

COVID 19 EMPLOYMENT

1. Overview

In Australia, the main sources of employment law are legislation, industrial instruments and the common law. *The Fair Work Act 2009* (Cth) (the **FWA**) governs the obligations and entitlements of the majority of Australian employees (supplemented by other federal, state and territory schemes relating to workplace health and safety and discrimination).

The FWA determines modern Awards and Enterprise Agreements. For those employees who are not covered by an Award or Enterprise Agreement, an employment contract (contract of service) will often be the source of their employment conditions and salary.

Whilst terms may be implied into an employment contract by fact, custom or law, the National Employment Standards (**NES**) establish the minimum standards of employment across 10 categories (for those employees who do not fall under an Award or Enterprise Agreement):

- maximum weekly hours;
- requests for flexible working arrangements;
- parental leave and related entitlements;
- annual leave;
- personal carers' leave and compassionate leave;
- community service leave;
- long service leave;
- public holidays;
- notice of termination and redundancy pay; and
- Fair Work Information Statement.

Employment law generally protects employees employed pursuant to a 'contract of service' (employees) rather than a 'contract for services' (independent contractors) although the FWA does contain some protections for independent contractors.

COVID-19

The novel coronavirus, COVID-19, has led to various temporary but abrupt shutdowns across many industries. This has in-turn had a significant impact on and economic consequences for many industry sectors.

The consequent economic downturn has necessitated difficult decisions for many employers, especially in the service industries.

We know that this health crisis will end and already a degree of normalisation is returning. It is important to keep this in mind when making difficult decisions.

This guide sheet is intended to provide information for employers to consider some of the options available to them.

RETURN TO THE WORKPLACE

2. Health and safety in the workplace

Employers have a legal requirement under the FWA and WHS laws to create a safe work environment. Employees and other workers also need to take care of their own and others' safety. Before employers and employees return to work, it's important that businesses have a plan to keep their workplace safe, healthy and free of coronavirus.

Information on compliance and maintaining a safe work environment such as risk assessment, physical distancing, hygiene, and cleaning can be found at <https://www.safeworkaustralia.gov.au/covid-19-information-workplaces>

Employees cannot be dismissed or injured in their employment because they have a responsibility under a workplace health and safety law to quarantine or self-isolate. In this context 'injury' refers to deprivation of one or more immediate practical incidents of employment, such as loss of pay or reduction in rank.

3. Transitioning back to work

During the height of the pandemic, many businesses have implemented flexible working arrangements to protect their employees. The return to the physical workplace necessitates co-operation to find solutions that benefit both the workplace and affected individuals.

Many states and territories continue to have rules about people working from home, if they can. Employers need to check and stay up to date with any enforceable government directions in their relevant state or territory such as directions that say employees should be working from home, or should be allowed to work from home if it is practical.

Employers should continue exploring alternative working arrangements in their workplace, particularly while social distancing rules apply, such as supporting different types of work from home arrangements where possible.

Employers can give directions for employees if the direction is reasonable. An employee cannot refuse an employer's direction to perform work (eg. from a specific location) if the direction is reasonable and in line with their employer's legal obligations. If an employee doesn't come to an arrangement to work from home with their employer, or doesn't use paid leave, then they aren't entitled to be paid for choosing not to work.

If an employee does not comply with their employer's reasonable direction to return to work or their usual workplace, their employer may take disciplinary action against them, which in some circumstances could include termination of employment. Employers need to make sure they comply with the general protections and unfair dismissal obligations in the Fair Work Act.

Employers and employees are encouraged to work together to manage the return to the workplace.

If an employee cannot return to the workplace because they need to care for a child whose school or childcare centre has closed, they should come to an arrangement with their employer.

In some circumstances, employees may be able to refuse to return to work because of a reasonable concern about their health and safety or another legitimate reason. If an employee has concerns about the safety of the workplace, they should raise their concerns with their employer as soon as possible. Employers should consider sharing information about any steps they have taken to ensure a safe workplace, to help manage employee concerns.

Many businesses are electing a graduated return to the workplace with employees working alternate days at home or at work, on a rostered basis.

Coronavirus restrictions are State and Territory specific. For up to date guidance visit <https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/returning-to-work-and-the-workplace>

4. Changed duties

As employees return to work, employers may need to make changes to their usual duties because the business is operating differently. Employers should check whether there are any rules about doing this in any applicable award, agreement or employment contract before making any changes.

Recent changes to some awards allow employers to direct employees to perform duties that are within their skill and competency. This includes if the duties aren't part of an employee's usual classification.

See <https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/temporary-changes-to-workplace-laws-during-coronavirus>

5. Protection from discrimination for raising health and safety concerns

Employees cannot be discriminated against for raising health and safety concerns on the basis of particular traits or attributes the employee has. These include the employee's:

- race
- colour
- sex
- sexual orientation
- age
- physical or mental disability
- marital status
- family or carer's responsibilities
- pregnancy
- religion
- political opinion
- national extraction
- social origin.

Employees are also protected from adverse actions, including the doing, threatening or organising of any of the following by an employer:

- firing an employee for exercising a workplace right
- injuring the employee in their employment, eg. not giving an employee legal entitlements such as pay or leave
- changing an employee's job to their disadvantage
- treating an employee differently than others
- offering a potential employee different and unfair terms and conditions for the job compared to other employees.

The information above is provided by way of high-level assistance and is intended as a guide only. This is not legal advice.

Please feel free to contact von Muenster Legal at info@vonmlegal.com or by phone on 02 9163 8958 if you require any further information or assistance.