

# BULLETIN

## Industrial Relations



Reference No: COVID-19/BC-03-2020

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### Urgent IR Bulletin

#### Stand down Q&A, and tools for member's assistance

VACC has been inundated with calls from members inquiring as to whether they can stand down staff due to the impact of current Coronavirus outbreak on their businesses. After hearing that airlines and major employers stood down their workforce, there is general confusion across industries regarding the ability of businesses to stand down staff. VACC sought legal advice from Legal counsel last week regarding standing down related issues.

**Legal counsel was briefed to answer the following questions:**

#### Question relating to temporary closure for mandated sanitising of the workplace

*If the Victorian Health Department or Worksafe Victoria (or equivalent State Department) orders the temporary closure of a business unit or the entire business because an employee (or employees) of a VACC member was diagnosed with the Coronavirus and the business was ordered to sanitise their business, could the VACC member stand down their employees without pay or would the VACC member need to pay ordinary wages to the fit and work ready employees who cannot be usefully employed?*

#### Legal counsel response

**Yes**, an employer may stand down its employees without pay (in accordance with s. 524(3) of the Fair Work Act) if they cannot usefully be employed because of a stoppage of work caused by the closure of business operations for a period to sanitise as required by an order of a relevant Victorian government agency, (or other State government authority) for which the employer could not reasonably be held responsible.

#### Question relating to stand down where a business is subject to an enforceable government direction to close down

*If the State or Federal Government orders the ceasing of all work/trade activities in Victoria (and any other state) due to the spread of the Coronavirus and VACC members would be compelled to close down their businesses, could a VACC member stand down its employees without pay when it closes its business?*

#### Legal counsel response to question

**Yes**, an employer may stand down its employees without pay (in accordance with s 524(3) of the Fair Work Act) if they cannot usefully be employed because of a stoppage of work caused by the cessation of all work or trading activities in Victoria (or any other State) ordered by the State or Federal Government due to the spread of the Coronavirus, for which the employer could not reasonably be held responsible.

#### Question relating to implementing stand down - offer to take leave

*Before standing down an employee without pay pursuant to subsections 524 (1) (c) and 524 (3) of the Fair Work Act at present (when Australia is experiencing the Coronavirus pandemic), is an employer obliged to offer to an employee the opportunity to take the employee's accrued Annual Leave or Long Service Leave?*

### **Legal counsel response**

The better option is an employer is obliged to offer to an employee the opportunity to take some or all of the employee's accrued Annual Leave or Long Service Leave before standing down an employee without pay pursuant to subsections 524 (1) (c) and 524 (3) of the Fair Work Act. This is because it is only when that leave has been exhausted or declined to be used by the employee that it can accurately be said that the employee cannot be usefully employed because of a stoppage of work for a cause for which the employer cannot reasonably be held responsible.

### **Question relating to implementing stand down – refusal to grant leave entitlements**

*Can an employer refuse an employee's request that their employer allow them to take their accrued Annual Leave or Long Service Leave before the employer stands them down without pay pursuant to subsections 524 (1) (c) and 524 (3) of the Fair Work Act at present (when Australia is experiencing the Coronavirus pandemic)?*

### **Legal counsel response**

The corollary of the question is that the better view is that an employer should not refuse an employee's request that their employer allow them to take their accrued Annual Leave or Long Service Leave before the employer stands them down without pay pursuant to subsections 524 (1) (c) and 524 (3).

### **Other issues raised with Legal counsel – onus of proving that there is a stoppage of work**

The onus of proving whether employees could not have been usefully employed because of a stoppage of work for any cause for which the employer could not reasonably be held responsible is on the employer as the party seeking to implement the stand down.

Although the underlying cause of a likely stoppage of work is the Coronavirus outbreak but the direct causal link must be established that the statutory conditions giving rise to the right of an employer to stand down employees – that "because of" not just the underlying Coronavirus issue but also the immediate business or trading circumstances of the employer mean that particular employees cannot usefully be employed. It may be accepted (as it would be likely to be by the Commission) that the underlying cause of a likely stoppage of work is the Coronavirus outbreak. If there is work for them to do, despite the restrictions (e.g. social distancing) imposed as a result of the Coronavirus then they should be permitted to do that work and should not be stood down.

### **Tools of assistance**

#### **Stand down evaluation and implementation check sheet**

It is important that should members need to justify to the Fair Work Commission or a Court that the non-mandated stand down was justified, members would be able to provide evidence of their considerations before standing the employees. Attached to this bulletin is a stand down evaluation and implementation [check sheet](#).

#### **Stand down template letter**

It is important members document the standing down of employees. A template stand down letter is [attached](#).

### **Question relating to end of employment – redundancy situation**

#### **Question relating to the situation where business owners themselves decide to close down**

*Where a VACC member experiences a downturn in their business caused by the Coronavirus related changes in the marketplace and in consumer sentiments, and the VACC member decides to close down part of their business or their entire business before the State or Federal Government compels them to do so, would the VACC member need to comply with clause 119 - Redundancy Pay, of the Fair Work Act?*

**Legal counsel response**

**Yes**, an employer would need to comply with s119 Fair Work Act redundancy pay obligations **IF** it retrenches an employee (terminates their employment on the basis of redundancy – that is, because they no longer want anyone to do the job the employee was doing (permanently) because it has closed part or all of its business permanently).

Currently the VACC IR Department is receiving a very high volume of calls and we are aware that some members are experiencing long wait times before they get through to a member of the department.

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