

COVID-19 WORKFORCE REDUCTION OPTIONS FOR EMPLOYERS

Options for dealing with a work stoppage or business downturn due to the Coronavirus

Many businesses want to know what they can do with their workforce if they are impacted by a work stoppage or downturn due to the coronavirus. We set out below various options in the order that a business is likely to consider them.

These options include:

- Employees agreeing to reduce hours or take leave
- Requiring employees to take leave
- Standing employees down temporarily
- Redundancies

1. Agreeing to reduce hours or take leave

We suggest first trying to agree on altered arrangements with your employees. Employers can agree with their employees to do any of the following:

- Reduce the hours they work with a corresponding reduction in pay. This could be for a fixed period of time or open ended until further agreement.
- Take annual leave, which could include:
 - regular annual leave using an employee's accrued annual leave balance;
 - annual leave in advance;
 - a mix of reduced hours and annual leave (eg work 2.5 days per week and take annual leave for 2.5 days per week).
- Take unpaid leave, which could be for a fixed time period or open ended until further agreement (employees do not continue to accrue leave while they are on unpaid leave).
- Some employees may also have sufficient long service leave accrued that they could use this entitlement. For example, in NSW employees can take LSL after 10 years of employment and can take at least one month of LSL in advance by agreement.

Each state has different rules for taking long service leave so please let us know if you would like to know the rules for your state.

Separate agreements need to be made with each employee, which can be recorded in a simple letter agreement which the employee signs.

2. Requiring employees to take leave

Annual leave

The usual position is that annual leave needs to be taken by agreement between the employer and employee. However, if no agreement can be reached, an employer may be able to require employees to take annual leave. Whether they can do this will depend on whether the employee is covered by an award or enterprise agreement. The following rules apply:

- If an employee is not covered by an award or enterprise agreement, the employer can require them to take a period of paid annual leave if the requirement is reasonable;
- if an employee is covered by an award or enterprise agreement, any provisions about forced annual leave in the award or enterprise agreement will apply;
- if an employee is covered by an award or enterprise agreement, and there are no provisions about forced annual leave in the award or enterprise agreement, or the provisions don't apply to this situation, annual leave needs to be taken by agreement.

Because these rules come from the Fair Work Act, they will override any contractual provisions that give employers the right to direct employees to take annual leave.

If you would like help determining whether your employees are covered by an award or enterprise agreement, and whether forced annual leave provisions apply, let us know.

For award/agreement free employees, whether a requirement to take annual leave is reasonable will depend on the circumstances. It is likely that requiring employees to take leave in the event of a shut down or temporary reduction in work is reasonable, but each situation needs to be looked at on a case-by-case basis.

Long service leave

In most states, if an employee has qualified for long service leave, the employer can direct them to take long service leave by providing them with notice. For example, in NSW an employer can direct an employee to take long service leave by providing one month's notice.

If you would like advice on the position in your state, please let us know.

Leave without pay

Employers are not permitted to direct employees to take leave without pay unless it is expressly permitted in their employment contract.

3. Stand down

Section 524(1) of the *Fair Work Act 2009* (Cth) allows an employer to stand down an employee during a period in which the employee cannot usefully be employed because of a stoppage of work for any cause for which the employer cannot reasonably be held responsible. It is possible that a stoppage of work due to the coronavirus would be considered a cause for which an employer cannot reasonably be held responsible. However, again, each situation needs to be looked at on a case-by-case basis.

For more detail on whether stand down is an option for your business, please read our guide to [standing down employees](#).

An employer is not required to pay employees while they are stood down under this section. However, they will continue to accrue their service-based entitlements.

To use the stand down provisions it would also need to be the case that the employee cannot usefully be employed. If they could work elsewhere in the business, work from home or work in any other way, they could not be stood down under these provisions.

Employers should also check any applicable awards or enterprise agreements because these may also contain stand down provisions that can be used.

4. Redundancies

Where an employer no longer requires the job a person has been doing to be done by anyone, it can make their position redundant.

In order to avoid unfair dismissal claims, an employer needs to:

- redeploy the employee elsewhere in the business if there is a reasonable opportunity to do so; and
- follow a consultation process prior to the redundancy (notify the employee in writing of the changes, meet with them to discuss the change and take into account their input before making a final decision).

When an employee's employment is terminated as a result of redundancy, they will be entitled to:

- all accrued but untaken annual leave;
- a proportionate long service leave payment (if they have sufficient service);
- notice of termination (which can be worked out or paid in lieu);
- a redundancy payment in accordance with the scale set out below.

Redundancy pay	
Employee's period of continuous service with the employer on termination	Redundancy pay period
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



If an employer cannot pay an employee's redundancy payment per this scale, it can apply to the Fair Work Commission to reduce the amount of redundancy pay to a specified amount (which may be nil).

Need help?

We are able to help you manage your workforce during this difficult time. Contact [Sean Melbourne](#) if your business needs legal or HR assistance.

Check out other COVID-19 Employer Response resources on the Source website: <https://www.sourcelegal.com.au/covid-19-response/>