



## EMPLOYMENT CONSIDERATIONS REGARDING COVID-19 (CURRENT AS AT 1 APRIL 2020)

### 1 OVERVIEW

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- 1.1 Given the current climate and the issues that businesses are facing during this COVID-19 pandemic, one of the key questions many of our small to medium business clients have for us is 'what are their rights in respect to their employees' and equally 'what is the best way to exercise their rights, in an attempt to mitigate any loss to the business and the employees alike'.
- 1.2 To that end, we have sought to prepare an 'overview' guide addressing those important questions, focusing on outlining the various options that are available to businesses at this point in time (the **Guide**). We understand that each business is unique and is subject to different circumstances, and even within each business, each employee and their personal circumstances is unique.
- 1.3 Consequently, this Guide is intended to provide generic advice to businesses, and is not intended to provide tailored advice to you, your business or your employees. Rather, the purpose of this Guide is to assist businesses in obtaining a general understanding of what their current options and/or rights could be given the unfolding events and outline strategies to consider in that regard.
- 1.4 ***It is important that you read up to and including the Conclusion, as this part of the Guide provides you with practical steps and considerations to keep in mind, that we believe can make tangible differences to your business. The Conclusion will not have context if you do not read the Guide as a whole.***

### 2 STAND DOWN WITHOUT PAY

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- 2.1 Pursuant to the Fair Work Act, employers can stand employees down **without pay** during a period in which the employee **cannot usefully be employed** as a result of a number of scenarios. With regards to the current Coronavirus outbreak, the most relevant scenario is, **stoppage of work for which the employer cannot be held responsible**.
- 2.2 Whether a particular employee can be **usefully employed** is a question of fact to be determined having regard to the circumstances that face the individual employer and the specific employee. "Usefully employed" has not been defined in any legislation, but Courts have in the past determined that if an employer is able to obtain some benefit or value for work that could be performed by the employee, then the stand down provisions **will not apply**.
- 2.3 Fair Work recently published guidelines for employers who have been impacted by the enforceable government directions to prohibit mass gatherings or events, restaurants, gyms, pubs and clubs. Fair Work's statement reads as follows: "**As these enforceable government directions have been issued, affected businesses are likely be able to stand down employees [without pay], where they cannot usefully be employed.**"
- 2.4 During a legitimate stand down period, it is important to keep the following in mind:
  - (1) employees are still employees of your business, and you still have important obligations as an employer such as work health and safety obligations which extend to employees at home and employee's mental health etc.;
  - (2) the onus is on you as an employer to make regular assessments on whether or not your respective employees can be usefully employed. If they can be usefully employed then

you will need to consider whether or not they should return to work, at which time you will also need to consider whether or not the employee no longer qualifies for being stood down without pay;

- (3) permanent employees who have been stood down without pay will qualify for the income support measures introduced by the Government, which will be a minimum of \$550.00 per fortnight;
- (4) employees **do not need** to be paid during the stand down period, but they will accrue leave and other rights in the usual way; and
- (5) the theory behind a stand down without pay period is that the employee(s) will either:
  - (a) eventually return to work when they can again be usefully employed by the business; or
  - (b) find another job during the stand down period in which case they may resign; and
  - (c) when permanent employees resign, as an employer you will be required to pay that employee:
    - (i) outstanding wages for hours worked, including penalty rates, allowances etc.;
    - (ii) accumulated annual leave, including annual leave loading if it would have been paid during employment; and
    - (iii) if it applies:
      - (A) accrued or pro rata long service leave; and
      - (B) payment in lieu of notice.

### **3 REDUNDANCIES**

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- 3.1 Many businesses at the moment are considering whether it is better to stand down staff without pay, or whether redundancy may be the better option.
- 3.2 Any decisions around redundancy should be carefully considered, preferably with the input and/or advice from an expert lawyer and your accountant.
- 3.3 In circumstances where the business may not be able to afford legal fees, the business should refer to Fair Work best practice guidelines, the Fair Work Act and other similar resources. Businesses should also keep in mind that in making employees redundant, they need to follow the Fair Work Act, relevant Enterprise Bargaining Agreement (EBA) (if any), the relevant Award (if any) and/or the employee's Employment Agreement. There are strict procedures around the process surrounding redundancy.
- 3.4 In essence, however, an employee can only be made redundant if an employee's job is no longer required for the business. For example, in the current coronavirus climate, the job will most likely no longer be available because of business downturn.
- 3.5 There are a number of other considering factors prior to making an employee redundant, subject to the individual circumstances of the business and the employee, and this advice does not attempt to cover off on any such circumstances as these will differ for each individual business and each individual employee.
- 3.6 It is, however, important to note that when your business chooses to make an employee redundant, you may be required to pay them a significant severance pay, as follows:
  - (1) outstanding wages for hours worked, including penalty rates, allowances etc;
  - (2) accumulated annual leave, including annual leave loading if it would have been paid during employment;
  - (3) if it applies:
    - (a) accrued or pro rata long service leave; and

- (b) payment in lieu of notice; and
- (4) redundancy pay for that employee, which is calculated on the employee's base pay rate, multiplied by the number of weeks subject to their continuous period of service with your business as follows:

| Period of continuous service            | Redundancy Pay |
|---|----------------|
| At least 1 year but less than 2 years   | 4 weeks        |
| At least 2 years but less than 3 years  | 6 weeks        |
| At least 3 years but less than 4 years  | 7 weeks        |
| At least 4 years but less than 5 years  | 8 weeks        |
| At least 5 years but less than 6 years  | 10 weeks       |
| At least 6 years but less than 7 years  | 11 weeks       |
| At least 7 years but less than 8 years  | 13 weeks       |
| At least 8 years but less than 9 years  | 14 weeks       |
| At least 9 years but less than 10 years | 16 weeks       |
| At least 10 years                       | 12 weeks*      |

*\* There is a reduction in redundancy pay from 16 weeks to 12 weeks for employees with at least 10 years continuous service. This is consistent with the 2004 Redundancy Case decision made by the Australian Industrial Relations Commission.*

3.7 There are, of course, some employees who do not get redundancy pay - this generally includes:

- (1) employees whose period of continuous service with the employer is less than 12 months;
- (2) employees who were employed for:
  - (a) a stated period of time;
  - (b) an identified task or project; or
  - (c) a particular season;
- (3) employees terminated because of serious misconduct;
- (4) casual employees;
- (5) trainees engaged only for the length of the training agreement; and
- (6) apprentices.

3.8 **There is also an important potential exception for small businesses.** A small business is a business that employs fewer than 15 employees. Some small businesses do not have to pay when making an employee redundant. This is subject to the business and its internal policies, the Fair Work Act, relevant EBA (if any), the relevant Award (if any) and/or the employee's Employment Agreement.

#### **4 CONCLUSION / PRACTICAL CONSIDERATIONS**

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4.1 What should be self-evident from the above, is that any redundancy decision needs to be carefully considered as:

- (1) you could be paying a significant amount of money that may otherwise not be payable, and that could:
  - (a) further jeopardise the viability of the business and its survival; and
  - (b) be otherwise used 'in the business' to implement strategies to keep your business afloat and give it the greatest chance of survival during this critical time; and
- (2) it could significantly 'legally' expose your business in the future (when) the business pulls through the current pandemic climate.

4.2 Some practical 'considerations' from the above advice are as follows:

- (1) you will be obliged to pay the employee certain entitlements including annual leave and long-service accrued leave regardless, whether you stand your employee down and they later resign and/or are made redundant;
- (2) given the above, it is worth considering whether, in agreement with the employee, it may be a better option to have the employee take annual leave in the first instance, which will mean the:
  - (a) employee has some time to 'digest' what is happening, with minimal disruption to pay;
  - (b) the business pays to the employee what they otherwise would have had to in any event;
  - (c) business may be able to take advantage of the significant financial stimulus and concessions currently being offered to businesses which sees them potentially being eligible to keep the PAYG component of employee pay; and
  - (d) business is afforded time to 'sit and wait' and assess what is happening given the current rapidly changing environment;
- (3) standing an employee down if legally allowed (and whether that be before or after annual leave/long-service leave entitlements have been exhausted by allowing an employee to take their leave) will almost always be the most appropriate step because:
  - (a) it will buy your business some time to fully consider whether or not redundancy is in fact the best option for the respective employee(s), and if so, to identify whether or not any of the redundancy exemptions may apply to your business. This step can potentially save your business significant money if carefully worked through with the assistance of an expert lawyer;
  - (b) during the stand down, your business will be paying minimal to no employee wages which will give your business the best opportunity possible to survive this uncertain and challenging period, with your employees intact;
  - (c) during the stand down, the employee may find other alternative employment (there are a number of industries who are looking to employ a significant amount of employees due to increasing demands in different areas) and resign, which majority of the time will mean that no redundancy will be payable. Only the other usual entitlements would be payable such as annual leave, long-service leave etc. (and remember, at this point in time your business may be able to keep the PAYG component of those entitlements paid);
  - (d) at the moment, your employees will most likely qualify for extra support and relief from the Government; and/or
  - (e) things may turn around, in which circumstance you can cease any relevant stand down of employees and have those employees ready to 'hit the ground running'.

4.3 The above is a snapshot of some general thoughts and considerations that ought to be going through the minds of every employer prior to them deciding on what to do with their employees given the current climate. Of course, again, this is simply a general Guide which endeavours to touch on two options available to businesses with regards to their employees at the moment, and does not attempt to provide nor should it be construed as tailored advice, nor does it attempt to cover off on each and every option available to your business.

4.4 Where you can afford to seek tailored, considered legal advice we would implore you to contact our team of Employment Law experts, as this will be the first step needed to be taken in order to ensure your business is in the best position possible for when it pulls through on the other side of this pandemic.