Employment Law and COVID-19

EXPLAINING THE COMPLEX COVID-19 WORK ARRANGEMENTS

Current as at 8 April 2020

The COVID-19 pandemic presents an unprecedented set of challenges to Australian businesses. RMB Commercial Lawyer MICHAEL MANDICOS explains some of the issues that business people should be aware of:

Businesses need to make immediate decisions to ensure their workplaces are safe and then in most cases transition to reduced business level or potentially enact hibernation or closure of work sites or business assets.

Despite the immediacy of the crisis, business should also be considering how they will ramp back up to typical operations after the pandemic.

This paper considers the options employers have in reconfiguring their workforce to deal with significantly reduced business levels. The paper is a guide only and does not constitute legal advice – we strongly recommend any impacted employer or employee seeks advice specific to their situation.

As a general approach, employers should work in the following hierarchy:

- Attempt to enact mutually agreed approaches with employees
- Directing change to workforce arrangements where required
- Consider standing down employees
- Employee termination.

Employee Leave

An immediate consideration employers are likely to face relates to employee leave arrangements. This may be due to employee requests, social distancing or self-isolation requirements, or the employer looking for opportunities to reduce working hours due to reduced business activity.

Here is a guide to the application of various leave types during the COVID-19 pandemic.

Annual leave rights and obligations will depend on whether the employee is covered by a modern award or EBA. Section 94(5) of the *Fair Work Act 2009 Cth* states that an employer may require an award/agreement free employee to take a period of paid annual leave, but only if the requirement is reasonable.

In the case of most businesses, COVID-19-related reduction in work requirements would provide a reasonable basis to enact Section 94(5) powers. However**,** Section 94(5) does not apply to employees covered by an award or EBA. Most awards do not contain a general right for an employer to direct an employee to take annual leave, but many awards do contain a term permitting the employer to compel annual leave during close down of the business.

An employer cannot direct that an employee take ***unpaid leave*** unless the employee is prevented from working because of an enforceable government direction requiring them to self-quarantine.

However unpaid leave arrangements can be agreed between the employer and employee. The Fair Work Commission is proposing to vary 103 Awards to enable employees to take two weeks unpaid leave if the employee is prevented from working by measures taken by the government in response to COVID-19.

An employee is entitled to paid ***sick leave*** where they are not fit for work because of personal illness or personal injury. There is no ability for an employer to direct an employee to take sick leave, however an employer may direct an employee to not attend a work place due to illness or injury.

An employee is entitled to take ***carers leave*** to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of a personal illness or injury or an unexpected emergency. Note it is yet to be tested as to whether a school closure constitutes an unexpected emergency.

In NSW ***long service leave*** accrues under the *Fair Work Act 2009 Cth* after 10 years of service – however it may be payable on termination if the employee has between five and 10 years of service. An employer can direct an employee to take long service leave by giving one month's notice.

Changing the Employment Contract, including Stand Down and Termination

Many employers will be forced to consider more significant options than employee leave arrangements. These options may include temporary changes to employment terms, mid-term arrangements such as employee stand downs, and permanent employee reduction through termination or redundancy.

The employer and employee can agree to ***vary employment terms*** to meet genuine business needs. Changes can include when work is performed, where work is performed, work conditions (including overtime, penalty rates, allowances) and quantum of work performed. Note that most contracts, awards and EBAs do not provide for flexibility and do not allow the employer to impose these changes without employee consent. Any employer attempting to do so is likely to amount to a constructive termination of employment via breach of contract. Any agreed change in arrangements should be documented and should specify the applicable period.

If no work is available for reasons outside the employers control (COVID-19 meets this definition) ***stand down*** is an option under Section 524 of the *Fair Work Act 2009 Cth*. If the employer has an EBA, award or employment contract that deals with stand downs the employer needs to comply with those arrangements. An employee who is stood down remains an employee and is expected to return to work in the future. Note that if the decision to stand down is challenged by the employee the employer bears the onus to prove the conditions for stand down is met.

If part of the employer's business is permanently closing, or there is work that will no longer be required at any point in the future the employer can progress to ***termination. Redundancy*** provisions will then apply.

Despite the often readily apparent need for workforce reduction in the COVID-19 pandemic employers are still required to consult with employees and consider options such as redeployment. Employers should be aware that if there is a reduction in the number of people required to undertake similar tasks, and therefore some employees are retained and some are made redundant, the employer must demonstrate an appropriate process has been applied to determine the redundant employees. Where employers enact redundancies they must ensure they provide notice and redundancy payments per the employees contract or award.

Casual employees and contractors typically do not have leave entitlements so employers do not have the option to make temporary adjustments by enacting leave arrangements. Depending upon any contractual restraints that may apply to contractors, employers can seek to renegotiate arrangements with casual employers or contractors. Employers may seek to stand down casual employees rather than terminate employment due to the JobKeeper program (refer below), however this option does not apply to contractors. Both casual employees and contractors are not entitled to redundancy payments.

Government Assistance

The Australian Federal Government has made a number of announcements in the last month aimed at assisting the Australian Economy through the profound challenges of the COVID-19 pandemic. The most notable of these was on 30 March 2020 when the Government announced **The JobKeeper Package.**

The legislation to enact the JobKeeper program was tabled at an emergency Federal Parliament session on 8 April. The foundation of the package is a $1500 per fortnight payment to employees paid through the employer for up to six months. The payment applies to:

- employees on the books on 1 March who are still employed or who have been stood down; and who are employed by
- employers with annual turnover less than $1 billion with a 30% revenue reduction, or an annual turnover greater than $1 billion and 50% revenue reduction, or a charity registered with the Australian Charities and Not-For-Profit Commission (ACNC) with a 15% revenue reduction.

The JobKeeper program applies to companies, partnerships, trusts, sole traders, not for profits and charities. The program also applies to casual employees who have been with the same employer for more than 12 months as well as the self-employed.

Regarding the quantum of payment:

- If an employee ordinarily receives $1500 or more in income per fortnight before tax, they will continue to receive their regular income according to their prevailing workplace arrangements. The JobKeeper Payment will assist by partially subsidising the employer
- If an employee ordinarily receives less than $1500 in income per fortnight before tax, their employer must pay their employee, at a minimum, $1500 per fortnight, before tax.
- If an employee has been stood down, their employer must pay their employee, at a minimum, $1,500 per fortnight, before tax.
- If an employee was employed on 1 March 2020, subsequently ceased employment with their employer, and then has been re-engaged by the same eligible employer, the employee will receive, at a minimum, $1500 per fortnight, before tax.

The COVID-19 pandemic provides a range of unprecedented challengers for employers and employees. RMB Lawyers is working at full pace with its team over the COVID-19 restrictions period and we are able to provide any employment related situational specific advice you or your organisation may require.