

INDUSTRIAL RELATIONS UPDATE

March 2020

Coronavirus—Workplace Relations Impact

We have been following developments as most have, advising clients on an ad hoc basis in relation to various situations that have arisen with this pandemic. Below are some comments and ideas that may be of assistance in the short term as we all tackle this problem.

Communication

It is good practice to communicate frequently with your employees about management's intentions and the effects on work of external sources (e.g. key suppliers), preferably at the same time(s) each day and wherever possible, in the same manner, e.g. email. It is best to nominate just one person in the organisation to do that, so the prospect of conflicting advice and multiple sources of information (some of which will be wrong, out of date or otherwise of no positive value) is avoided.

This person should restrict communications to facts, not speculation. Health advice should be only that which is sourced from public health authorities and confined to basic hygiene measures required in the workplace and related areas within the employer's control.

Employee responsibilities - general

Dealing with this situation is a shared responsibility, as under Australian WHS laws, employees have a duty to take care not to adversely affect the health of other persons. Employees have an obligation to self-report and stay away from their workplaces if they believe they have been infected. If they know they are at risk or have symptoms, they must behave accordingly.

Employee responsibilities – return after quarantine

Some employees will have been absent due to requirements to self-isolate, e.g. returning from overseas, and are due to

return to work if there is work for them. We advise that you require a statement from the employee that they have in fact complied with the self-isolation directions before admitting them back into the workplace. Advise other employees that this protocol has been put in place.

Stand Down

A key question is whether or not any absence that does occur is paid or unpaid and that will depend on the circumstances – there is no unfettered right to stand-down employees without pay. Standing down of employees, without pay, can occur where a stoppage of work arises for a cause for which the employer cannot be reasonably held responsible. We think this situation falls squarely in the definition. Stand down should be a formal process, in writing.

Employers must check their enterprise agreements and contracts of employment that employees operate under, to ensure that if either of those documents contain stand down provisions, that if a stand down is initiated, it is in accordance with those agreements and/or contracts. Otherwise the stand down operates under the auspices of the Fair Work Act.

Before instituting a stand down, options for paid leave should be considered, at least to start with. That is, where the decision is made that no useful work can be provided because of the situation, then employees can apply for leave and subject to cash flow etc., those applications can be approved. Then no stand down in respect of the employees on leave exists. Once the leave is exhausted, if the stand down is still 'in force' generally, then the employee needs to be formally advised that he/she is stood down at that time.

Leave Options

Some alternatives exist. Depending on the jurisdiction, em-

employers can approve access to a short period(s) of long service leave, including in advance. Annual leave would be available and there are ways to effectively approve annual leave at half pay where an employee requests it. This assists with cash flow. Where capacity exists, annual leave can be approved in advance.

Personal/carer's leave is not available unless the normal criteria apply. That is, if the employee is sick/injured or caring for a household member who is, then the usual rules apply. Employees in quarantine cannot claim this leave either unless they meet the basic criteria.

Alternative working arrangements

There is the issue of employees whose children may be affected as schools close. For some, there will be difficulties coping with alternative arrangements at short notice. Employers should be ready to respond to additional requests for flexible hours and leave in respect of this development. For others, even though the holidays were imminent, they too may have had child care arrangements which may now be either in doubt or cancelled.

Depending on the nature of employees' tasks, home-based work is a good option. Some companies are testing their IT networks' capability by asking staff to stay at home and participate in trials a day at a time before deciding if it will be effective. Where this is occurring a WHS assessment of the home facilities is highly recommended. Practicalities may mean that the employee can assist in that process, using their phone to film/photograph their home work area – this provides some reassurance in re-

spect of potential WHS problems later. It isn't ideal, but in the circumstances, likely to be considered reasonable.

Potential for disputes

Some employees will feel uncomfortable knowing that colleagues are recently returned from infected areas or otherwise have reasonable grounds for believing they are at risk, perhaps due to their need to visit other worksites or locations in order to perform their normal duties.

These situations are potential sources of dispute. An employee could be on solid ground refusing to work in some of these scenarios. Caution should also be exercised before taking disciplinary action or withholding pay if there is a refusal.

Right to refuse entry

Some businesses and institutions may decide to refuse entry to any person, including the employees of suppliers and contractors, unless that person takes some specified precaution or otherwise minimises the business' or institution's risk.

It also includes union officials – just because they have entry rights does not mean an employer's WHS obligation, and/or those newly imposed by government in response to the pandemic, don't apply to them.

If all visitors are required to perform some risk mitigation task or otherwise cooperate with site requirements, then it applies to everyone, no exceptions.