



## COVID-19: Implications for workers

**Author:** [Margaret Kaukas](#)

**Email:** [enquiry@andersons.com.au](mailto:enquiry@andersons.com.au)

**Phone:** 08 8238 6636

**Date:** Tuesday March 24, 2020

The COVID-19 (Corona virus) outbreak will have wide ranging implications for Australians in many ways. All over the world, businesses and workers are coming to terms with an entirely unprecedented reality as the measures to combat the spread of COVID-19 become more significant.

The state of the law in the workplace, which can be uncertain at the best of times, will undoubtedly be tested over the next couple of months as we seek to 'flatten the curve' or slow the spread of Coronavirus.

It is already obvious that there is some tension between the primary interests of employers, such as risk exposure and managing outgoings through an uncertain downturn; and those of employees, who might be unable to work and might not be paid (or face a reduction in pay) during their absence.

This blog discusses the legal issues impacting employees and employers in these difficult times.

### Workers rights with COVID-19: paid leave, unpaid leave and time off work

As the financial impact of the COVID-19 virus increases, employers will be exploring all avenues to reduce their costs in the face of declining revenue. It is inevitable that there will be job losses. Most employers will likely explore alternative options before laying permanent staff off. In such a climate, it is important that employees understand their entitlements, rights and obligations.

A worker's entitlements, rights and obligations at work derive from several different instruments including:

- Enterprise Agreements
- Modern Awards
- Contracts of employment
- Fair Work Act/National Employment Standards (NES)

Although there is no single standard rule for every worker in Australia, the NES provides minimum entitlements for the vast majority of workers.

## Taking personal (Sick and Carers) leave during COVID-19

A worker is only entitled to access personal leave if they are themselves sick / unwell or they are caring for a family member who is sick / unwell.

For example, a worker who is required to self-isolate or quarantine after having returned from overseas or having been exposed to someone who has tested positive for the virus, will not, strictly speaking, be eligible to claim paid personal leave unless their doctor considered that they are suffering from some other illness or injury (for example, anxiety which might arise because of the circumstances).

## Will I be required to use my annual leave or long service leave during COVID-19?

A worker who is sick and has exhausted their personal leave, or who is required to self-isolate or quarantine after having returned from overseas or having been exposed to someone who has tested positive for the virus, would be entitled to access any accrued annual or long service leave to maintain their income while unable to work.

An employer can only decline a request for paid leave if it is reasonable to do so. We doubt that, in the circumstances at hand, it would be reasonable for an employer to refuse to allow a worker who cannot work due to the need to self-isolate or quarantine to access their paid leave entitlements.

If a worker is required to self-isolate or quarantine after returning from an overseas work trip, or after being exposed in the workplace to someone who has tested positive for the virus, in our opinion the worker would be entitled to argue that, as the potential exposure occurred during employment, they should not be required to use their accrued leave and should be paid by the employer. How employers would respond to such an argument remains to be seen.

## What are my working from home rights during COVID-19?

Employers may direct a worker to work from home, in which case they should continue to be paid. For employees, whose work is not conducive to working from home, their employers might direct them not to attend at work at all.

Generally, if a permanent worker is willing and able to work they are entitled to be paid for their time even if the employer directs them not to attend at work. Therefore if your employer directs you not to attend at work, and you are not sick, your employer is legally required to continue to pay you.

The situation is different for casual employees. Casual workers are technically employed on a shift-to-shift basis and so, if no work is provided to them, they are not entitled to be paid.

## Will I still be paid if my work place closes down due to Coronavirus?

Some Modern Awards allow an employer to “close down” its operations or part of its operations and require employees to take annual leave.

All Modern Awards which contain such provisions require that at least four weeks’ notice be provided to employees before the “close down” takes place. Generally, if a Modern Award allows a “close down” there will be certain criteria which will apply (such as the minimum length of the “close down”, a maximum of two “close downs” each year). Such provisions require that employees be paid any accrued annual leave during the “close down” and, if they do not have sufficient annual leave accrued, the balance of the “close down” will be leave without pay.

Remember, however, that not all employees are covered by Modern Awards and that not all Modern Awards contain “close down” provisions.

## Excessive Accrued Annual Leave and Coronavirus - will I be forced to take it?

As employers look for ways to reduce their wages bills, and to remove staff from the workplace, it is likely that they will look for ways to direct employees to take paid annual leave. Many employees who have accrued excessive annual leave can be directed to take paid annual leave whether they agree to or not.

For employees who are covered by a Modern Award, “excessive” accrued annual leave is defined as eight weeks or more (permanent employees accrue four weeks’ annual leave each year). Most Modern Awards allow an employer to direct an employee to take paid annual leave if they have “excessive” leave, with certain qualifications. Firstly, the employer must give at least 8 weeks’ notice, and after the leave is taken there must be at least 6 weeks’ accrued leave remaining. (Some Enterprise Agreements have similar provisions.)

Employees who are not covered by a Modern Award or Enterprise Agreement can also be directed to take paid annual leave. The NES provides that employees who are not covered by a Modern Award or Enterprise Agreement can be directed to take a period of paid annual leave if the direction is reasonable.

In our view, having an excessive leave balance would be a reasonable basis for such a direction. Unlike some Modern Awards, the NES does not define what an “excessive” leave balance is, but we expect that any Court or Tribunal asked to rule on this question would take the same position as is outlined in Modern Awards – namely, that an annual leave balance of 8 weeks or greater is excessive.

Furthermore, it could even be argued – in relation to employees who are not covered by a Modern Award or Enterprise Agreement – that the COVID-19 crisis could constitute a reasonable basis for a direction to take paid annual leave, whether the employee in question has accrued excessive leave or not. For employees who are not covered by a Modern Award or Enterprise Agreement, it is arguable that their employer could direct them to take paid annual leave, whether they want to or not, if the employer is facing a dramatic reduction in work or revenue.

The NES does not outline the notice period required before paid leave commences in such cases. Accordingly, reasonable notice would be required and, in our view, at least two weeks' notice would be reasonable.

Any direction by an employer to an employee to take paid annual leave would be limited by the amount of paid leave the employee in question had accrued, except in the circumstances outlined here, an employer cannot direct an employee to take unpaid leave.

## Will I be required to reduce my hours of work or take a pay cut?

As the financial effects of the COVID-19 crisis increase, it is likely that many employers will have to consider redundancies. In that case, employers might ask their employees to consider accepting a cut in pay or a reduction in working hours in an attempt to save their jobs.

Any employment relationship can be amended or varied by agreement. Accordingly, if an employee agrees to reduce their hours or take a cut in pay, this will not be unlawful **as long as** the reduction in pay does not mean that the employee ends up being paid less than the rate set in any applicable Modern Award or Enterprise Agreement.

## Will I be asked to stand down due to stoppage of work during COVID-19?

Section 524 of the Fair Work Act allows an employer to stand down an employee during a period in which the employee cannot be usefully employed “because of a stoppage of work for any cause for which the employer cannot reasonably be held responsible”. In such a case the employer is NOT required to pay the employee during the period in which the employee is stood down.

In our view, an employer could not rely upon this provision simply because it would like its employees to self-isolate or quarantine, or because it is struggling financially. We consider that something more is required.

Given the recent decision by the Federal Government to shut down all cinemas, pubs, clubs, gyms, indoor sporting venues, restaurants and cafes (except for take away orders) we consider that employers in these industries may be entitled to rely upon Section 524 of the Fair Work Act to stand down employees without being required to pay their wages during the stand down period. In such cases, any employees who had accrued annual or long service leave would be entitled to access that leave to maintain their income during the stand down and any employees who were sick or caring for a sick family member would be entitled to access any accrued personal leave.

We expect that Qantas may rely upon this provision in relation to its staff who have been stood down as a result of the government directive about overseas travel.

If you believe that you are likely to be adversely impacted by a stand down decision made regarding the COVID-19 crisis, you should contact your union representative immediately or [seek specialist legal advice](#) to ascertain whether your employer is acting lawfully.

## What are my rights if I am made redundant due to Coronavirus?

If an employee loses their job because their employer is suffering financially and needs to cut costs, this is, technically, a redundancy. Any forced redundancies due to COVID-19 still need to be genuinely made and require appropriate consultation with the affected worker or workers.

All permanent employees who are dismissed are entitled to a certain period of notice or payment in lieu. This does not apply to casual employees.

In addition, permanent employees who are employed by employers with 15 or more staff members are entitled to receive redundancy payment upon termination of their employment on the grounds of redundancy. This also does not apply to casual employees.

If an employer does not have the financial resources to pay redundancy payments, it can apply to the Fair Work Commission for an order either reducing the amount of redundancy payments it is required to pay, or relieving it of its obligation to pay redundancy payments entirely. The employee in question has the right to be heard in any such application to the Fair Work Commission. If this occurs to you, we recommend that you [seek specialist legal advice](#).

An employee who is dismissed in such circumstances, including casual employees in regular and systematic employment, and who has been employed more than six months (or twelve months if employed by a business with less than 15 staff members) could bring an unfair dismissal claim on the grounds that the dismissal was harsh, unjust and unreasonable.

However, it is often difficult to succeed in an unfair dismissal claim in redundancy situations and, if the COVID-19 crisis leads to serious financial losses in business, it is likely that it will become even more difficult to establish that a dismissal on the grounds of redundancy is harsh, unjust or unreasonable.

If you believe that you have been unfairly dismissed, you should seek legal advice.

Do you require legal advice relating to your employment? Whether COVID-19 related or not, please contact [Margaret, Anthony or Carly](#) from [Andersons Workplace Law Team](#).

This blog was written by [Margaret Kaukas](#) and [Anthony Reynolds](#).

---

*Please note, this Blog is posted in Adelaide, South Australia by Andersons Solicitors. It relates to Australian Federal and South Australian legislation. Andersons Solicitors is a medium sized law firm servicing metropolitan Adelaide and regional South Australia across all areas of law for individuals and businesses.*