

16 March 2020

Coronavirus (COVID-19) pandemic Work health and safety and workplace relations advice

SUMMARY

The Coronavirus (**COVID-19**) pandemic raises a number of important work health and safety (**WHS**) and workplace relations issues. These include:

- The importance of ensuring the health and safety of employees and others in the workplace;
- Work health and safety issues to consider if employees are working from home;
- The entitlements of employees when absent from work as a result of COVID-19.

Work health and safety

WHS laws require that employers and other persons conducting a business or undertaking (**PCBUs**) ensure, so far as is reasonably practicable, the health and safety of their workers and others at the workplace. This includes providing and maintaining a work environment that is without risk to health and safety and adequate facilities for workers in carrying out their work, so far as is reasonably practicable.

To comply with the laws, employers must identify hazards at the workplace and the associated risks, and do what is reasonably practicable to eliminate those risks, or where this is not reasonably practicable, to minimise those risks.

Whether or not a control measure is reasonably practicable to implement involves consideration of what is able to be done to manage a risk and whether it is reasonable in the circumstances to do so. The likelihood of the risk occurring, the degree of harm that might result and the availability and suitability of a control measure are key considerations in determining what measures are reasonable.

Safe Work Australia has released advice to assist employers and other PCBUs to decide what they should do to protect workers and others at their workplace from risks arising from COVID19. The advice is available on [Safe Work Australia's website](#) and includes the following:

“What should a PCBU do to protect workers and others at a workplace?”

Under the model WHS laws, PCBUs must have measures in place to eliminate or manage the risks arising from COVID-19.

To do this, you should keep up to date with the latest COVID-19 information and advice to ensure that any action taken is appropriate. This includes closely monitoring the information provided by the Australian Government [Department of Health](#), the [Smartraveller website](#) and advice from state or territory government agencies, including health departments and WHS regulators. See Information and Resources section below for links to these agencies.

You may not be able to completely eliminate the risk of workers contracting COVID-19 while carrying out work. However, you must do all that is reasonably practicable to

minimise the risk of workers contracting COVID-19.

What control measures will be reasonably practicable will depend on the work being carried out by workers and particular workplaces. Generally, you should:

Determine appropriate control measures in consultation with workers, their representatives and taking account of official information sources.

Implement those measures and clearly communicate them to all workers, including providing clear direction and guidance about what is expected of workers:

- *workers should know when to stay away from the workplace;*
- *what action to take if they become unwell; and*
- *what symptoms to be concerned about.*

Continually monitor relevant information sources and update control measures when and if necessary. PCBUs should continue to provide information to workers, including changes to control measures, as the situation develops.

Provide workers with continued access to official government sources for current information and advice

Provide workers with appropriate personal protective equipment and facilities, and information and training on how and why they are required to use them

Require workers to practice good hygiene, including:

- *frequent hand washing;*
- *limiting contact with others, including through shaking hands; and*
- *covering their mouths while coughing or sneezing.*

Require workers to stay away from the workplace if they are unwell and not fit for work, and encourage them to seek medical advice as appropriate.

Seek advice from health authorities immediately if there has been a confirmed case of COVID-19 in your workplace.

Limit access to the workplace by other people, unless necessary.

Reconsider work-related travel and implement other methods of communication:

- *for example, rather than requiring employees to undertake air travel to attend face to face meetings, facilitate attendance by tele or videoconference.*

Remind workers that they have a duty to take reasonable care for their own health and safety and to not adversely affect the health and safety of others.

Provide workers with a point of contact to discuss their concerns, and access to support services, including employee assistance programs.

Allow workers to access available entitlements in line with obligations under any applicable enterprise agreement, award, employees' contracts of employment, and workplace policies."

Safe Work Australia's advice includes the following section about when an employer can direct a worker to stay away from their usual workplace:

"When can a PCBU direct a worker to stay away from their usual place of work under the model WHS laws?"

There is nothing in the model WHS laws that deals expressly with when a PCBU may direct a worker to stay away from their usual place of work. This includes when you can direct a worker to work from another workplace, including from home. Note: the model WHS laws have been implemented in all jurisdictions except Victoria and Western Australia.

However, the model WHS laws require you, so far as is reasonably practicable, to ensure the health and safety of their workers and others at the workplace. To meet this duty, you must identify risks at the workplace, and do what is reasonably practicable to eliminate those risks, or where this is not reasonably practicable, to minimise those risks.

For example, in discharging your WHS duties you may undertake a risk assessment and form the view, based on all the available information from health authorities and having consulted with your workers, that an appropriate control measure to eliminate or minimise a risk to workers and/or other people at the usual workplace, is to require workers and other people to stay away from the usual place of work. Depending on the circumstances, you might also determine that it is appropriate for workers to work from another location, including their home.

For other PCBU's this approach may not be reasonably practicable (e.g. a workplace that relies on specialised plant or equipment) but there might be other controls that would minimise the risk of infection such as implementing other forms of social distancing or delaying non-essential tasks. There is no one size fits all approach.

The important thing is that you actively consider the context of your business or undertaking, the specifics of your workplace and all the workers and others to whom you owe a WHS duty and take every step you reasonably can to eliminate or minimise any risks to health and safety.

Of course, if you know a worker is confirmed to have COVID-19, you should ensure that the worker does not return to work while they are infectious."

Work health and safety considerations for employees working from home

Many employers are allowing employees to work from home in appropriate circumstances if their jobs enable this (e.g. office workers).

It is important to consider health and safety issues, and these can be addressed in a company Working from Home Policy. Here is an example of a policy that addresses some key WHS issues:

"Working from Home Policy

Employees are able to work from home on appropriate occasions and with the approval of their Manager.

In addition, there may be occasions when a staff member is asked to work from home for health and safety reasons. On these occasions, if you are not able to work from

home, please talk to your Manager about other arrangements.

Working from home arrangements are not a substitute for childcare and staff should ensure that, if working from home, they are able to do so in a quiet environment without frequent interruptions.

It is important for all staff who work from home to ensure that the work environment is safe. Before commencing work, employees should undertake a home workspace check to ensure that there are no hazards, including ensuring that:

*The work area provides sufficient space;
There are no trip hazards;
Lighting is adequate;
There is no excessive noise;
It is a non-smoking environment;
Electrical equipment is safe; and
There are no other hazards.*

If you have any concerns about your ability to safely work from home or require any advice about a work health and safety issue, please speak to your Manager."

Employers need to be conscious of the potential psychological effects on employees of long periods of isolation from the workplace. Where employees are working from home, employers should consider using technology (e.g. Skype) to maintain a sense of belonging within the workplace, and managers should contact each employee regularly.

Employment and workplace relations issues

It is evident that employers are working hard to support their employees and mitigate the impact of the COVID-19 pandemic upon them including, for example in appropriate circumstances:

allowing employees to work from home, if their type of work enables this;

providing certain entitlements to employees beyond those legally required, if the employer is in a position to do so;

allowing employees to access their accrued annual leave and personal/carer's leave if they are unable to work; or

granting annual leave or personal/carer's leave in advance if an employee does not have sufficient leave accrued and they are unable to work.

In determining what the entitlements of employees are in circumstances relating to COVID-19, the usual long-established legal principles apply. Relevant considerations include:

Is the employee a permanent employee (i.e. a full-time or part-time employee) or a casual employee?

Are there any relevant provisions in an award, enterprise agreement, employment contract or company policy that need to be considered?

Is the employee "ready, willing and able" to work?

Is the employee ill?

Is the employee caring for an immediate family member or member of their household who is ill?

The following sections summarise some key minimum entitlements under the *Fair Work Act 2009 (FW Act)*. Please note that these are minimum entitlements only. Also, it is important for employers to consider any relevant provisions in applicable awards, enterprise agreements, employment contracts and company policies, which could contain more generous entitlements.

Employees and their family members who are sick

Under the FW Act full-time and part-time employees are entitled to access their accrued paid personal/carer's leave if:

the employee is not fit for work because of a personal illness or personal injury; or

to provide care or support to a member of the employee's immediate family or a member of the employee's household because of a personal injury, personal illness or unexpected emergency affecting the member.

Casual employees are not usually entitled to paid personal/carer's leave because the standard 25% casual loading includes compensation for this entitlement.

Under the FW Act, casual employees are entitled to two days of unpaid carer's leave per occasion. Also, full-time and part-time employees can take unpaid carer's leave if they do not have any accrued paid personal/carer's leave left.

Under the general protections in the FW Act, employees are protected from being dismissed as a result of a temporary absence due to an illness or injury.

Employees who are stuck overseas on a personal holiday

Employees who are stuck overseas on a personal holiday due to travel restrictions are not entitled to be paid for periods not worked, unless they use any paid leave entitlements that they have (e.g. paid annual leave).

Employees who are required by the Government to self-isolate when they return to Australia

The entitlements of full-time and part-time employees who are required by the Government to self-isolate for 14 days on their return from overseas have been the subject of a great deal of debate.

The Australian Government's announcements have referred to the "requirement" for certain persons entering the country to self-isolate for 14 days. However, it appears that, so far, the Government has not used the formal legal instruments that it has available to it to force people to comply (i.e. instruments under the *Biosecurity Act 2015*).

On 15 March, the Prime Minister announced a new requirement that persons returning from overseas will be required to sign a Statutory Declaration when they enter Australia declaring that they will self-isolate for 14 days. The Prime Minister stressed that the 14-day self-isolation period is mandatory and that State and Territory Governments will determine what penalties will apply to those who do not comply, through relevant State and Territory legislation.

The effect of this appears to be as follows:

If, by agreement between the employer and the employee, an employee works from home during the 14-day period, the employee is entitled to be paid.

If a full-time or part-time employee is absent from work due to the employee's voluntary

compliance with the Government's self-isolation requirement, the employee is not entitled to payment unless they use paid leave entitlements (e.g. paid annual leave).

If a full-time or part-time employee is not willing to comply with the Government's self-isolation requirement (despite the fact that they may be exposed to penalties) the employer would be wise to direct the employee not to attend work to protect the health and safety of others in the workplace. In these circumstances, the employee would ordinarily be entitled to be paid.

A casual employee is not entitled to be paid for periods not worked.

Of course, employers are able to make payments to employees that exceed the legal minimum should they wish to do so.

Employees who are required by their employer to stay at home as a precaution

If an employer requires an employee to stay at home as a precaution, the following entitlements would apply:

If, by agreement between the employer and the employee, an employee works from home during the period, the employee is entitled to be paid.

If a full-time or part-time employee takes paid leave by agreement with the employer, the employee is entitled to be paid for the period of the leave.

If a full-time or part-time employee takes unpaid leave by agreement with the employer, the employee is not entitled to be paid for the period of the leave.

If a full-time or part-time employee is not willing or able to work from home, and not willing to take leave, the employee would ordinarily be entitled to be paid.

A casual employee is not entitled to be paid for periods not worked.

Annual leave

The FW Act does not give employers the right in most circumstances to direct employees to take annual leave, so employers who wish their employees to take annual leave should endeavour to reach agreement with each employee.

If an employee requests annual leave the employer must not unreasonably refuse such a request.

Employers are able to grant a period of annual leave in advance to an employee, should the employer wish to do so.

Do you require further advice?

For more information or assistance, please contact the Road Freight NSW Workplace Advice Line on 1300 781 905.



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