article provides general information about the subject matter, and summarises the information that we have been able to collect on this issue. The article provides for a range of possibilities depending on the most common circumstances that might be faced by employers and is based upon the information we currently have.

It will not, and does not purport to, cover every eventuality that might arise, and readers should be aware that the risks faced and actions that may be taken by employers may change as the pandemic develops. Employers will likely need specific advice in relation to the circumstances that they face.

This article is somewhat lengthy. Having said that, I encourage employers to read it in its entirety as it will identify issues that might not have previously been considered by them. But for those who won't do that I have used headings so that you can hopefully drill down to your specific circumstances faster.

For the purpose of avoiding doubt, this article is provided on the basis that it is general information only and is not intended, nor should it be taken as professional advice. Individual circumstances may significantly impact on the obligations and courses of action open to employers and individual employers, if they are unsure of their obligations, should obtain professional advice specific to their circumstances.

#### **Communication is Going to be Critical to Managing Risk**

I cannot overstate the importance of effective communication with staff in relation to this issue. The financial challenges that will be faced by employers will also potentially be faced by employees as well. If financial shocks can be avoided, or at least minimised by good communication, then the chance of the business becoming a test case on the uncertainty of the laws that are in place will be minimised. It is also essential to keep in mind that this crisis will end at some point, and how the business manages the communication process will determine in part whether the business suffers long term damage.

In many cases businesses will not be able to afford the so called "best practices" that some politicians and unions are already talking about such as paying casuals sick leave. However, I also caution against scenarios that might arise where metaphorically once the ship has hit the iceberg, people start throwing the women and children out of the lifeboats to save themselves. It may assist the business owner in the short term, but particularly in businesses where longer-term employment is important, it could do permanent damage to relationships by the decisions that are made or not made. If the business cannot afford, or decides not to, provide additional support to employees, it will be important to tell staff early what they can expect, and why, so they can plan to mitigate the downside for them.

If the facts of life are explained to staff in an honest and frank manner, many staff will be prepared to assist. Unfortunately, it is likely that for a range of reasons, not all staff will co-operate, and they will have to be managed individually.

### **The Legislative Framework**

This advice relates to employers covered by federal workplace laws. This will be all businesses in all States except Western Australia. In Western Australia businesses typically covered under federal laws are entities where the employer is a Ltd and Pty Ltd company, or a Trust where the trustee of the trust is a Pty Ltd company. Businesses that operate through a sole trader, partnership (with none of the partners being a Ltd or Pty Ltd company), or Trust with an individual as the trustee of the trust are covered under State workplace laws. The obligations under Western Australian State laws are largely the same, but there are some differences. I do not intend to outline the issues here because only a few businesses are covered in this jurisdiction and this article is going to be long enough already.

A further important issue to note is that the Act as it is currently drafted, does not anticipate in the stand down or personal/sick/carer's leave provisions the issue of a pandemic and the quarantining of employees by government direction that may have been exposed but also may not have been, and are not currently unwell. For reasons that will become clearer further on, this creates uncertainty regarding an employer's obligations.

Mixed in with all this are both the employers and employee's obligations under occupational safety law and it is even now being suggested that disability discrimination law may have some influence on the issue.



### **The Scenarios**

There are a range of scenarios that might arise in individual businesses. The following is our view of the most common possibilities.

#### ***An employee is diagnosed with the Coronavirus or must care for a family member with the virus***

In this circumstance, the employee, assuming they are employed on a full time or part time basis, would access their personal leave entitlement. The personal leave entitlement may be taken as either sick leave or carer's leave.

Personal leave is typically 10 days per year which accrues from year to year if untaken.

If an employee is a casual employee, then they don't have any entitlement to personal leave and there is no obligation to pay them. Casuals are entitled to 2 days unpaid carer's leave.

I provide some additional information about casual employees later in this article.

#### ***An employee has been directed by the government to self-quarantine for 14 days, but they have not been diagnosed with Coronavirus***

This option arises when the employee has returned from or transited through countries that have been declared as high risk. Currently, these countries are China, Italy, Iran and South Korea. Additional countries are likely to be added to this list before the pandemic ends.

The best course of action in this situation is to consider the following options.

1. Can the employee work from home and thus create a business as usual arrangement where there is no significant reduction in productivity and the employee does not lose remuneration?
2. Can an agreement be reached whereby the employees take a period of paid annual leave or long service leave, if it is available? This may not be ideal in the employee's mind, but in the circumstances, they may agree and if they do then this will mitigate the risk. Except where the employee has excessive annual leave (usually more than 8 weeks), there is no capacity to direct the employee to take annual leave.
3. Is a combination of the above two options possible? For example, work for 3 days from home and take 2 days annual leave.
4. If an employee does not have enough annual leave, is it possible to allow them to go into deficit annual leave. There is some risk for employers with this, but it is likely that there will be risk in many of the options that present.
5. Employees may be permitted to use personal leave for the period. However, in my view, there is some real risk with this because the employee does not meet the definition of personal ill health or injury and so if they were to challenge this at a later date, they might have to be recredited with the entitlement.
6. Consider using the stand down provisions under the Act. In these instances, the employee does not have an entitlement to pay. However, we recommend that this option is only used as a last resort because there are issues here with the capacity to stand down employees under the Act, given that the Act does not specifically deal with the issue of pandemic, and common law contractual issues because it is not technically the employer that is standing down the employee, it is happening at the direction of the government. The position on this issue may become clearer over time. Based upon the preponderance of published advice on this issue, it would seem that an employee could be stood down without pay if absolutely necessary, and if none of the above options could be agreed, but standing down employees without pay if a dramatic move and I would not advise it except in the most desperate circumstances where all other options have been exhausted.

***An employee does not want to come to work to avoid actual or perceived exposure through contact with other staff or customers***

This gets a bit complicated because OH & S laws can impact. This issue could arise in any business where customer contact is common.

The employer has an obligation to provide a safe system of work. If it is a reasonable possibility that an employee may be infected by attending work, the employee would be entitled to stand themselves down from their position until it is safe to return to work. They would also be entitled likely be entitled to payment for this period. An employer should also not put the employee in that situation anyway. The employee does have certain obligations to inform the regulator about their concerns so that the issue can be assessed if they intend to stand themselves down under OH & S laws. It probably would be a bit more than just personally forming a view that it was not safe to go to work.

If the employee's belief is not reasonable, then the employee could find themselves in trouble for not attending work when rostered and there would not be any entitlement to payment.

The determining factor may be whether the belief was reasonable. Try working through that in the evolving circumstances of this crisis.

***The employer is concerned about an employee attending work, but the employee is not been legally prevented from coming to work***

Some employees will still be intending to travel overseas even though the travel warnings may discourage but not prevent this conduct. This course of action may place the employee at an increased risk of contracting the Coronavirus and the employer and even some employees may have concerns in relation to being exposed to the Coronavirus.

In this situation the general position is that if the employee is directed not to attend work by the employer, and there is no agreement to take leave, then the employee will likely have to be paid for the period of their absence. There is no capacity to stand down an employee without pay in these circumstances under employment laws.

The employer may however be able to mitigate risk in this scenario by relying OH & S laws.

Under OH & S laws, both the employer and the employee have obligations to ensure that the workplace is safe. Given that this obligation exists, it is likely to be reasonable to expect that if the employee has come back from an area where the Coronavirus is impacting to obtain a medical clearance prior to returning to work.

To avoid uncertainty about expectations and to ensure that employees can obtain the clearance in the most timely manner it is our advice that each business should discuss this issue with any employee intending to travel and advise them of the requirements to produce the clearance. It would also be advisable to get them to book an appointment with their doctor before they leave so as to minimise the chance of issues arising if they can't obtain an appointment immediately upon their return. It is important to do this because if the employee cannot get an appointment for several days, and they cannot return to work without one, the issue of whether the employee must be paid arises. The answer to this is contested at this stage as is the issue of whom must pay for the medical appointment. If the expectations are clear, before the employee leaves then there is a reduced chance of a dispute arising.

***An employee needs to take time off because they must care for a child that cannot attend day care or school as a result of the virus***

Whether there is a right to carer's leave in these circumstances is uncertain at this time.

Carer's leave is typically taken to care for a family member who is ill. However, it can also be taken to provide care or support to a family member when there has been an unexpected emergency. The issue that might arise is whether this circumstance constitutes an emergency and if so, is it unexpected. The Act does not define either of these terms. Some information published on this issue suggests that because it is now commonly known that school shutdowns are possible, they may not be considered to be unexpected and if it is not unexpected, there may not be any entitlement.

How this matter is dealt with will depend on what view the employer takes in relation to the above issue. If the employer permits the employee to take personal leave then the issue probably won't arise, but if they contest the entitlement, the employee may have to access other entitlements such as annual leave to cover for the period.

The risk for the employer is that if it eventuates that the employee did have the entitlement, the employer will have been in breach of the relevant Award or the Act. It may also result in bad feelings between the employer and the employee and this can have ongoing ramifications and the possibility of adverse publicity, especially on social media if it "gets out" that the employer is denying staff leave to care for children.

Businesses need to consider their position in relation to this issue and seek further advice regarding the process and risks that they may be taking.

***What are the options available if I must reduce staffing levels due to a downturn in business because of the Coronavirus?***

It is at least foreseeable, and possibly likely, that some businesses will suffer significant reductions in business activity levels as a result of the Coronavirus. This is likely to result in a need to reduce staffing levels, temporarily at least.

It is relatively easy to reduce the hours of casual employees and that is really where the process should commence. Except where special circumstances exist, casual employees should have their hours reduced or ceased before permanent employees' arrangements are changed.

If a need arises to make adjustments, a number of options should be considered including:

1. Ask employees to take paid annual leave or long service leave if it is available.
2. Consider, whether there can be an agreement with employees to temporarily change from full time employees to part time. This will assist in preserving the number of jobs and ensure that employees have at least some income coming in.
3. Making some staff redundant. This may trigger severance pay obligations.
4. Consider whether all or part of the business can be shutdown giving rise to the possibility of standing down employees without pay for a period.

The last three options will have a significant impact on employees and so should not be done without taking professional advice. Business will have to have to comply with their consultation obligations under the relevant Awards in order to minimise the risk of an unfair dismissal claim arising.

It is important to keep in mind that this crisis will end at some point in the future and how businesses deal with these very difficult issues will impact on continuing relationships with staff. Effective communication will be key to minimising the negative outcomes.



#### **OTHER QUESTIONS**

##### ***There has been talk about casuals being paid sick leave, is this going to happen?***

It would seem highly unlikely. The Attorney General/Industrial Relation Minister has stated that he does not expect this to happen. It is likely that if the government wants to support casual employees, they would do it in other ways.

##### ***If things get really bad and we have to temporarily close the business or we are directed by the government to do so, can we stand down our employees without pay?***

Let's hope this situation does not arise but it is very possible that it will for some employers.

If it does then the rights of an employer might be impacted by what is contained in any contract of employment, enterprise agreement, Modern Award or the National Employment Standards. Each situation needs to be scrutinised to determine what can be done.

It is likely though that as a result of this pandemic, that it may be possible to stand down employees without pay assuming the business or a big part of it ceases to operate temporarily.

The regulators will likely look very closely at each case to determine if the situation is warranted.

It would also be a disaster for the staff who will not be paid and as such, it should only occur in the most difficult of situations. Specific advice should be taken before any such decision is made.

##### ***What do I do if there are tensions between staff because someone coughs or sneezes?***

Regrettably, these incidents will arise. We are aware of a number of them already having occurred with our clients. Whilst most of these types of incidents will be overreactions from people who are anxious about what is going on, it is also possible that some employees may use this pandemic to progress their own racist or xenophobic views.

Supervisory staff need to be closely monitoring staff and having discussions with any staff that are symptomatic. If necessary, these staff may be required to attend a medical examination to determine if they are fit for work.

Staff should also be advised not to come to work if they are sick and to ensure they follow good hygiene practices whilst at work.

Staff should be spoken to about the issue and advised that it is understandable that they are anxious, but if they have concerns, they should come to management about them and not take them up with other staff members directly. Legitimate concern about the Coronavirus will not be an excuse for unacceptable conduct.

We are all going through this and some staff will handle it better than others. One size will definitely not fit all here and so management must be adaptive to the regularly changing circumstances.

We recommend that all supervisory staff are instructed as to how these matters should be dealt with and any sign of trouble should be attended to promptly.

Failure to deal with situations promptly may result in claims of discrimination of which the employer can have a vicarious liability.

***Am I insured for this - Business interruption/Management liability insurance***

We suggest that businesses speak with their insurance provider to determine if any coverage exists for losses that may arise out of this event. Business interruption insurance may provide some cover. Our enquiries to date don't look that positive, but it's probably still worth checking.

Management liability, often also known as business practice insurance might provide cover against legal risk that arise out of decisions made in relation to staffing matters.

It is important to understand what coverage the business has in these areas as it will be a consideration for some business operators when assessing what risk they are prepared to take.

***Where can I find out more about which areas are affected?***

The link below is a regularly updated source to find the latest information about the virus.

<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert#travellers-and-visitors>

***Will the situation change and evolve over time?***

Yes, certainly. There may be significant changes in all or part of this advice over time and as the full picture becomes clearer. The government may also legislation changes to the rule. We can only go on what we know now, and even some of that is not agreed at this time.

Unfortunately, it is already clear that not every business is going to get through this. If you need specific advice, please call our office.

Except in circumstances where members have complex circumstances, advice to members of ACWA will be at no cost to the business and is provided as a benefit of membership of the Australian Car Wash Association.

For all your queries, and specific advice, please call the ACWA Members HelpLine

*Note: you will be asked for the name of your site to verify you are a current financial member*

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