

# STAND DOWN EMPLOYER GUIDE

Managing the workplace in face of the outbreak

March 2020

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# WHAT IS A STAND DOWN?

An employer may stand down an employee during a period in which the employee cannot usefully be employed because of a number of circumstances including:

- industrial action (other than industrial action organised or engaged in by the employer),
- a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown, or,
- a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

Whether the option of standing down employees is available is very fact dependent and an employer should exercise the option cautiously.

The employer must be able to demonstrate that:

- there is a stoppage of work,
- the employees to be stood down cannot be usefully employed (which is not limited to the work an employee usually performs),
- the cause of the stoppage must also be one that the employer cannot reasonably be held responsible for,
- If an employer unlawfully stands down employees without pay, the employees will likely be able to recover unpaid wages.

# STAND DOWN UNDER THE FAIR WORK ACT 2009

## SECT 254

Section 524 of the Fair Work Act 2009 (FW Act) states:

An employer may stand down employees in certain circumstances:

1. An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:
  - a) industrial action (other than industrial action organised or engaged in by the employer);
  - b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;
  - c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.
  
2. However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:
  - a) an enterprise agreement, or a contract of employment, applies to the employer and the employee;  
and
  - b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.

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**Note: Where any of the above circumstances apply, an employer may stand down an employee for a period. It is noted that the above stand down provisions apply to full-time, part-time and casual employees.**

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## EXAMPLE: LACK OF VITAL SUPPLY STAND DOWN

Sally's company operates a business that imports and sells electrical goods which are manufactured in China.

The factory in China ceases to operate as a result of coronavirus and announces that it will not be exporting any goods for a period of at least 3 months.

Sally explores other options but is unable to identify any alternative work of any value for her 20 permanent employees to do.

Sally closes her shop and regrettably informs her employees that they are to be stood down without pay. Sally explains that they are entitled to take any accrued paid leave during the period as an alternative to being stood down without pay.



# PAYMENTS DURING A PERIOD OF STAND DOWN

If an employer stands down an employee during a period in accordance with s.524 of the FW Act then the employer is not required to make payments to the employee for that period.

Section 524 is intended to relieve an employer of the obligation to pay wages to employees who cannot be usefully employed in certain limited circumstances. The consequences of a stand down can be severe for an employee as the employee may be deprived of wages for a lengthy period. Whether an employee can be usefully employed is a question of fact to be determined having regard to the circumstances that face the employer.

## DOES A STAND DOWN AFFECT AN EMPLOYEE'S ENTITLEMENTS?

Standing down an employee is different to the suspension of an employee, and a stand down period does not break the employee's continuity of service meaning an employee will continue to accrue entitlements to annual leave and personal/carer's leave under the National Employment Standards (NES), as well as an entitlement to a public holiday that falls on a day the employee has ordinary hours of work.

For example, a full time employee being stood down over a period of 6 months will accrue approximately 2 weeks annual leave and approximately 5 days personal/carer's leave during the period of stand down.

# ENTERPRISE AGREEMENTS, CONTRACTS OF EMPLOYMENT AND AWARDS

An employer may not stand down an employee under s.524 of the FW Act if:

- an enterprise agreement, or a contract of employment, applies to the employer and the employee, and
- the agreement or contract provides for the employer to stand down the employee during the relevant period if the employee cannot usefully be employed during that period because of industrial action (other than industrial action organised by the employer), or a breakdown of machinery or stoppage of work for which the employer cannot reasonably be held responsible .

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**Note: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).**

**If the terms of an enterprise agreement or contract of employment provide for the standing down of employees, then the employer will generally need to rely upon the terms of the enterprise agreement or contract of employment to effect a stand down of an employee.**

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# ALTERNATIVES TO STAND DOWN

To avoid the need for stand downs, you may choose to direct your employees to take:

- annual leave;
- long service leave; or
- working from home.

## ANNUAL LEAVE

During a business interruption, you may require permanent employees to take paid annual leave. Whether you can enforce this will depend on the terms in an applicable:

- modern award;
- enterprise agreement; or
- employment contract.

Employers are reminded that you can only do this if the employee has sufficient accrual of paid leave. Modern awards have standard clauses dealing with the imposition of requirements to take annual leave where there is no agreement to take annual leave. You can only impose this if:

- the leave accrual is more than 8 weeks; and
- you have genuinely tried but failed to reach agreement with an employee with excessive accrual to reduce their accrued leave.

You can then direct the employee, in writing, to take one or more periods of annual leave of not less than 1 week, in no less than 8 weeks' time. This will reduce their leave accrual to not less than 6 weeks. It may be reasonable to require an employee to take annual leave if:

- the employee has accrued excessive annual leave; or
- your business is being shut down.

# LONG SERVICE LEAVE

In most cases, an employee must take long service leave (LSL) at a time agreed on between you and the employee.

However, legislation in most states and territories permits you to direct the employee to take LSL at a particular time, with notice. You may choose to do this as an alternative to standing down the employee.

In Queensland, an employer can request an employee who has accrued long service to take a period of leave with 3 months written notice.



# WORKING FROM HOME

If you choose to allow an employee to work from home, take the following steps:

## **Step 1: Implement working from home policies and procedures**

Adopt policies and procedures for working from home to ensure that all employees who work from home:

- know what is expected of them;
- understand the health and safety risks and procedures; and
- are treated fairly and equally (i.e. the same as other employees in the office), e.g. stipulate that there must be a certain amount of child-free time for employees to perform their work.
- You should implement policies and procedures to clarify your expectations

## **Step 2: Determine what equipment is required and whether you need to provide it**

If the employee requires special equipment to work from home (e.g. furniture, IT equipment or communication facilities), clarify who will meet the associated costs.

## **Step 3: Determine communication times and channels**

Ensure an appropriate personal connection with work, e.g. through web cam discussions, regular emails and telephone calls.

## **Step 4: Ensure the employee has a safe working environment that does not pose risks to their health and safety**

Create rules that will help to ensure this, e.g. there must be a dedicated space with ergonomically fitted equipment.

# HOW ARE STAND DOWN DISPUTES RESOLVED?

The Fair Work Commission (FWC) has power to deal with disputes over the application of the FW Act right to stand down.

The FWC may deal with the dispute only if the application is made by:

- an employee who has been, or is going to be, stood down under the FW Act stand down power;
- an employee who has made a request to take leave to avoid being stood down under the FW Act power, whose leave the employer has authorised;
- a union that is entitled to represent the industrial interests of an employee in the above circumstances; or
- a Fair Work inspector.

## HOW WILL THE FWC DEAL WITH A STAND DOWN DISPUTE?

The FWC can deal with stand down disputes through:

- mediation;
- conciliation;
- making a recommendation;
- expressing an opinion; and
- arbitration.

In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

Fairness between the parties, objectively assessed, may not displace some sense of lingering injustice felt by one or both sides. Resolving a stand down dispute involves making judgements about how to make the best of a bad situation, i.e. determining the fairest outcome.

# HOW TO IMPLEMENT A STAND DOWN

Take the following steps when you need to implement a stand down:

## **Step 1: Identify the source of the right to stand down employees**

If the right is governed by a stand down provision in an enterprise agreement or employment contract, you will need to comply with that provision.

If not, your right will be governed by the FW Act.

## **Step 2: Verify evidence and the right to stand down employees**

You will need to be able to produce evidence to show the work stoppage was due to reasons outside your control.

## **Step 3: Identify the employees to be stood down**

These are the employees who cannot be usefully employed due to the circumstances causing the stand down.

## **Step 4: Consult with your employees**

It is essential that employers consult with their employees on the stand down process.

## **Step 5: Notify the employees of the stand down in writing**

Employees are to be notified in writing of the stand down and clearly advised what a stand down means for them. By providing written notification as opposed to just telling them about it, employers can be satisfied that employees are aware of the stand down as being the reason for not attending work.

Written notifications are to be placed in each employees personnel files.

Please see stand down letter template on the next page.

<Insert date>  
<Insert name of employee>  
<Insert address of employee>

Dear <insert name of employee>,

Due to the recent <insert reason for stand down> affecting <enter name of business>, the Business will cease operating from <insert date>.

As a result of the <insert reason for stand down>, over which we have no control, the business has temporarily ceased operation and a stoppage of work has occurred. In accordance with section 524 of the Fair Work Act 2009 (the "Act") your employment has been stood down for the period of the stoppage.

It is expected, but to be confirmed, that the <enter name of business> will recommence operation on <insert date if known> and at this date you will be required to return to work. Please note that you will be contacted to confirm the end of the stand down period and our requirement that you return to work.

In line with section 524(3) of the Act, during the period of stand down the <enter name of business> will not be paying you any wages for the hours that you would have ordinarily been required to work, however you will continue to accrue annual leave and personal/carer's leave entitlements during the period. If you have any further question, please do not hesitate to contact me.

Kind regards

<insert name>



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