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COVID-19: (Australia) Pressing Issues Facing Employers

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SHOULD I BE STANDING MY EMPLOYEES DOWN OR ISSUING A JOBKEEPER DIRECTION?

When this all started in March, many employers had never contemplated a stand down and most had not heard of Section 524 of the Fair Work Act. Fast forward four months and now employers have choices about stand down.

There are two methods of unilaterally standing down employees: under s 524 of the Fair Work Act 2009 (Cth) (the FW Act) and by way of JobKeeper Enabling Stand Down Direction.

JOBKEEPER ENABLING STAND DOWN DIRECTION

Employers eligible to receive JobKeeper, may be able to issue a JobKeeper Enabling Stand Down Direction (in respect of the employees who are eligible to receive JobKeeper) directing any employee to not work at all or to work reduced hours.

What are the prerequisites?

- Employees cannot be usefully employed for their normal days or hours
- This is because of changes to the business attributable to COVID-19 or government initiatives to slow transmission of COVID-19
- The direction is reasonable.

JobKeeper Enabling Stand Down Directions provide flexibility for employers to direct employees to work reduced hours and do not require a complete stoppage of work.

But there is a downside. Employers must provide three days' notice of their intention to issue this direction, and then consult within those three days with the employees before issuing the written stand down direction. This can all take time and administrative resources that a lot of employers don't have. This is particularly the case in Victoria where Stage 4 restrictions will commence at 11.59 pm Wednesday 5 August 2020 for most industries.

Also JobKeeper Enabling Stand Down Direction will only operate as long as the JobKeeper Scheme remains in force.

SECTION 524 OF THE FAIR WORK ACT

A stand down under the Fair Work Act has a number of requirements that must be met before the stand down is triggered:

- A situation must exist where the employee cannot usefully be employed
- This must be because of a stoppage of work
- And the stoppage must be for a cause which the employer cannot reasonably be held responsible.

If your business meets these requirement, the benefits of s524 stand down are that it can be instant, does not require onerous paperwork or consultation and operates independently from the JobKeeper Scheme.

There remains a question mark over what will be considered a stoppage of work.

The most obvious is where your business is required to effectively cease due to the pandemic, think businesses relating to international air travel.

Where an employer has discrete divisions, some of which are forced to close and others that can remain open, for example retail operations closing but online operations continuing, we consider that this will still meet the stoppage of work requirements.

The issues becomes cloudier where a business is able to remain operating, but at a restricted capacity (for example certain sectors of the manufacturing and construction industries). Depending on how that reduction is implemented, we consider it may still amount to a stoppage of work, but this not yet been tested in the courts.

If an employee can be usefully employed for part of the time this will not constitute a stoppage of work, s524 will not apply and it will be necessary to rely on JobKeeper directions or where they are not available it is always open to reach agreement with your employee to reduce hours and salary.

CAN I DIRECT MY EMPLOYEES TO TAKE LEAVE OR IS IT BETTER TO REACH AN AGREEMENT?

With the assistance of JobKeeper payments, many employees have been reluctant to draw down on their leave entitlements while stood down or working reduced hours. So what can an employer do if they want employees to take leave during this period?

Direction

The Fair Work Act and some modern awards provide that employers are able to direct employees to take annual leave in certain circumstances (for example, where an employee has accrued excessive leave). However, it is fair to say these directions often require extensive notice, and must not result in an employee's leave balance dropping below a defined threshold. As such, this is unlikely to be particularly useful in unpredictable and rapidly changing circumstances.

The direction to take long service leave falls back on the provisions set out in State/Territory legislation or industrial instruments.

Request

Under the JobKeeper legislation, employers who are eligible to receive JobKeeper, may make a JobKeeper Request that an employee (who is also eligible to receive JobKeeper) take annual leave, provided the employee keeps an annual leave balance of at least 2 weeks). The employee must consider such a request and cannot unreasonably refuse it. If the employee does refuse a dispute can be notified to the Fair Work Commission which can direct the annual leave to be taken.

Agreement

If all else fails an employer and employee may reach an agreement about the taking of leave and also agree in writing with an eligible employee for them to take annual leave at half pay for twice the length of time.

SHOULD I CONTINUE WITH STAND DOWN OR PROCEED WITH REDUNDANCIES?

Many employers, especially those with operations in Victoria that have had to cease operations as part of the Stage 4 restrictions are being faced with tough decisions about the future of their workforce. Many are assessing whether they should continue to utilise JobKeeper to wait out the storm or start implementing redundancies now.

There is no one size fits all answer.

If, as a result of COVID-19, employers have had to restructure operations on a permanent basis and are clear that they need less staff going forward, there is no impediment to them determining that positions are no longer required, consulting with employees and implementing redundancies right now.

On that other hand, if there is no work for employees as a direct result of the shutdown and this is likely to be only temporary, that situation may not meet the test of redundancy being that the "position is no longer required". There is a risk therefore that any termination by reason of redundancy may be challenged as an unfair dismissal.

As we keep hearing, we are in unprecedented times. In Victoria in particular, additional supports for employers are being announced for businesses daily. It is very likely that changes to the federal JobKeeper system will be aimed at incentivising employers to keep employees on as long as possible to prevent unsustainable strains on the JobSeeker system. Ultimately employers need to make the best decisions for their business to get them through this time. For those that are not sure

what that is we encourage you to avoid knee jerk decisions on redundancies that may be open to challenge.

COVID SAFE PLANS – WHAT ARE THEY AND WHERE DO I GET ONE?

Workplaces remaining open under Stage 4 restrictions in Victoria (except workplaces with less than five employees) have until midnight on Friday 7 August 2020 to implement a COVID-19 Safe Plan.

A COVID-19 Safe Plan template and guidance for Victorian employers to create their own COVID-19 Safe Plan can be found via this link.

A COVID-19 Safe Plan must set out:

- Your actions to help prevent the introduction of coronavirus (COVID-19) in your workplace
- The level of face-covering or personal protective equipment (PPE) required for your workforce
- How you will prepare for, and respond to, a suspected or confirmed case of coronavirus (COVID-19) in your workplace
- This plan must demonstrate how you will meet all of the requirements set out by the Victorian Government. Some higher-risk industries or workplaces have additional requirements of employers and employees.

HOW DO EMPLOYERS KEEP EMPLOYEES SAFE AT HOME?

Many employees have been working from home for months. Some in Victoria may just be starting with the end well and truly not in sight.

For some, the prospect and process of working from home has been welcomed and relished. For others it is difficult and what we are beginning to see emerging is that the disconnection from the workplace is taking its toll on employees and exacerbating underlying mental health issues for many.

For all employers, it is important to recognise that whatever the sentiment is amongst your workforce, it's paramount that no organisation adopts an out of sight/ out of mind approach to WH&S matters.

An employer's health and safety obligations at law remain unchanged. The home will and does constitute a workplace for the purposes of WH&S.

In accordance with the 'duty of care obligations' relevant to all employers, an employer must so far as reasonably practicable, provide and maintain for employees and others a working environment that is safe and without risk to health.

We encourage all employers take a proactive, systematic and tailored approach to OH&S management in the midst of COVID-19. As things change and evolve, particularly in Victoria OH&S considerations and strategies will also need to be agile.

To assist with compliance, employers should whilst employees are working from home:

- Provide guidance on what a safe work environment looks like and include a safe working from home checklist.
- Maintain regular (preferably visual e.g. via video conferencing) contact with employees to ensure concerns can be raised, support services can be communicated (EAP programs and providers) and general health can be assessed.
- Provide up to date information to employees regarding working from home, for example relevant copies of appropriate employer policies and procedures. Employers should ensure employees are familiar with these policies and the obligations embedded within.
- Remind employees of their safety duties to take reasonable care in the home.
- Require employees to comply with good ergonomic practices and facilitate to the extent possible the implementation of appropriate workplace equipment at the home.
- Directly ask employees and consult with employees about their working from home concerns, so individual circumstances can be considered.

Further guidance can be located here:

- Safe Work Australia
- WorkSafe Victoria

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