



FREQUENTLY ASKED QUESTIONS **EMPLOYING STAFF DURING COVID-19**

Current at 17 September 2020

DISCLAIMER

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If you require any further assistance regarding any of the matters outlined in this document, please do not hesitate to contact the NRA Workplace Relations Hotline on [1800 RETAIL](tel:1800-RETAIL) (738 245).



Q What is the purpose of this guide?

A This guide outlines the options available to employers to manage their employees during the coronavirus (COVID-19) pandemic.

It does not deal with the JobKeeper Payment Scheme, and employers should refer to the separate [JobKeeper Payment Scheme FAQ](#) published by the NRA.

Q Can I stand down my employees?

A There are three mechanisms under the *Fair Work Act 2009* (Cth) where an employer may stand down a full-time or part-time employee without pay. In all cases, the employee must not be able to be “usefully employed” due to circumstances outside of the employer’s control.

Where both the employer and an employee are **eligible to participate in the JobKeeper Payment Scheme**, you may be able to issue a “JobKeeper enabling stand down direction”. The requirements for issuing this direction are outlined in the NRA’s [JobKeeper Payment Scheme FAQ](#).

After 28 September 2020, if an employer was previously eligible to participate in the JobKeeper Payment Scheme, they may still be able to issue a “JobKeeper enabling stand down direction” if they have experienced a 10% decline in turnover. The requirements for issuing this direction are outlined in the NRA’s [JobKeeper Payment Scheme FAQ](#).

If either the employer or an employee **have never been eligible to participate in the JobKeeper Payment Scheme**, the employee is only able to be stood down in accordance with section 524 of the *Fair Work Act 2009* (Cth).

There are strict requirements to be able to rely on this provision. The reason that the employee cannot be “usefully employed” must be because of a **stoppage of work for which the employer cannot reasonably be held responsible**. Generally speaking, an employee will not be able to be “usefully employed” if they are unable to add any value to the business. If an employee is able to work from home or from another store, they may still be able to be “usefully employed”.

Each State and Territory has different restrictions for businesses depending on the measures needed to reduce the spread and risk of transmission of COVID-19. If your business has been **directed to close** by the government, you may be able to stand down employees who cannot otherwise be “usefully employed” because there is a stoppage of work for which you cannot reasonably be held responsible.

Unless an employee is enrolled in the JobKeeper Payment Scheme, they **do not have to be paid** while stood down. However, an employee will continue to accrue **leave entitlements** (including personal leave and annual leave) while they are stood down.

If your business is covered by an **enterprise agreement**, there may be additional requirements to stand down your employees, and you should review your agreement before making any decisions. It is usually unnecessary to formally stand down a casual employee.

Q What happens if my business is forced to close?

A If your business is directed to close by a State, Territory or Commonwealth Government, you will need to comply with this direction and take any other steps as required under the direction.

In these circumstances, you may be able to stand down your employees without pay. You should first consider whether the employee is still able to be “usefully employed”, for example by working from home or at another store.

However, if the reason that your store is forced to close is as a result of a **downturn in business** or a supply shortage, there are other issues you will need to consider. If you are considering effecting a stand down under section 524 of the Fair Work Act 2009 (Cth), and not a “JobKeeper enabling stand down direction”, a downturn in trade on its own may not be sufficient to stand employees down without pay.

Q Do I have to keep my business open?

A Unless your lease says otherwise, you are **not required** to open for business on any day.

Making sure customers are aware of any store closures – such as through social media – can help minimise the impact for when you reopen.

If you direct a full-time or part-time employee not to attend work **without implementing a formal stand down**, they will still be entitled to be paid for the hours you have contracted them to work.

Q If I direct an employee to self-isolate, do I have to pay them?

A Yes.

If an employee is exhibiting symptoms of COVID-19, you should ask them to consider **taking personal leave** until they have recovered. Where reasonable to do so, you may also request the employee to provide a **medical clearance** before permitting them to return to work.

In extreme cases, if an employee refuses to take personal leave you may be able to direct them to self-isolate, however the employee would still be entitled to be paid for the hours you have contracted them to work.

Q If an employee is self-isolating, do I have to pay them?

A Where an employee is performing work from home while in self-isolation, you should pay them for the hours that they work.

However, if the employee is voluntarily self-isolating or has been directed by the government to do so, they will need to access a **leave entitlement**.

There are five different types of leave that an employee may be able to access:

- personal leave;
- annual leave;
- unpaid pandemic leave;
- unpaid leave; and
- special paid leave.

Following the outbreak of COVID-19, two weeks of unpaid pandemic leave was introduced into a number of modern awards. An employee is able to access this leave where they are **required by the government or a medical practitioner to self-isolate**, or they are prevented from working due to measures taken by the government, for example closing public transport.

There is no right for an employee to take unpaid leave or special paid leave, and you can **administer these at your discretion**.

If a self-isolating employee is receiving a JobKeeper payment, they must continue to be paid this amount, even if this would be more or less than their ordinary rate of pay.

Employees without any paid leave available who are not eligible for the JobKeeper payment (including casual employees or employees on temporary visas), may be eligible for assistance from State, Territory, or Commonwealth Government, and they should be encouraged to contact [Services Australia](#).

Q Can I direct employees to take personal leave?

A There is no power under the *Fair Work Act 2009* (Cth) for an employer to direct an employee to take personal leave.

An employee is not entitled to take personal leave unless they are **unfit for work** because of an illness or injury, and **you may request evidence** (such as a medical certificate) to support this absence. However, employers and employees may agree to access personal leave in order to maintain their income, even if they are in self-isolation as a precaution.

Q Can I direct employees to take annual leave?

A An employee is only able to access annual leave with your permission, however this request cannot be **unreasonably refused**.

However, if the employer and an employee are eligible to participate in the JobKeeper Payment Scheme, you may be able to request that they take annual leave. In such a situation, the employee may not unreasonably refuse your request. The process for such a request is outlined in the NRA's [JobKeeper Payment Scheme FAQ](#). Please note that the ability to make this request will cease on **28 September 2020**, and any request for a period of annual leave to be taken **from this date onwards will not be effective**.

Employees covered by a modern award or enterprise agreement may be directed to take annual leave, but only in the **circumstances prescribed by the award or agreement**. In most cases, these circumstances are limited to situations where the employee has accrued an excessive leave balance.

If an employee is not covered by a modern award or enterprise agreement, you may require the employee to take annual leave if the **direction is reasonable**. Whether the requirement is reasonable will depend on the circumstances of each particular case.

If an employee does not have sufficient annual leave accrued, you may wish to consider granting **annual leave in advance**. However, modern awards and enterprise agreements may provide specific requirements for the provision of annual leave in advance.

Q If an employee refuses to self-isolate, can I direct them to not attend work if they aren't presenting any symptoms (for example, if they have recently travelled to a hotspot)?

A You can direct an employee to not attend work as long as the direction is **reasonable**. You should be guided by the principle that it will be reasonable to direct an employee to not attend work if:

- they are returning from a region with a higher risk of transmission, in particular where the government has declared that region to be a hotspot; or
- they have been in close contact with a confirmed case of COVID-19.

You should consider whether the employee should be asked to work from home while in quarantine, otherwise if they refuse to access any **paid leave entitlements** they may nevertheless be entitled to be paid for the period that they are directed by you to not attend work.

Q What are my obligations if someone is directed by the Government to self-isolate?

A State and Territory, and the Commonwealth Government have the power to **direct individuals to remain at their place of residence** or be isolated in a medical facility.

Government guidelines also require people who have been in close contact with a proven case of COVID-19 to isolate themselves for 14 days from the date of last contact with the confirmed case. If an employee meets these circumstances, they are required to self-isolate even if they are not specifically directed to do so by the government.

If an employee **cannot attend work** as a result of these requirements, they should be encouraged to access personal leave, unpaid pandemic leave, or annual leave.

If an employee does not have access to any paid leave entitlements, they may be entitled to income support from the government. You should advise them to contact [Services Australia](#) for further guidance.

Q When can employees work from home?

A An employer may direct an employee to work from home, **as long as the direction is reasonable**. If a State or Territory, or the Commonwealth Government is requiring employees to remain at home, and the nature of work involved is suitable to be conducted at home, it is likely that this direction will be reasonable.

However, you should also review your obligations under any applicable **enterprise agreement, contract of employment, or policy** (such as consultation clauses) prior to issuing such a direction.

Where employees are required to record their hours of work (for example, in relation to annualised wage arrangements under some awards), this **needs to continue when employees are working from home**.

If an employee is in self-isolation and accessing annual leave, personal/carer's leave, or unpaid leave, you should not ask them to work.

Q How do I manage productivity if someone is working remotely?

A When managing productivity for employees working from home, you should take similar steps to manage employee productivity as you would in the workplace. You will need to adapt your approach to account for your inability to visually supervise them and the potential for miscommunication.

A few easy steps employers can take to more effectively manager remote workers include:

- **Set clear expectations**
Clearly outline what you want, when you want it done by, how you want it done, and ensure you encourage employees to clarify anything they are not clear on. Avoid assumptions, and vague or ambiguous directions.
- **Maintain regular communication**
Organise regular catch-ups, and try to maintain multiple lines of communication in addition to email, such as voice calls, and instant messaging.
- **Provide the appropriate technology**
Where possible, provide employees working remotely with the technology required to do so. Productivity is likely to suffer where an employee has technical issues, and this is more likely where they rely on personal laptops or home internet.

Q What happens to casual employees if they are required to go into isolation?

A Casual employees are **not entitled to paid leave**. If a casual employee is entitled to the JobKeeper payment, you should continue to pay them this amount.

Alternatively, they may be able to access **income support payments** from the government, and should be encouraged to contact [Services Australia](#) as soon as possible to determine whether or not they are eligible.

Where a casual employee is not eligible for income support payments or JobKeeper payments, they may still be eligible for financial support from a State or Territory Government, and they should be encouraged to check with the relevant government department.

In addition to the above, employers may choose to make **discretionary payments** to casual employees during this period, however any such payment would be purely discretionary and not required by law. It is recommended that independent legal advice be obtained before making any such payment to casual employees.

Q How does the disruption impact casual conversion rights?

A Some modern awards and enterprise agreements allow casual employees to **request to convert** to part-time or full-time if certain conditions are met. It is possible that the disruption caused by COVID 19 could interfere with these casual conversion rights.

Specifically, the disruption caused may:

- disrupt a casual employee's **pattern of work** to such an extent that they no longer satisfy the eligibility requirements for casual conversion; or
- result in reasonable grounds for refusing a request for casual conversion.

It should be noted that notwithstanding this, employers can still agree that employees convert from casual to permanent employment if this is appropriate for the needs of their business.

Q Can I dismiss an employee who refuses to self-isolate?

A No.

However, if an employee refuses to self-isolate, you may wish to issue them with a direction **not to attend the workplace** until the self-isolation period has passed for the employee. The employee should be paid for their contracted hours at their base rate of pay.

If an employee does not follow this direction, this may amount to **misconduct**.

However, employers should always ensure they follow a **fair disciplinary process** that affords the employee with **procedural fairness** when considering disciplinary action against an employee that may result in termination of their employee.

Any termination or other disciplinary action because an employee is required to self-isolate, whether they have contracted COVID-19 or not, may be **prohibited under anti-discrimination laws**. Before taking any such action, it is recommended that you seek independent legal advice.

Q What steps should I take to protect my employees?

A Work health and safety laws in Australia require employers to ensure, so far as is reasonably practicable, the health and **safety of their workers and others at the workplace**. You must identify hazards at the workplace, and take steps to eliminate or reduce any risks.

It is important to **stay up-to-date** on the advice published by a State, Territory, and the Commonwealth Government about steps you should take to protect your employees and customers.

Employees who contract the virus at work may be eligible to make a **workers' compensation claim** if they contract the virus due to insufficient measures being taken by their employer to ensure their health and safety.

Q Do I have to provide my employees with personal protective equipment (PPE) (i.e. face masks)?

A Depending on the risk present in your workplace you may need to provide employees with PPE. In some areas, people may **already be required to wear a mask at all times** and so your employees should already have a mask.

If the nature of the workplace poses a **significant risk of an employee contracting the virus**, then an employer may need to consider making PPE available to their employees.

If an employer decides that face masks or other forms of PPE are appropriate to minimise the risk of an employee contracting COVID-19, then they will need to provide these masks to employees, and cannot expect employees to purchase their own.

Employers should:

- select PPE that is **suitable** with regard to the nature of the work, and how COVID-19 is transmitted;

- provide **information and training** on how to use, wear, store and maintain the PPE properly;
- maintain, repair, and replace PPE to ensure employees are provided with clean, hygienic, and functioning PPE; and
- ensure that employees use or wear the PPE provided.

However, if employers believe that the risk to employees was such that the use of masks was appropriate, then employers should also consider whether it is even safe for the business to continue to operate. PPE is the **least effective form of risk prevention** in the workplace, while **elimination of the risk** is the most effective.

Q How should I deal with customer abuse towards staff?

A Customer abuse directed at staff should **never be tolerated** and protocols for dealing with customers who are aggressive should be followed. This will differ between organisations and shopfronts.

A procedure should be in place for when and how to **contact management or supervisors** for assistance with an aggressive customer. If the matter escalates then the relevant security service used by the employer (if any) should be contacted. If a conflict occurs between customers that is escalating towards a physical confrontation, then the police should be contacted.

If an employer is selling a product that is in particularly high demand then it may be useful to develop a **guidance script** for employees to assist them with explaining to the customer the reasons behind the policy and why it is occurring.

Alternatively, you may need to create a procedure to manage refusal of entry to a customer who is not wearing a mask, potentially with a more senior employee managing the **entry and exit of customers**.

Employers should consider supporting employees who have been subject to verbal or physical abuse through an employee assistance program that provides access to counselling services.

Q Can a person claim workers' compensation if they contract COVID-19 while at work?

A Yes.

It is possible that an employee may be able to claim workers' compensation if they contracted COVID-19 in the course of their employment, and their employment was a **significant contributing factor**.

Q If I have a confirmed case of COVID-19 in my store, do I need to notify anyone?

A Yes.

Where there has been a confirmed case of COVID-19 in the workplace, you may need to notify your employees so that steps may be taken to ensure their health and safety. Under work health and safety legislation, employers also have a **duty to notify** the relevant State or Territory regulator of an incidence of a "serious injury or illness of a person" for an employee in the workplace.

This includes where there is an injury or illness requiring the person to have:

- immediate treatment as an in-patient in a hospital;
- immediate treatment for loss of a bodily function; or
- medical treatment within 48 hours of exposure to a substance.

Depending on the circumstances of COVID-19 affecting an employee, you may need to notify the relevant regulator.

If you do decide to make a public announcement, it is recommended that you check with the relevant government health department (either State, Territory or Federal) to ensure that any public notice you make is accurate. The relevant health department will be the department which notifies you of the confirmed case in your store.

Q What privacy considerations do I need to keep in mind at this time?

A Most employers will need to collect personal information from staff members and workplace visitors to control the risks posed by the COVID-19 pandemic, but **they must still comply with privacy laws and the Australian Privacy Principles (APPs)** in Schedule 1 of the *Privacy Act 1988* (Cth).

Employers can collect, use and disclose personal information for the purpose of **ensuring all necessary precautionary steps are taken** for the individual the information is taken from or any other individuals who might be at risk. However, you must collect “as little information as is reasonably necessary”, in line with relevant Department of Health advice on identifying COVID-19 risk factors and controlling the spread of the communicable disease.

You may inform staff that a colleague or visitor has or may have contracted COVID-19 but you should only use or disclose personal information that is **reasonably necessary in order to prevent or manage COVID-19 in the workplace**.

Depending on the circumstances, it may not be necessary to reveal the name of an individual in order to prevent or manage COVID-19, or the disclosure of the name of the individual may be restricted to a limited number of people on a ‘need-to-know basis’.

Where employees are working remotely or from home we strongly recommend employers implement stringent security measures to protect personal information during remote work. This include ensuring all laptops and other devices have updated operating systems and anti-virus software, and strong passwords; workers use work email accounts instead of personal ones; and multi-factor authentication for remote access systems and resources are in place.

APPENDIX A - FURTHER SOURCES OF INFORMATION

Commonwealth Government National Coronavirus Health Information Line: [1800 020 080](tel:1800020080)

Commonwealth Department of Health: [Coronavirus \(COVID-19\) health alert - latest advice](#)

Commonwealth Department of Home Affairs: [Advice on travel, including current restrictions](#)

Fair Work Ombudsman: [Coronavirus and Australian workplace laws](#)

Safe Work Australia: [Coronavirus \(COVID-19\): Advice for PCBU\(s\) conducting a business or undertaking](#)

Services Australia: [Financial Assistance for those affected by Coronavirus \(COVID-19\)](#)

Smart Traveller: [Current advisories for overseas travellers](#)

World Health Organisation: [Guide - Getting your workplace ready for COVID-19](#)

State and Territory Work Health and Safety Regulators

New South Wales: [SafeWork NSW](#) and their [current advice on COVID-19](#)

Victoria: [Worksafe Victoria](#)

- [their current advice on COVID-19](#); and
- report - [Preparing for a pandemic: a guide for employers](#)

Queensland: [WorkCover QLD](#) and their [current advice on COVID-19](#)

Northern Territory: [NT Worksafe](#)

Tasmania: [WorkSafe Tasmania](#) and their [current advice on COVID-19](#)

Australian Capital Territory: [WorkSafe ACT](#)

South Australia: [SafeWork SA](#) and their [current advice on COVID-19](#)

Western Australia: [WorkSafe WA](#)



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