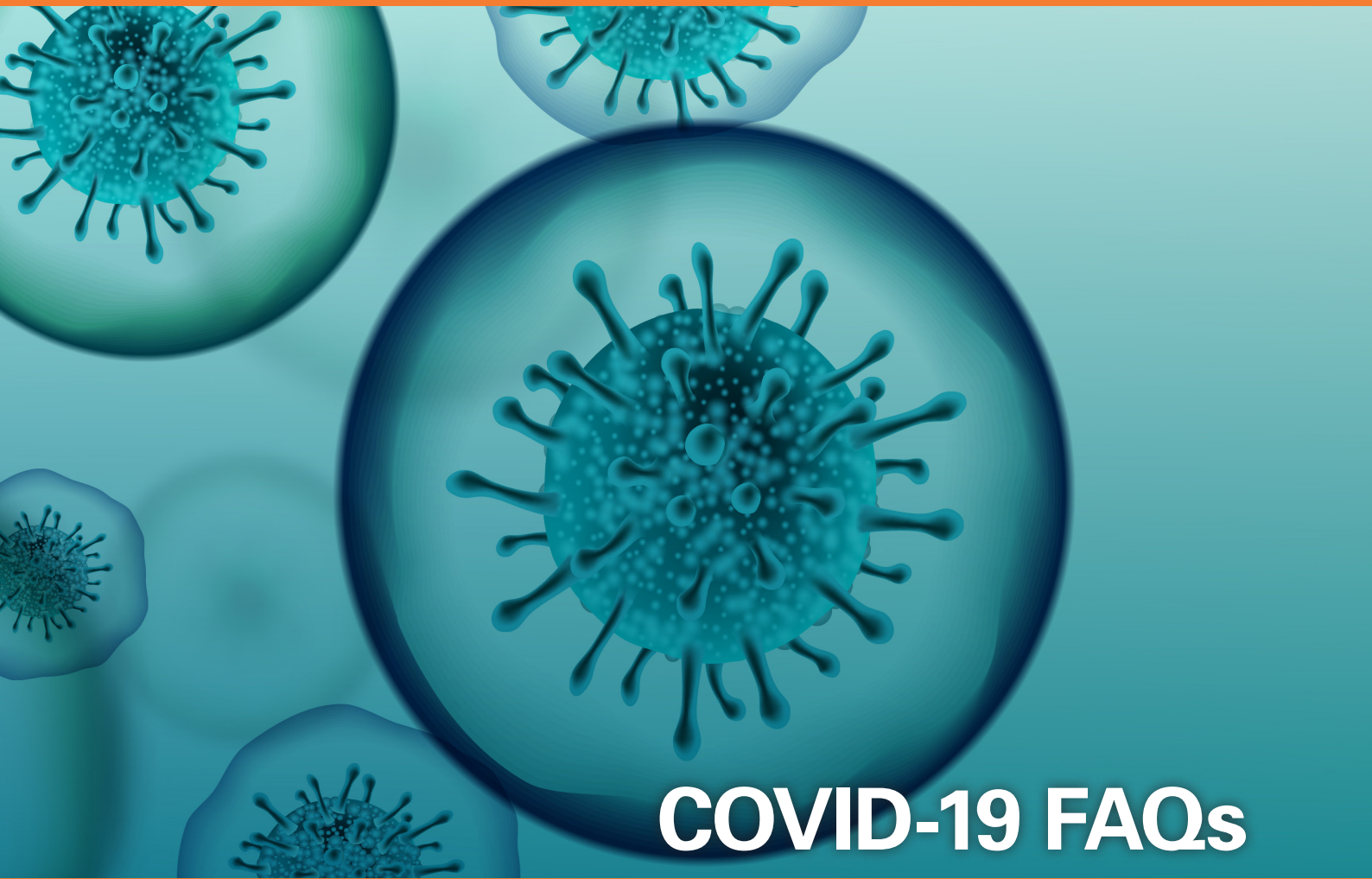




AUSTRALIAN BUSINESS
Lawyers & Advisors



COVID-19 FAQs



1. Should I be talking to my employees about what is going on and how we are looking to work through the COVID-19 pandemic?

The situation is evolving and very fluid and we would urge you to over-communicate right now. Employers who have a plan and are implementing it to balance the business and the employee's welfare are managing quite well at the moment.

Most management teams are talking daily and communicating to employees every 48 hours as things develop.

2. I have an employee who has been overseas and has just arrived back and is self-isolating for 14 days in accordance with the isolation protocols. Do I have to pay them?

No, you are not required to pay employees in circumstances where a public health order or other regulation has been issued under a Commonwealth, State or Territory law where your employee resides/works.

There is some variation across the States and Territories in relation to the legal mechanism that has been utilised to enforce the 14-day self-isolation requirement. However, where the relevant State or Territory has enacted the requirement into law, employees will not be able to lawfully leave their homes to attend for work and so will not be "ready, willing and able to work" (unless they can perform work from home). On that basis, there is no requirement to pay the employee during the 14-day self-isolation period.

It is possible that testing may become more widely available and you may in the days to come be able to determine (negative test) if such an employee can return to work more quickly than the current 14 days.

In most cases, the employee is not "sick" and so they are not eligible for personal leave. Some employers are paying employees out of their accrued personal (sick) leave. Strictly speaking you cannot pay personal leave to an employee, in these circumstances, who is not ill or injured as this is the criteria for personal paid (sick) leave under the National Employment Standards.

Given that (in most cases) you will not be required to pay them during the 14-day self-isolation period, you might choose to adopt one of the following options:

- choose to pay them as a discretionary payment; or
- agree to allow the employee to use their annual leave or long service leave if they have an available accrued entitlement to cover all or part of the period; or
- consider whether you would agree to grant the employee some annual leave in advance (if the relevant Modern Award provides for annual leave in advance); or
- consider whether you would agree to grant the employee long service leave in advance (if the relevant State or Territory long service leave legislation provides for long service leave in advance).

3. My employee has called in sick do I pay them?

Yes, if they are a full-time or part-time employee and they have accrued personal leave to cover the absence. If they run out of paid personal leave, they may ask to be paid annual leave, if available.

Normal rules apply here whether they have a cold, the flu or are diagnosed with COVID-19.



If the employee has run out of paid personal leave, then the employee will continue to remain absent from work without pay for any period they remain unwell and may return to work after being certified as fit for work.

4. My employee has been off work because they felt ill and now says they feel fine, but their doctor will not clear them for work due to the current circumstances regarding COVID-19. Do I pay them and for how long?

You will need to approach this on the basis of the facts and circumstances particular to the situation. If you have a valid reason to doubt that they are fit to return to work, you can insist on a clearance from their doctor before they return.

While this is being sorted out the employee would remain on paid personal leave.

If you have concerns or a reasonable basis to be concerned about exposure to COVID-19, then please refer to questions 5, 8 and 9.

5. I have an employee who has been in contact with someone who has been diagnosed with COVID-19. Do I send them home and if so, do I have to pay them?

The employee should be directed to remain away from work and self-isolate. However, if they can get tested and cleared by a medical practitioner as COVID-19 free and fit for work, they may be returned to the workplace.

They may not qualify for testing which will mean they should remain away from the workplace for a period of at least 14 days. In the case of exposure, the employee concerned will likely represent a high risk to fellow workers and accordingly find themselves in the situation explained in Question 2.

6. One of my employees has asked to leave work early to pick up their partner who is feeling ill and has been sent home suspected of having COVID-19, should I let them go?

You should deal with this just like any other request from an employee to urgently assist a partner or family member. However, if the employee is asking for leave because they are required to provide care or support to their partner or family member, then they may take carer's leave. Where an employee qualifies for carer's leave, they may access their accrued paid personal/carer's leave.

An 'immediate family member' is:

- a spouse or former spouse, de facto partner or former de facto partner, child, parent, grandparent, grandchild, sibling;
- a child, parent, grandparent, grandchild or sibling of the employee's spouse or de facto partner.

A 'household member' is any person who lives with the employee.

The employee should be paid as if they were taking personal (sick) leave, the minimum requirement being payment at base rate of pay for the employee's ordinary hours of work in the period.

You may ask for reasonable evidence to justify the absence on carer's leave.



7. I have asked my employees to work from home, but one has refused saying their employment contract says they should work from our Bankstown office. What can I do?

It is very unlikely that an employment contract would be read in such a constrained way. The request is likely to be a lawful and reasonable request within the context of the employment relationship. Just make sure that you are providing (or paying for) any necessary equipment for them to work from home; computer, internet, phone etc.

You should also undertake some form of risk assessment for the employee working from home to ensure that any 'in-home' risks are identified and addressed. A working from home policy is often helpful and may assist. You may also need to consider insurance issues, including workers compensation.

8. What form of evidence should I ask for if someone says they are feeling ill and suspect that they have COVID-19?

COVID-19 is no different to any other illness and the same standard of proof applies for COVID-19 as it would for the flu or a cold.

The Fair Work Act requires that an employee provide their employer with evidence that would satisfy a reasonable person that the employee is absent due to illness or injury. In the current circumstances of the COVID-19 pandemic, we suggest that a greater degree of tolerance is warranted.

Regardless, the health and safety of your workers is paramount and should not unnecessarily be compromised. A clearance should be obtained (including in relation to COVID-19 in particular) before an employee can be returned to the workplace in these circumstances.

9. If a medical certificate simply says an employee is 'fit for work', will this suffice for an employee to return to the workplace in view of the COVID-19 Pandemic?

You should not permit an employee to return to the workplace in these circumstances if the employee:

- has exhibited the symptoms of COVID-19; and/or
- has been exposed to an individual who has COVID-19.

An employee who has exhibited the symptoms of COVID-19, should be tested and cleared of the virus before returning to work. Otherwise, the employee should wait at least the 14-day self-isolation period and only return to work if they remain symptom free. If the doctor has certified the employee as fit for work, you could usually assume (particularly in the current environment) that the doctor has considered the risks associated with COVID-19. This might be something you could confirm with the employee's doctor (subject to obtaining the employee's authority to do so) before permitting them to return to work if you have any cause for ongoing concern, for example, if the employee presents as unwell or symptomatic.

10. If they shut the schools can my employees claim carer's leave to look after their children?

An employee may take carer's leave to provide care or support to an immediate family or household member, where the care or support is required because of an unexpected emergency.

At this time, the closure of a school in the current climate will amount to an unexpected emergency. Where an employee qualifies for carer's leave, they may access their accrued paid personal/carer's leave.



The rules set out in answer 6, with respect to who qualifies as a family or household member apply, as do the rules for payment and evidence.

11. What if an employee needs to look after someone that is ill? Including a child or family member who is ill or requires support due to COVID-19?

An employee may take carer's leave to provide care or support to an immediate family or household member, where the care or support is required because of a personal illness, or personal injury.

Provided the family or household member is suffering from an illness, the employee would be entitled to access their accrued paid personal/carer's leave.

The rules set out in answer 6, with respect to who qualifies as a family or household member apply, as do the rules for payment and evidence.

12. What if an employee needs to look after their child(ren) due to school closures but has no personal/carer's leave left?

You have a few options. You may choose to decide to pay the employee as an exercise of discretion. Absent this the employee could take leave without pay (subject to any leave without pay policy you have) or they could access another form of paid leave such as annual leave or accrued long service leave.

13. If my business starts to slow down can I make employees take annual leave?

You and your employees may agree to this as a sensible option to tide the business over, but you are limited in directing leave unless it is "excessive leave".

The situation with Modern Award or enterprise agreement covered employees is not the same as award-free employees. Most modern awards and enterprise agreements provide an ability for employers to direct employees to take annual leave if their balance is 'excessive'. Before giving this direction, it is important to check the relevant modern award or enterprise agreement and follow those rules.

Before directing a Modern Award covered employee to take annual leave on the basis that their leave balance is excessive, it is important to check the relevant Modern Award and follow the rules in it before giving such a direction.

The vast majority of Modern Awards provide that an employee is considered to have an excessive leave balance if:

- the employee has accrued more than 8 weeks; or
- for shift workers, 10 weeks.

A direction to a Modern Award covered employee to take annual leave must be in writing and:

- cannot result at any time in the employee's remaining paid annual leave balance being less than six weeks taking into account other paid annual leave arrangements;
- must not require taking paid annual leave of less than one week;
- must not require the employee to take a period of annual leave beginning less than eight weeks or more than 12 months, after the direction is given; and
- must not be inconsistent with any agreed leave arrangement.



For Award Free employees, an employer may require them to take a period of paid annual leave if the requirement is reasonable.

The Fair Work Act notes that it may be reasonable if the employee has accrued an excessive amount of annual leave. We would recommend that strong guidance can be taken from the rules relating to Modern Award covered employees as to what is reasonable for Award Free employees.

14. If things get bad can I shut my business down and not pay my employees for a time?

Where an employee or group of employees cannot be usefully employed for a period because of a stoppage of work for which the employer cannot reasonably be held responsible, then you may 'stand down' that employee or group of employees for that period without pay.

This is usually seen as a last resort. Employers usually exhaust employees taking available paid leave such as annual leave before considering standing down without pay and as with many other COVID-19 related decisions you should consider balancing affordability, culture and engagement with the law before deciding what to do.

Natural disasters and pandemics, such as the current COVID-19 pandemic, can place businesses in circumstances where they are unable to usefully employ an employee or group of employees.

It is critical that there is a stoppage of work to trigger a stand down. That is, all or part of the business must cease operations in order to lawfully stand employees down without pay.

So, you need to ask yourself:

- Is there a stoppage of work?
- Is it for a reason reasonably outside your control?
- Can the affected employees be employed to perform useful work?

You cannot stand down an employee if there is useful work available within the ambit of their usual job and employment contract (focus on the employee's role and job description to make this assessment). Useful work does not have to be the work that the employee ordinarily performs but needs to be genuine productive work not made up work.

15. If things get bad do the normal rules on redundancy still apply during the COVID-19 pandemic?

Yes.

If you decide that redundancies are required, it is important to remember there are three requirements for a genuine redundancy to best avoid an unfair dismissal claim:

1. The business must no longer require the person's job to be performed by anyone because of changes in operational requirements.
2. The business must consult with any employees who are covered by a modern award or enterprise agreement (in accordance with the relevant consultation provision).
3. It must not have been reasonable in all the circumstances for the person to be redeployed within the business or an associated entity.

If redundancies are implemented, you must consider your obligation to provide:

- redundancy pay;
- notice of termination (or payment in lieu); and
- other statutory or contractual entitlements.

16. Can I reduce the hours my casual employees are working as business falls off?

Yes. This operates just like any other situation where demand falls off. It's good practice to be talking to the casual employees and explaining what is happening and what if any work options they might have and when work might pick up. Again, you need to balance the short and longer-term needs of the business and keeping important casual employees with some income may be a key issue when the pandemic ends especially if they are your star barista.

17. To keep staff employed, should I ask my employees to consider other arrangements, including moving them to part-time, casual or another variation to the terms of their employment, as an alternative to redundancy?

Yes, you may ask your employees to consider other arrangements, which will be subject to their agreement.

You would ordinarily approach the employee(s) and explain the situation, including that you are looking for alternatives to ensure the viability of the business going forward.

An agreement could be for a set period, open ended or contingent on the cessation of the current COVID-19 pandemic.

This would require a formal variation to their employment contracts.

However, you **SHOULD NOT** introduce the prospect of redundancies (or any other potential adverse outcome) as a potential ramification should agreement not be reached in relation to any proposed alternative. This could amount to unlawful adverse action and expose you and/or your business to legal liability.

18. If my employees go to client sites what precautions should I take?

COVID-19 is no different to any other 'client site' situation. You have a duty of care to ensure that your employees are safe on your client's site. In the context of COVID-19 this should involve you making enquiries about the protocols adopted by the client.

This should include understanding what the client is doing:

- With employees who fit the 14-day Government isolation period (are they following this?)
- With employees who are sick (are they being sent home and isolated?)
- Have they had anyone in the workplace diagnosed with COVID-19 and if so, have they undertaken effective cleaning of the work area?
- In relation to sanitisation, hygiene and personal protective equipment (if any)



19. Can my employee refuse to work if they think they are being exposed to COVID-19?

An employee can refuse to work if to do so places them in “imminent risk” to their health or safety. If this occurs, they must hold themselves ready to do other work.

This is often a challenging question and you need to take into account the nature of the job and also what risk mitigation you have instituted before arriving at a conclusion.

For instance, if hire car driver was asked to transport a COVID-19 diagnosed person from their home to a testing centre and the driver did not have appropriate personal protective equipment (and the passenger as well) then the direction is likely to be one which the driver can lawfully decline to follow the direction.

Generally, there may be some well-founded concern from some employees and accordingly, in the circumstances of COVID-19, a greater degree of tolerance is warranted and recommended where employees may be seen to being ‘overly cautious’ in exposing themselves to risk.

20. What more creative things might I do to get through this with my employees?

There are a lot of things that might be worth considering at different times. For instance:

- Split rosters to reduce who is in the office at any one time.
- Working from home.
- Moving to virtual meetings with customers or clients.
- Incentivising annual leave; “take three weeks and we will give you a fourth”.
- Reducing exposure to public transport by providing parking or car pooling.
- Providing some support to employees who have to attend the workplace which reduces general community exposure such as providing or buying-in lunch for them.
- Exploring whether part-time work options may suit anyone for a period.
- Possibly changing operating hours to reflect changes in demand which in some cases may involve an Individual Flexibility Agreement.
- Temporary variations to contracted hours of work by agreement with individual employees.
- More targeted recognition and reward programs for those frontline workers carrying the business through COVID-19.
- Reaching agreement to vary an EA to defer pay increases or to vary other terms (requires approval by the Fair Work Commission).
- Making an application under section 120 to reduce/defer any redundancy payments.
- This guide is intended to help you understand your options and decide what is right for your business. Please get in touch if you have specific questions or need legal advice on the issues facing your business during COVID-19.



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