RIGBY COOKE LAWYERS

Coronavirus (COVID-19) FAQs for Employers

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The Coronavirus (COVID-19) pandemic continues to raise a myriad of questions and challenges for employers. It is important to stay abreast of government regulation and policy in this area as it will impact the decisions you make as a business and the currency and relevancy of our comments below.

We strongly recommend regularly monitoring the information provided by the Australian Government Department of Health, the advice from the State or Territory governments in which your business operates and the policy decisions in response to the COVID-19 pandemic that affect employers by the Australian Government and relevant State and Territory governments.

We have prepared the following updated FAQ's based on some of the most common questions we have been receiving from employers. We have set out your minimum legal obligations as well as best practice to help guide you. This is subject to any relevant terms in applicable enterprise agreements, policies and employment contracts.

If you have further questions specific to your workplace or which arise as the situation continues to develop, please do not hesitate to contact a member of our team as we are here to support you through this pandemic

1. If an employee is required to self-isolate or is in quarantine in accordance with government travel restrictions or restrictions for people who come into close contact[1] with a proven case of COVID-19, do we have to pay them during the 14 day self-isolation period?

Legal requirements

No – because the self-isolation or quarantine requirements are imposed by the government and not the employer, subject to the following.

If the employee becomes unwell or is required to care for an immediate family or household member who is unwell, see Q3. Full time/part time employees are entitled to be absent on public holidays without loss of pay.

Best practice

If the employee was travelling overseas or interstate for work or came into contact with the proven COVID-19 case in the course of performing their duties, the employer should pay the employee for the self-isolation or quarantine period.

Employers should consider and discuss with the employee what options are available to minimise the impact on them and the business including working from home where this is possible and safe for them to do so, allowing them to access their accrued annual leave and/or allowing them to take annual leave in advance.

1. The definition of "close contact" varies between States/Territories but in Victoria, it currently means someone has been face to face for at least 15 minutes with a person who has tested positive for COVID-19, or has been in the same closed space for at least 2 hours, when that person was potentially infectious. Being a close contact means there is a significant risk of becoming infected with COVID-19.

2. If an employee is well, but is required to remain away from work in accordance with an employer requirement that exceeds government requirements, do we have to pay them? If so, can we require them to take their leave entitlements?

Legal requirements

The current direction from Federal and State governments is that employees should work from home if possible.

Employers can lawfully direct employees to remain away from work where this is reasonably necessary to protect the health and safety of themselves or others, even where there is currently no government requirement that they self-isolate or be quarantined. Examples include:

> where there are grounds to believe the employee may have been exposed to someone with the virus;

> or where the employee is living with someone who has returned from overseas and is in self-isolation.

However, if the employee is otherwise ready, willing and able to attend for work, they are entitled to be paid as normal and cannot be forced to take their leave entitlements.

Casual employees are only entitled to be paid for rostered shifts and subject to relevant minimum engagement period requirements.

Best practice

To minimise the impact on their business, employers are exploring ways to enable employees to work from home where possible.

3. If an employee is unwell or required to care for a child or other immediate family or household member who is unwell, what leave can they access?

Legal requirements

Under the National Employment Standards (**NES**), full time and part time employees are entitled to access their accrued personal/carer's leave. If this is insufficient, they can be required to take unpaid leave.

Casual employees (and permanent employees who have exhausted their paid carer's leave entitlements) are entitled to 2 days of unpaid carer's leave per occasion.

Employees are also entitled to 2 days compassionate leave (paid for full time/part time employees, unpaid for casuals) if an immediate family or household member dies or suffers a life-threatening illness (which may include COVID-19). This is a separate entitlement to personal/carer's leave.

Employers may require a medical certificate or other reasonable evidence of the entitlement to take personal/carer's and compassionate leave (eg a statutory declaration), and impose reasonable notification requirements on employees.

Employees cannot be dismissed or otherwise subjected to adverse action because of a temporary absence from work due to illness. Anti-discrimination protections also apply.

Best practice

Employers should consider and discuss with the employee what options are available to minimise the impact

on them if they have insufficient personal/carer's leave including allowing them to access their annual leave or long service leave (LSL) entitlements.

Some employers (where able to do so) are choosing to grant employees (including casuals) who are unable to work due to COVID-19 up to 14 days paid 'special leave' if they have insufficient paid leave entitlements.

4. If an employee is required to stay at home to care for their child because the child's school has closed down, can they access their carer's leave entitlements?

A school closure on short notice and for a short period due to COVID-19 concerns (eg someone at the school has tested positive), depending on the circumstances of the closure, may be an "unexpected emergency", which qualifies under the NES as carer's leave (see Q3).

Each individual circumstance needs to be taken into account in assessing whether the closure is an "unexpected emergency".

It is unlikely that the changes in schooling arrangements which have been announced by some State governments for Term 2 would qualify as carer's leave as it is not an "unexpected emergency".

5. Can we require our employees to undergo temperature checks?

Given a pandemic has been declared and there is evidence of transmission in the community, depending on the nature of the workplace/employee's role and any particular health and safety risks for employees or those they come into contact with (eg in an aged care setting), it is likely to be lawful and reasonable to require employees to submit to a temperature check before commencing work (including because employees also have responsibilities under health and safety laws).

This should be done following consultation with employees/any relevant health and safety committee, in accordance with any relevant Australian Standards, and should be conducted discreetly in a non-intrusive way. Privacy laws also apply in relation to the collection, handling and use of an employee's health information.

6. Can we require employees to provide a medical clearance or produce a negative test result before returning to work if they are showing COVID-19 symptoms or may have been exposed to COVID-19?

Given the current pandemic, it is a lawful and reasonable direction to require anyone showing COVID-19 symptoms (fever, flu-like symptoms such as coughing, sore throat and fatigue, or shortness of breath) to remain away from work until they are no longer symptomatic, even if those symptoms are mild or the employee does not fall into a recognised risk category (ie they have not recently travelled overseas or come into close contact with a confirmed case).

It is also a lawful and reasonable direction to require such an employee to seek medical attention and provide a clearance from their doctor. However, employers need to recognise that GP's are currently difficult to access due to the pressure on the health system, may not accept COVID-19 related appointments, and cannot provide conclusive opinions about infection status on medical certificates.

Given the global shortage of test kits, tests are restricted to specific risk categories (which have just been expanded). Employers can (and should) require that employees who fit within these risk categories be tested and remain away from work whilst awaiting their test results. Their entitlement to payment during this period will

depend on their particular circumstances.

7. If an employee chooses not to attend work as a precaution but this is not required by the government or employer, can they do so and are we required to pay them?

Legal requirements

Employees may have reasonable grounds for not attending work even if they are not unwell (for example if they or their spouse has a weakened immune system). However, if they are not required by the government or their employer to remain away from work, they are not entitled to be paid, subject to the following.

Employers must ensure they meet their health and safety obligations and in certain cases, even if there is no government requirement to self-isolate, it may be necessary based on a risk assessment to direct employees not to attend work (and pay them as normal as per Q2). Employers must ensure they do not breach discrimination legislation eg by refusing to allow employees aged over 65 to attend work.If the employee becomes unwell or is required to care for an immediate family or household member who is unwell, see Q3. Full time/part time employees are entitled to be absent on public holidays without loss of pay.

Best practice

Employers should consider and discuss with the employee what options are available to minimise the impact on them including working from home where possible, allowing them to access their accrued annual leave and/or allowing them to take annual leave in advance.

8. What are our options if our business suffers a significant downturn in demand and/or revenue as a result of the pandemic?

Options include:

> Temporarily varying / reducing employees' hours / days of work, duties and/or location if permitted by the JobKeeper amendments to the Fair Work Act 2009 (Cth) (FW Act);

> Reducing casual staff numbers/hours;

> Freezes wage increases (subject to award minimums), discretionary bonuses /payments and recruitment;

> Asking full time/part time employees to voluntarily take paid or unpaid leave or reduce their working hours on a temporary or ongoing basis (but you cannot force them to do so, unless outlined below);

> Directing employees to take their accrued annual leave in accordance with the new JobKeeper legislation, the NES or applicable awards (many of which have been varied by the Fair Work Commission in response to the pandemic) or enterprise agreements;

> Considering restructuring, including voluntary or forced redundancies where positions are no longer required due to changes in your operational requirements (subject to applicable consultation, notice/redundancy pay, redeployment and other legal obligations);

> Directing employees to take accrued LSL. This is only available in limited circumstances. For example, under the Victorian LSL Act, an employer must provide 13 weeks' notice; and

> In permitted circumstances, standing employees down (see Q9).

> Accessing available Federal and State government funding / economic relief

9. In what circumstances can we stand employees down without pay?

The JobKeeper amendments to the FW Act permit eligible employers to stand employees down (for some or all of their normal hours) if they cannot be usefully employed for their normal days / hours of work due to the impact on the business of COVID-19. Further details regarding these provisions are addressed in our separate updates.

Where the JobKeeper amendments are not applicable, in certain circumstances a business may be able to rely upon the stand down provisions in the FW Act (or an equivalent provision in an applicable enterprise agreement or employment contract). Section 524 permits an employer to stand employees down without pay "during a period in which the employee cannot usefully be employed because of…a stoppage of work for any cause for which the employer cannot reasonably be held responsible."

Section 524 is likely to apply if a government authority has mandated the closure of your business (for example an Indoor Gym) or your landlord locks down your building due to COVID-19 (to the extent that employees cannot still be usefully employed).

The issue is more complex if you decide to close or stand employees down because of a lack of work due to the pandemic. Employers who are considering relying on s524 when there is no specific government directive forcing them to shut down their business are strongly urged to seek specific advice.

Employers should also note that:

> the stand down period counts towards an employees' service under the FW Act, including for the purposes of annual leave and personal/carer's leave accrual

> employees who were on paid or unpaid authorised leave or an authorised absence at the time of the stand down are taken not to have been stood down.

10. Can we require employees to disclose that they intend to travel overseas or interstate or come into close contact with someone who is high risk?

Yes, this is a lawful and reasonable direction and is also consistent with employees' obligations under health and safety laws.

11. If an employee is stuck overseas or interstate, required to self-isolate or in quarantine, are they entitled to be paid?

If the employee was on a personal trip, they are not entitled to be paid while stuck overseas / interstate or required to self-isolate or remain in quarantine. Employers should consider and discuss with the employee what options are available to minimise the impact on them and the business including working remotely where possible or allowing them to access their accrued annual leave or LSL.

If the employee was on a work-related trip, they would generally be entitled to continue to be paid until they were able to return to Australia or their home State and commence working again.

If whilst overseas, in self-isolation or in quarantine the employee becomes unwell or is required to care for an immediate family or household member who is unwell, see question 3.

12. Can we decline to approve annual leave or LSL requests, including if an employee intends to travel?

Legal requirements

With limited exceptions all travel overseas is currently banned by the Federal Government. The Queensland, Northern Territory, Western Australian and Tasmanian governments have each imposed quarantine or self-isolation restrictions on interstate travellers. Advice from Federal and State Governments is to avoid unnecessary travel, including in the same State.

An employer must not unreasonably refuse a request by an employee to take accrued annual leave. In the current circumstances, it would not be unreasonable to refuse a request if the employee intends to travel overseas or interstate or to approve the request on condition that the employee takes unpaid leave during any subsequent self-isolation or quarantine period (or if they become stuck overseas or interstate).

Refusing leave requests on the basis that you are experiencing staff shortages or cash flow issues as a result of COVID-19 would also generally be considered reasonable.

Generally, an employer cannot withdraw approval for leave when it has previously been granted.

Best practice

Given the business impact associated with travel, most employers are now refusing to approve leave requests for travel or stipulating that it is at the employee's own risk (other than in exceptional circumstances).

If you intend to introduce a temporary policy of not approving future leave requests, ensure you clearly communicate this to employees and provide as much notice as possible.

13. If employees insist on wearing a face mask at work can we direct them not to where there is no health authority requirement to do so?

Currently the advice from health authorities is that it is unnecessary for anyone who is not unwell to wear a mask (other than limited exceptions in certain industries/roles).

Employers are entitled to set reasonable standards of dress and, in customer facing roles for example, it would be reasonable to require that employees do not wear a face mask to work where there is no health authority advice or requirement to do so as this could cause unnecessary concern amongst customers and damage your business' reputation. If the employee is uncomfortable remaining at work, the employer should discuss their options which may include them accessing their accrued entitlements or taking unpaid leave.

Consistent with its health and safety obligations and advice from health authorities, employers should ensure they are taking all recommended precautions to minimise the risk of infection (including implementing hygiene and social distancing measures and any special requirements for particular industries or occupations).

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