

Questions from the Australian Small Business and Family Enterprise Ombudsman

1. Under what circumstances can you stand down permanent staff?

Under the *Fair Work Act 2009 (FW Act)*, an employee can only be stood down without pay if they cannot be usefully employed because of equipment break down, industrial action or a stoppage of work for any other cause for which the employer cannot be held responsible (see section 524).

Employers cannot generally stand down employees simply because of a deterioration of business conditions or because an employee has the coronavirus. Whether the right to stand down is enlivened is highly fact dependant and an employer should exercise the right cautiously, as the onus will be on the employer to demonstrate that the stood down employees could not be usefully employed (which will not be limited to the work an employee usually performs). If an employer *invalidly* stands down employees without pay, the employees will likely be able to recover unpaid wages.

Stand down may become available to employers, for example, if there was an enforceable government order or direction requiring the business to close, if a large proportion of the workforce was required to self-quarantine with the result that no useful work was able to be performed in the business, or if there was a stoppage of work due to lack of supply for which the employer could not be held responsible.

Enterprise agreements and employment contracts may include additional rules about when an employer can stand down an employee without pay.

For completeness – section 524 is provided as an [Attachment](#). See also the answer to question 7.

1(a). Do you have to pay them?

Employers are not required to make payments to employees for the period of a stand down but may choose to pay their employees.

2. If a staff member is self-isolated do you have to pay them?

Where an employer directs a full-time or part-time employee to stay home in line with advice, for example in line with the Australian Government's health and quarantine advice, and the employee is not sick with coronavirus, the employee is ordinarily entitled to be paid while the employer's direction applies.

However, if an employee cannot work because they are subject to a government order requiring them to self-quarantine, the employee is not ordinarily entitled to be paid, unless they use paid leave entitlements. In this case, their inability to work is because of a government order, not because of their employer. If an employee cannot work due to travel restrictions (for example, they are stuck overseas), they are not ordinarily entitled to be paid (unless they use paid leave entitlements).

Employees who want to stay at home as a precaution (but who are not directed to do so by their employer or as a result of a government order) need to come to an arrangement with their employer, such as making a request to work from home (if this is a practical option) or taking 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.

Employers should consider whether their obligations are impacted by any applicable enterprise agreement, modern award, contract of employment or workplace policy, which may be more generous.

2(a). Can they take personal leave? What if they have no personal leave?

If an employee is experiencing symptoms or has been diagnosed with the coronavirus, they would be entitled to access paid personal leave under the National Employment Standards on account of their illness.

An employee must give their employer notice of taking personal leave as soon as practicable (which may be a time after the leave has started). If required by the employer, the employee must also give the employer evidence that would satisfy a reasonable person that the leave is taken as a result of the employee being unfit for work due to a personal illness affecting the employee. Modern awards and enterprise agreements may include terms relating to the kind of evidence that an employee must provide.

If an employee is not experiencing symptoms and is not diagnosed with the virus, they should be encouraged to reach some arrangement with their employer.

If an employee has no personal leave, other options or entitlements that may be available include:

- working from home or another location (if the employee is fit for work and this is a practical option), noting the employer should review any applicable enterprise agreement, modern award, employment contract or workplace policy;
- taking annual leave;
- taking any other leave available (such as long service leave or any other leave available under a modern award, enterprise agreement or employment contract);
- arranging any other paid or unpaid leave by agreement between the employee and the employer.

Employers should consider whether their obligations are impacted by any applicable enterprise agreement, modern award, employees' employment contracts or workplace policies, which may be more generous.

3. If a Doctor tells a staff member exposed to stay home for a period of time — is this personal leave? Or if no personal leave available, can annual leave be taken?

We assume this question concerns an employee who is at risk of having contracted the coronavirus, for example, because they have been in close contact with a person who has the virus.

See the answer to question 2(a) above.

Under the National Employment Standards, personal leave is available when the employee is not fit for work because of a personal illness or personal injury affecting the employee. Notice and evidence requirements apply, as outlined in the answer to question 2(a) above.

Employers should consider whether their obligations are impacted by any applicable enterprise agreement, modern award, employees' employment contracts or workplace policies, which may be more generous.

If no personal leave is available, paid annual leave may be taken for a period agreed between the employee and employer. The process for requesting annual leave is often set out in a modern award or enterprise agreement, contract of employment or workplace policy. An employer can only refuse an employee's request for annual leave if the refusal is reasonable.

An employee's terms and conditions of employment may include terms about taking annual leave in advance of the employee having accrued the entitlement (see, for example, clause 32.4 of the *General Retail Industry Award 2010 (Retail Award)* and clause 28.4 of the *Fast Food Industry Award 2010 (Fast Food Award)*).

Employees can only generally be directed to take annual leave if the requirement is reasonable. If a modern award or enterprise agreement applies, the instrument must include a term allowing an employee to be required to take paid annual leave in particular circumstances and the requirement must be reasonable. Such terms often allow an employer to direct an employee to take a period of annual leave to reduce the employee's excessive level of accrual (for example, if the employee has more than 8 weeks' paid annual leave or 10 weeks for a shiftworker) or if the employer decides to shut down the workplace over the Christmas/New Year period. Modern awards sometimes allow for such directions in a different range of circumstances. For example, clause 32.5 of the Retail Award allows an employer to require an employee to take annual leave as a part of any close-down of its operations by giving at least four weeks' notice. By contrast, the Fast Food Award does not permit employers to direct annual leave to be taken during a close-down of operations.

4. If a parent has to stay home to look after children due to school childcare closures - is this personal/carer's leave?

An employee who cannot come to work because they need to care for a child whose school or child care centre has closed will ordinarily need to use paid leave entitlements to be paid for their absence.

Paid carer's leave is available to a full-time or part-time employee where the employee needs to look after a family member or a member of their household who requires care or support because of a personal illness or unexpected emergency affecting the member. A school or child care centre closing on short notice and for a short period due to concerns about coronavirus (for example, because someone at the school has tested positive) is an unexpected emergency for this purpose.

An employee must give their employer evidence of the unexpected emergency if their employer asks for it.

4(a). What happens if they have no personal/carer's leave?

Where no personal carer's leave is available, other entitlements or arrangements that may be available include:

- working from home (if this is a practical option and consistent with any applicable modern award, enterprise agreement, employment contract or workplace policy) or other flexible working arrangements;
- taking annual leave;

- taking any other leave (such as long service leave or any other leave available under an award, enterprise agreement or employment contract);
- taking any other paid or unpaid leave by agreement between the employee and the employer.

Note that 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 personal/carer's leave left.

5. Can you reduce hours of permanent staff? What if they agree? Under what circumstances?

Modern awards and enterprise agreements must include terms requiring employers to consult employees about a change to their regular roster or ordinary hours of work and allowing for representation of those employees during the consultation (see, for example, clauses 8A of both the Retail Award and Fast Food Award). Under these terms, employers have to:

- provide information about the change;
- invite employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and
- consider employees' views about the impact of the change.

Modern awards and enterprise agreements may also set out additional rules about changing rosters or ordinary hours of work.

Reducing a permanent employee's ordinary hours usually requires the employee's agreement. We note in this regard that modern awards typically define full-time employment by reference to working an average of 38 hours per week and require part-time employees to agree to a regular pattern of work.

An employer and employee may agree to an "individual flexibility arrangement", which may vary terms in an applicable modern award or enterprise agreement relating to when work is performed. Such agreements only apply in respect of the individual employee, must be in writing and are subject to a number of safeguards to ensure the agreement has been genuinely made and the employee is left better off overall.

6. What are the duties of care for an employer with regards to COVID 19?

The Fair Work Ombudsman (**FWO**) can only provide advice in relation to the Fair Work Legislation.

However, the FWO has been consulting with Safe Work Australia and the federal Department of Health in relation to the impact of the coronavirus, and has links on the FWO Webpage to relevant sources of information concerning health and safety in the workplace are as follows:

- The Australian Government [Department of Health](#) - for the latest information and advice about coronavirus;
- Your State or Territory Public Health Unit's website - for local coronavirus response activities and advice;
- [Safe Work Australia](#) - for information and referrals about managing the risks of contracting coronavirus in the workplace;
- [Your State or Territory workplace health and safety body](#) - who can also assist with [workers compensation](#) enquiries;
- [Smart Traveller webpage on the Coronavirus](#) .

7. If an employer (owner) has to isolate — can they close the business? Do they have to pay staff?

In the first instance, employers and employees should be encouraged to work together to consider their options to keep employees employed.

If a small business owner is required to self-isolate, in some circumstances they may have no option other than to close their business on a temporary basis.

As referred to above, section 524 of the FW Act sets out the circumstances when an employer can stand down employees without pay. In this context, if the small business has to be closed because of the owner's incapacity to work due to coronavirus, then section 524(1)(c) of the Act may apply (i.e. a stoppage of work ... for which the employer cannot reasonably be held responsible).

For example, if the small business owner is a baker, and the baker shop cannot produce any bread or produce while the baker is in isolation, then 'stand down without pay' is likely to be available with regard to employees of the business who would otherwise be idle (subject to the other requirements of section 524 applying). If, however, the business had other bakers that were available to work, then the other workers might still be usefully employed, in which case stand down would not be available. The right to stand down is not available simply because the employer's financial situation is negatively impacted.

As evident from the example, and as referred to above, whether the right to stand down is enlivened is highly dependent on the particular circumstances, and an employer should exercise the right cautiously.

Other options that an employer may consider include the following:

- seeking employees' agreement to take paid (or unpaid) leave over the period of the employer's absence;
- in limited circumstances, directing employees to take paid annual leave (see answer to question 3 above);
- negotiating with employees to change regular rosters or hours of work (see answer to question 5 above);
- terminating the employment of the employees, in which case the employer may have to provide redundancy pay.

The FW Act includes requirements that employers have to meet before they can terminate an employee's employment, such as providing notice of termination. An employee is also protected from being dismissed because of discrimination, a reason that is harsh, unjust or unreasonable or another protected right. If the employer can provide evidence that the Small Business Fair Dismissal Code was followed, the dismissal will be deemed to be fair. Employers are prohibited from exerting undue influence or undue pressure on employees in relation to making certain agreements or arrangements. These protections continue to operate in relation to employees impacted by the coronavirus.

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

524 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.