

Flood related employment issues

The most common flood related situations which might affect employers are below:

1. The **employee cannot attend work** because the floodwaters have made their travel (for example damaged their mode of transport) to work impossible and the workplace is still open for business.
2. **The employee can attend** work but is unable to perform their duties because the floodwaters have damaged the workplace.
3. The employee can attend work and the workplace is open for business, but the employee participates in a recognised emergency management body such as the State Emergency Services.

Employee cannot attend work

Where an employee cannot attend work because of flooding and their workplace is open for business, the employer is not obliged to pay wages to the non-attending employee.

However, the employer could offer other alternatives to employees who cannot attend work due to the flooding on the condition that the employee agrees to the proposed alternatives.

The above-mentioned alternatives may include:

- Offering access to accrued paid Annual Leave or Long Service Leave
- Offering unpaid leave (which might enable an employee to obtain social security payments)
- Allowing the employee to take time off in lieu of any overtime that has not yet been paid for by the employer (in accordance with any requirements under an applicable modern award)

Additionally, the employee may in certain circumstances (i.e. an unexpected emergency affecting a member of an employee's immediate family or household) be entitled to access their accrued personal/carer's leave entitlements for a limited period. Members are encouraged to contact VACC IR Department to discuss whether that option is applicable to any of their employee's circumstances.

Employee can attend work, but the workplace is not open for business because of flooding

In circumstances where the employer's business is not operational due to flooding, an employer should discuss with employees the option of taking either paid or unpaid leave before considering standing them down.

Section 524 of the *Fair Work Act 2009* ("Act") prescribes the circumstances in which employees may be stood down without pay by the employer in circumstances in which the employee cannot be "usefully employed", although there is no specific reference to circumstances in relation to natural disasters such as flooding, bushfires, or severe weather.

To be able to rely on the Stand Down provisions of the Act an employer must be able to establish that **employees cannot be usefully employed because of a stoppage of work for any cause for which the employer cannot reasonably be held responsible.**

In view of the above, if an employer's workplace has been flooded but it has another workplace site then the employer cannot necessarily stand down an employee without pay. For an employer to utilise the Stand Down provisions of the Act, it might also need to be able to prove that it **could not offer alternative** duties in another nearby workplace site or branch that the effected employees could have attended.

If an employer's workplace is not flooded but its customers are not open for business, then the employer may want to close that particular branch. This situation does not meet with both criteria and consequently, the employer cannot stand down employees without pay.

Employees attending recognised emergency management body

Under the *Vehicle Repair, Services and Retail Award 2020* and under Division 8 – Community Service Leave of the National Employment Standards ("NES"), an employee is entitled to be absent from work on **unpaid** Community Service Leave if they are involved in community activities (including carrying out emergency services work) that relate to a natural disaster.

In view of the above, if an employee of a business takes Community Service Leave to be involved in the work of a recognised emergency management body, the employer does not need to pay the employee, but the employer cannot prevent the employee from taking Community Service Leave. The employer also must not victimise the employee for taking the Community Service Leave.

The time that an employee may be absent from work to participate in an eligible community service activity includes, not only the time where the employee engages in the activity, but also reasonable travelling time associated with the activity and a reasonable rest time immediately following the activity.

The Act defines the term recognised emergency management body under the NES.

Members seeking further advice or assistance are encouraged to contact VACC's Workplace Relations team on 03 9829 1123 or ir@vacc.com.au

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