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## COVID-19 and the Workplace

Wednesday 25 March 2020 / by Alicia Mataere and Ellie Jongma posted in [Workplace Relations](#)  
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To say that we are currently living in unprecedented times is an understatement. Each day we wake to distressing news of increased fatalities, spread of the COVID-19 virus and global attempts to flatten the curve.

In response to the rapid spread of the virus, we have seen an escalation of social distancing measures such as the cancellation of events, mandatory self-isolation for travellers, the closure of State borders, closure of some schools and universities and a requirement that there be four square meters for each person

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In the last 48 hours, New South Wales and Victoria have announced the closure of specific social places, with [further measures announced by Prime Minister Scott Morrison last night](#), including new restrictions on weddings and funerals, as well as further business closures.

While the crisis continues to unfold at speed, [Holman Webb](#) wants to provide businesses with an understanding of their obligations in relation to various scenarios that may take place during this 'one in a hundred year event', including:

- businesses being forced to close;
- workplaces becoming infected or exposed to COVID-19;
- employees and leave entitlements;
- social distancing in the workplace;
- working from home; and
- economic impact and business viability.

In discussing these various scenarios, it is important for all businesses to remember that they have an overriding obligation to ensure (so far as is reasonably practicable) that their workplaces are free from risks to health and safety.

### **Business closures**

Businesses with social aspect such as clubs, pubs, restaurants, cafes, places of worship, gyms and indoor sporting venues (amongst others) were told to close at midday on 23 March 2020.

Understandably, one of the biggest concerns for businesses forced to close (and others who may be affected by future forced closures) will be whether they are still required to pay employees.

In short, businesses who are forced to close as a consequence of government direction may not be required to pay employees, and may rely on the stand down provisions of the [Fair Work Act 2009](#) (Cth). Specifically, a stand down may occur when employees can no longer be usefully employed due to factors beyond an employer's control. This would extend to a government directed closure of a business - in which circumstance employers would not be under an obligation to pay their employees.

Employers should check their applicable Modern Award, enterprise agreements and employment contracts for any other provisions relating to stand down periods.

Further, Holman Webb notes that despite the ability to not pay employees who are stood down pursuant to the Fair Work Act, employers may choose to do so. Moreover, employers are reminded that employees will continue to accrue leave entitlements whilst they are stood down.

Another instance which may give rise to the need for businesses to stand employees down would be if employees are unable to work



the case, an option for the employer to enable the employee to be usefully employed would be removed through factors beyond the employer's control.

Notwithstanding the right of a business to stand employees down without pay, and bearing in mind that a business's greatest asset is its workforce, [Holman Webb](#) recommends that businesses first communicate with their employees in order to explore strategies such as taking annual or long service leave to cover the period of the stand down - and only rely upon such provisions as a last resort.

## **When your workforce is exposed to COVID-19**

Numerous businesses have already been impacted by an employee who has either contracted, or been exposed to COVID-19, and there is potential for others to be affected moving forward. In both instances, the workplace obligations for businesses are the same, with the overriding obligation being the provision of a workplace which is (so far as is reasonably practicable) free of risk to health and safety.

Businesses facing the scenario of an employee either contracting or being exposed to COVID-19 would be required to close the workplace until it has been sanitised and is free of risk to the health and safety of employees. Following such an incident, attention should turn to how to manage the workforce during the closure of that workplace, in order to make way for cleaning and sanitisation.

Ideally, all employees would be able to work from home, however this is not always possible due to the type of work required, and/or the technology available to employees at home. In circumstances where employees are unable to work from home, employers may rely on the stand down provisions outlined above.

Again, [Holman Webb](#) recommends that standing down an employee on unpaid leave should be a last resort. Businesses should work with employees to utilise available strategies and resources such as annual or long service leave, or other agreed arrangements that may be suitable.

## **Accessing leave entitlements**

There will undoubtedly be employees who require leave to deal with the personal effects of COVID-19. Where COVID-19 has impacted an employee or their immediate family member, they may be entitled to paid carer's leave.

Businesses must remember that employees are entitled to personal/carer's leave when providing care or support to an immediate family member or household member who requires that care or support during an unexpected emergency. Whilst the term 'unexpected emergency' is not defined in the Fair Work Act, Holman Webb's view is that the COVID-19 pandemic would qualify - although consideration would need to be given to each case.



As outlined above, a business's primary obligation is to ensure that their workplace is safe, and that it is adhering to the most up-to-date precautionary measures to prevent the spread of the virus. Where possible, businesses should remain flexible in accommodating employees who may be at risk, or who may have been exposed to the virus. This could include allowing employees to work from home, or other suitable locations - particularly where factors concerning age, co-morbidity or immunity may expose the employees to greater risk should they contract COVID-19.

Additionally, employees who are displaying any flu-like symptoms such as a fever, cough or runny nose should be directed to stay home and take personal leave.

[SafeWork NSW recently published advice for workplaces](#), stating that they should monitor the [Australian Government - Department of Health](#) and [NSW Health](#) websites for the latest information on disease management. It is important for businesses to stay up to date with the latest developments in order to comply with their obligations under the [Work Health and Safety Act 2011](#).

## **Social distancing in the workplace**

Unfortunately, [current guidelines on social distancing](#) have created a conundrum for workplaces looking to uphold their obligations to protect employees, whilst maintaining productivity.

At present, guidelines require all Australians to practice good hygiene - particularly through the avoidance of shaking hands, regularly cleaning hands with soap and hot water, avoiding face to face meetings and increasing ventilation in workplaces.

The guidelines established by the Department of Health recommend that everyone maintains a 1.5m distance from others in public, and also includes a ban on mass gatherings over 500 people. Indoor gatherings of 100 or more have also been banned, with indoor gatherings of less than 100 people requiring four square meters per person - although this excludes workplaces.

Whilst workplaces are excluded from the various social distancing requirements, where reasonably practicable, business should implement social distancing measures, for example:

- implementing flexible working arrangements such as working from home;
- dividing workforces into teams who vary between working from home and the office/on-site;
- varied and staggered working hours to limit the number of staff in the workplace at any one time;
- closing staff kitchens and lunch rooms; and
- providing bottled water and hand sanitiser.

## **Working from home**

Many workplaces have instituted flexible working arrangements to



Employers to recognize that their obligation to ensure a safe workplace extends to those employees who are working from home, as far as it is reasonably practical. This means that employees may be entitled to [worker's compensation](#) if they were to suffer an injury in the course of their employment.

Requests by employees to work from home need to be considered on a case by case basis, bearing in mind an employee's ability to request flexible working arrangements under the Fair Work Act and with regard to the various pieces of anti-discrimination legislation.

Accordingly, [Holman Webb](#) recommends that businesses implement a 'Working from Home' policy, or review their current policy in light of recent events.

### **Economic impact and business viability**

Many businesses are now facing significant financial strain and/or potential ruin due to the [economic impact brought about by the COVID-19 virus](#). Businesses are reminded that it is open to them to communicate, negotiate and, importantly, come to an agreement with employees with respect to reductions in hours, wages and other variations that may assist in enabling the business to continue operating.

Businesses needing to make positions redundant must keep in mind the consultation obligations in various Modern Awards and Enterprise Agreements; and that the incapacity to pay provisions in the [Fair Work Act 2009](#) (Cth) requires application to and approval by the [Fair Work Commission](#).

Holman Webb further notes that additional measures relating to obligations under the [Corporations Act 2001](#) (Cth) have recently been announced, which together with other economic stimulus measures may provide some comfort to businesses.

### **Further assistance**

The above is not a comprehensive list of the various issues and possibilities that may arise - for example we haven't dealt with potential General Protection claims that may be made, or the impact that current workplace flexibility will have on future requests once the pandemic is over.

Rather, the above is a summary of the issues which most businesses are currently facing in the workplace. Each business' obligations to its employees will differ depending on the specific circumstances.

We would encourage readers to get in contact with [Holman Webb's Workplace Relations](#) team for specific advice regarding your individual situation and responsibilities to workers.

