

Australia

Managing HR Through COVID-19

A Practical Guide For Multinational Employers

Prepared by Corrs Chambers Westgarth

As of April 29, 2020

Overview

This guide will help employers manage HR legal and practical issues arising from COVID-19.

It covers:

- [Good Practice Guidance giving high-level consideration](#);
- [An Action Point Checklist drilling down into the detail](#); and
- [Answers to Key Questions facing employers in Australia](#).

This publication has been coordinated by Mayer Brown and forms part of a wider Mayer Brown Guide for Multinational Employers, [which is available here](#).

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[ps2id id='Good Practice' target='']

Good Practice

There are a number of key good practice points that employers across all jurisdictions will want to consider regarding COVID-19:

1. Keep up-to-date with accurate information

It is difficult for an employer to make proper decisions based on rumors, assumptions and “fake news”. Therefore, it is important for an employer to stay up-to-date with accurate information and make decisions based on facts. Employers should monitor official sources, including government advisories and the World Health Organization (“WHO”) website, and check that the information they receive is factually correct.

2. Know where your employees are and where they have been

An employer cannot keep its employees out of harm’s way if it does not know where they are and where they have been. As outbreaks of COVID-19 occur in various parts of the world, keep track of which of your employees could be at risk.

3. Communicate with your employees

Employers should communicate openly and often with their employees so that they have the information they need to help keep themselves educated and updated about the coronavirus. It should not assume that all employees will educate themselves or have access to the same sources of reliable information. Putting everyone on the same page will help the employer and its employees move together in a timely manner as a business. Open and timely communication will help build trust and reduce the spread of rumors that may cause anxiety in the workplace.

4. Provide a safe platform for employees to raise concerns

Employers should give employees a *safe* platform where they can raise concerns on all aspects related to work, from mental health to the risk of having contracted COVID-19. This is not just good employee relations, but early detection and doing something about it can help to reduce the spread of the virus. It is one thing to have an employee assistance plan and ask employees to report issues, but if those who report are stigmatized or treated with contempt, employees may be deterred from reporting.

There may be nervousness and anxiety in the workplace, and possibly even conflicts, given concerns about the virus. Employees should be given avenues to communicate such anxiety to their employer, so that concerns are addressed earlier and do not balloon into bigger issues.

5. If you can be flexible, then be flexible

Employers should understand that this is a time of stress for all parties, including employees. Recognize that employees will have different needs depending on their circumstances (e.g., those with school-age children may need more time off as school classes are suspended).

This time of uncertainty will pass but employees will remember how their employer treated them long after the threat of the virus has disappeared. A disgruntled employee may try to make it known to the world how badly their employer treated them. This may affect the employer’s brand and ability to attract and retain talent. The employer may then have to wait for another crisis or challenging time to get the opportunity to prove itself as a good employer.

6. One size may not fit all

While consistency in treatment is generally to be favored, be conscious that one size may not fit all. For example, “work from home” or remote working may not work for everyone. The implementation of general directives should be checked against legal obligations under the contract of employment and local law.

[ps2id id='Action Point Checklist' target='']

Action Point Checklist

In general terms, the steps an employer needs to be taking now relate to four categories: **Review**, **Communicate**, **Update** and **Travel**. No list of action points will be comprehensive for all employers, but the following will form a good starting point.

1. Review

- Review business continuity plans and how these would be maintained if employees are suffering from coronavirus absences.
- Review existing sickness policies and procedures. Are they adequately disseminated to staff? Do they need amending?
- Review contracts of employment. It may be relevant to establish whether or not individuals can be asked to undertake different work or at different locations or at different times from the norm.
- Review the employer’s emergency procedures, e.g., if there is an infection and the workplace is closed on a temporary basis. If appropriate, carry out a test run of an emergency communication to see how robust the process is.
- Ensure contact details for all staff are up-to-date.
- Undertake a risk analysis of high-risk groups of employees, and what steps can be taken to try and reduce risks for those groups. These groups may include:
 - those who travel frequently to countries where there is currently or may well in future be a risk of infection.
 - those with health issues, such as asthma, diabetes, cancer, or those who are pregnant, who are more likely to suffer adversely if they become infected with the virus.
- Review procedures in the office for preventing the spread of the virus, e.g., increased cleaning, availability of hand sanitizers and tissues etc.
- Review planning for the possibility of large scale absenteeism. For example:
 - Identifying the essential positions within the business, what needs to carry on during an emergency, and what is the minimum number of employees required?
 - Identifying employees with transferable skills so that these essential positions can always be temporarily filled.
 - Considering flexible work patterns, such as employees working from home.
 - Identifying those employees who have the necessary IT infrastructure to work from home

(e.g., remote access to the office computer systems).

2. Communicate

- Identify an appropriate person as spokesperson/communicator of updates on policies etc., with appropriate credibility.
- What, if anything, is said about absence from work for reasons other than ill-health, e.g., where an office is closed?
- Assuming the employer has a health and safety committee, have there been any discussions with that committee about COVID-19 and its potential impact? If there is no such committee, the employer may want to consider setting one up.
- Communicate as a matter of urgency with the high-risk groups identified in any risk review to ensure they are aware of their high-risk status and the measures that are being taken to assist.
- Ensure managers are aware of the relevant workplace policies.
- Consider issuing guidance to employees on how to recognize when a person is infected with the coronavirus. What are the symptoms, and what should one do if one is taken ill at home or at work? It is also important to emphasize that individuals may not recognize that they have the virus and so may not be exhibiting symptoms. Employees should be informed of the reporting procedure within their employer if they have a potential infection as well as any official reporting process.
- Provide advice to encourage individuals to take a degree of responsibility for their own health and safety and to slow the spread of the virus. For example, advice on handwashing and use of sanitizer gels, coupled with a willingness to self-identify where it is possible that individuals have come into contact with individuals with the virus, have become infected themselves or have returned from private travel abroad to an area which turns out to be affected by the virus.
- Make clear that where staff are ill, they must not come to work regardless, i.e., “struggle through”.

3. Update

- Initiate a system to keep up-to-date, especially given the speed at which infection is spreading.
- Consider establishing a committee on the employer’s side to coordinate responses and engage with any staff consultative forum, and with particular responsibility for staying up-to-date with public health updates.
- How will employers communicate to employees regular updates on the coronavirus and its spread? As news develops, it is extremely important for an employer to be issuing fact-based updates, to avoid the possibility of fear being used by worried employees to make decisions about whether or not to come to work, whether to travel abroad, etc.
- Who will have the authority to determine changes to policy and issue any new communications to staff?

4. Travel

- Log employee travel before it is booked and check against the latest travel protocols.
- Ensure staff know that this applies to personal travel as well as business travel.
- Encourage staff to tell you if close family members with whom they share a house are travelling

to infected areas.

- Replace face-to-face meetings (especially those involving travel) with video conferences, telephone conferences, etc.
- Consult/communicate about whether to encourage varied work patterns to avoid travelling on public transport at rush hour.

[ps2id id='Country Overview' target='']

Country Overview

As at April 29, 2020

1. What are an employer's main legal obligations?

In response to events transpiring from the spread of COVID-19, employers need to consider their rights and obligations in relation to:

- ensuring, so far as reasonably practicable, the workplace health and safety of employees (i.e., by meeting obligations outlined under State and Federal work health and safety legislation);
- basic leave entitlements set out in the *Fair Work Act 2009* (Cth) ("**FW Act**") and applicable industrial instruments;
- obligations set out under employment contracts;
- compliance with emergency directions issued by Federal and State Governments; and
- obligations set out under anti-discrimination legislation.

2. Do I need to prepare for and have in place a workplace plan to deal with COVID-19?

Your policies on leave and flexible work practices, including working from home, will be tested. They should be reviewed, and should take account of your continuing work health and safety obligations.

3. What should a workplace COVID-19 response plan cover?

Flexibility and working from home

Employers should be across their policies concerning working flexibly. Many organizations are testing their capability to continue operations with the majority, or even all, their employees working remotely. To understand how this would be implemented at your organization you should:

- review existing working flexibly policies;
- review and test your support mechanisms for employees working remotely over extended periods; and
- consider the possibility that large numbers of employees will be required to or permitted to work remotely will challenge the systems of many employers.

Supporting well-being

Employers need to consider how they can both continue to manage performance whilst supporting the wellbeing of their employees in what threatens to be a particularly anxious environment for many. An important element will be having updated information that appropriately frames your perspective on the impact of the outbreak on your people and business.

Your business should regularly review guidance from the Federal Department of Health ([health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert](https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert)) and equivalent State health authorities and direct employees to these official sources in addition to internal policies.

Managing hours of work

Another consideration will be managing overtime. Compliance obligations remain important in a crisis. There will undoubtedly be occasions when requesting employees to work additional hours is necessary and reasonable. Reiterating your approach to overtime as part of your preparations should be considered.

Work-related travel

You should make sure that travel policies clearly address where employees can travel to, the reasons for travel and permission required. Employers need to monitor State and Federal agencies regarding applicable restrictions on interstate and overseas travel, even for critical meetings.

In this environment, informing employees that travel policies will be under regular review also can help communications and lessen anxiety. You should also carefully check the insurance coverage now provided for work-related travel.

Managing operating costs

In this environment having staged responses is likely to be more attractive than the alternatives. The priorities will be the welfare of your people, the need to retain talent and the need to protect the business in the long term.

The most difficult decision for some businesses will be whether or not to implement redundancies. There are a number of alternatives and supplementary steps you can consider first, including: supplementary labor, rostering solutions, standing down employees, and redeploying employees.

Implementing any of the above measures is likely to involve various legal processes either at common law under contracts of employment, or under enterprise agreements or awards or the FW Act.

Managing industry-specific risks

Some industries will have specific risks that are elevated because of the nature of their work, for example, health care workers, workers in aged care, airline and other travel industry personnel, laboratory workers, border, customs and quarantine workers, and waste management workers. Employers in high risk industries and services will need to assess the provision and use of appropriate personal protective equipment (PPE), such as gloves, gowns, masks, eye protection, and respirators.

Employers need to assess the risks associated with their operations in the context of the challenges

presented by the COVID-19 virus. In high risk industries, employers need to immediately review their infectious disease protocols and ensure that such protocols are up to date and are shared with all workers.

For general guidance on the contents of a workplace COVID-19 response plan, please see the [Appendix](#) and the [Action Point Checklist](#).

4. Can I direct my employees to go home or stay at home if there is an outbreak?

Where it is possible for employees to continue to work safely from home or where it is necessary for the business to comply with its duty to eliminate or reduce risks to health and safety, it will be a reasonable direction for a business to direct an employee to go home or stay at home.

However, employers do not have a right to unilaterally suspend performance of employment contract obligations in the absence of an express right conferred by the contract, industrial instrument or statute (known as a “**Stand Down**”).

Employers have no common law right to stand down or send home employees for whom they cannot find work, whether because of a turndown in business or because of factors outside the employer’s control, such as the outbreak of COVID-19. The power to stand down employees is derived from the FW Act. It may also arise under awards or agreements and/or contracts of employment.

For national system employers, Part 3-5 of the FW Act offers a default power to stand down employees without pay. Under s 524(1), this arises whenever they cannot be usefully employed because of industrial action (other than a lockout), a breakdown of machinery or equipment, or any ‘stoppage of work for any cause’. These provisions do not apply when an enterprise agreement or contract already grants such a power. Section 525 of the FW Act qualifies this power to the extent that an employee is not taken to be stood down during a period of authorized leave of absence, such as annual or personal leave.

5. Can I direct an employee to see a doctor?

Employers can direct employees to see a doctor provided the direction is reasonable in the circumstances. In the context of the COVID-19 pandemic, this would likely be a lawful direction.

It will be worth considering that attending a medical clinic may not be possible if there is a significant COVID-19 outbreak as people are likely to be directed to stay at home in many instances and not attend a hospital or medical clinic to avoid exposing others.

For employees who have symptoms of COVID-19, our recommendation at this stage is to ask those individuals to take personal leave where they are unwell or work from home as appropriate. Employees should then seek their own medical advice about whether testing is necessary. At present, we understand that testing is limited to individuals who are assessed as being high risk (e.g., they are expressing symptoms and have been in ‘close contact’ with a confirmed case or have recently returned from overseas). Managers should ask employees to keep them updated. If employees are tested, in the circumstances we consider it appropriate for managers to ask the employee for their test outcome. Such information should be stored securely and with restricted access only to HR and senior

management.

An employee must also give their employer evidence of the illness or unexpected emergency if their employer asks for it (for example, to access paid personal/carer's leave). Medical certificates or statutory declarations are typical examples of acceptable forms of evidence. While there are no strict rules on what type of evidence needs to be provided, the evidence needs to satisfy a reasonable person that the employee was genuinely entitled to the personal/carer's leave.

6. Do I have to continue to pay wages and provide other employment-related entitlements during a COVID-19 outbreak?

Your obligation to pay wages and other entitlements will depend on a range of factors, including:

- the reason for employees' absence from the workplace (e.g., to take sick leave, or because they have been stood down); and
- whether employees are entitled to leave and have leave available to them (for example, casual employees and independent contractors do not have statutory entitlements to annual leave or sick leave).

With widespread isolation measures being implemented it will become common to respond to the situation where an employee or their family member is ill with the COVID-19 virus. The basic sick leave entitlements are set out in the FW Act. In Australia, national system employees, other than those engaged on a casual basis, are entitled to 10 days' *paid* personal/carer's leave for each year of service.^[1] The entitlement accrues on a progressive basis and many employees will have an accrual of more than 10 days. These entitlements may be expanded by an enterprise agreement or contract of employment.

In the context of COVID-19, personal/carer's leave will apply:

1. when a full or part-time employee is not fit for work because they have contracted the virus; or
2. if an employee needs to look after a family member or member of the employee's household who is sick with the virus or in an unexpected emergency affecting a family member (e.g., if an employee is required to care for their child in the event where schools or childcare centres are closed down on short notice).

There is no limit on the number of days of accrued leave that can be taken for any of these purposes. However, in the event an employee is quarantined due to suspected exposure to the virus who is otherwise 'fit for work', an employer cannot require the person to take that period as personal/carer's leave.

If a full-time or part-time employee exhausts their personal/ carer's leave, they may be able to access other leave entitlements, including but not limited to annual leave, compassionate leave or long service leave. Where all applicable (paid) leave is exhausted, employees may be required to take leave without pay.

On April 9, 2020, federal legislation commenced to operate which provides for wage subsidies of up to \$AUD 1,500 per fortnight for each 'eligible employee' of employers who qualify for the scheme ("the

JobKeeper Scheme"). This is directly related to the COVID-19 pandemic, and is due to expire on September 28, 2020. Employers should visit <https://treasury.gov.au/coronavirus/jobkeeper> to ascertain whether they are eligible to access this scheme.

[1] Casual employees have access to unpaid carer's and compassionate leave.

7. Can I quarantine certain staff to certain parts of an office or send them to a different office?

The FW Act does not have specific requirements addressing this circumstance. Some employers may wish to develop policies to address this situation. An employer should consider its response to this scenario. It may include options such as:

- making arrangements for remote working (and/or reducing the number of employees required to work from the office);
- if remote working is not practicable, then the response may be to suggest an employee take:
 - annual leave;
 - any other leave available to an employee (such as long service leave or any other leave available under an award, enterprise agreement or contract of employment); or
 - any other paid or unpaid leave by agreement between the employee and the employer, including personal leave.

8. Can I direct my employees to report suspected cases of COVID-19?

In the circumstances of an outbreak such as this, we think it is a reasonable direction to direct employees to report suspected cases of COVID-19. Across Australia, in general terms, where a risk to health is identified at a workplace, employers must, so far as is reasonably practicable, eliminate the risks, or minimize the risks. This duty could foreseeably extend to directing employees to report suspected cases of COVID-19 to protect employees from such threats.

Employees also have work health and safety responsibilities. These obligations are useful when reminding employees why they may be required to provide certain information or be absent from the workplace. Employees typically have a duty to:

- take reasonable care for their own health and safety;
- take reasonable care for the health and safety of people who may be affected by the employee's acts or omissions at a workplace; and
- cooperate with their employer about any action taken by the employer to comply with a requirement imposed by a safety law.

In our view it is reasonable to expect employees to contact their employer as soon as practicable if they are unable to attend work because they are required to be isolated at home or to enter quarantine because of exposure to COVID-19.

9. Can an employee lawfully refuse to attend work if there is a COVID-19 outbreak?

An employee would typically need to make a request to work from home (if possible) or to take some form of paid or unpaid leave, such as annual leave or long service leave. An employee is not otherwise entitled to be paid if they refuse a reasonable direction to attend work as directed.

Events are unfolding quickly and your information needs to be updated to reflect the available public health advice. Commonwealth, State and Territory departments regularly publish (and update) information and guidance about the outbreak of COVID-19.

10. Can I screen employees and customers before allowing them to enter the workplace?

Yes, but only in circumstances where the instruction or policy is reasonable and necessary to eliminate the risks, or minimize the risks to health and safety. In addition to employers, officers and employees, workplace health and safety legislation requires that those visiting workplaces must comply with any reasonable instruction of a person conducting a business or undertaking. This legislation also imposes duties on employers to people other than their employees – such as customers and clients.

Employers should be careful not to implement practices and instructions that might be considered discriminatory (noting their obligations under anti-discrimination legislation). Amid the anxiety about the spread of COVID-19, reports are emerging of increased discrimination against people of an ethnic or perceived ethnic background. Australian anti-discrimination laws impose obligations on people not to discriminate against others on the basis of particular attributes including race, sex, family or carer's responsibilities, national extraction or social origin, when engaging in specified activities, such as employment or providing goods and services. The law of discrimination also encompasses other attribute-based conduct that causes harm, such as harassment or vilification.

Employers should also reflect on whether they have taken all reasonable steps to prevent employees behaving in an unlawful manner towards fellow employees, customers, clients or members of the public. Taking reasonable steps might mean having well-publicized diversity and harassment policies, and training all staff on the issue. Managers in particular must be trained about their responsibility to identify and prevent discriminatory behavior.

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[ps2id id='Appendix' target='']

Appendix: Workplace COVID-19 Response Plan

A plan should deal with the following:

BEFORE AN OUTBREAK

- Preventive measures.

- Disinfecting the workplace regularly.
- Maintaining good indoor ventilation.
- Making sure that employees, suppliers and customers are aware of the employer's plans in the event of an outbreak.
- Ensuring sufficient supplies of appropriate masks, alcohol wipes, gloves, paper towels, thermometers, disinfectants, etc.
- If employees are required to travel to areas known to have the virus, whether such travel is necessary.

DURING AN OUTBREAK

- The steps the employer will take to ensure the safety of employees while at work during a COVID-19 outbreak include how an employer will identify risks of employees becoming infected and how to minimize such risks. The employer may also wish to seek advice from government/official sources as to what steps need to be taken, e.g., quarantine requirements.
- Communication strategies such as how and what information will be communicated to employees, suppliers and customers.
- Where employees will work, e.g., home, in the office or in alternative temporary offices.
- At what stage will the workplace be closed and who will decide that.
- How to deal with infection and/or deaths of colleagues, e.g., counselling.
- A mechanism for determining whether employees, suppliers and customers will be allowed access to the workplace, especially if they show symptoms of being infected by COVID-19.
- What to do with high-risk/exposure staff (e.g., pregnant, key employees and employees who travel).

AFTER AN OUTBREAK

- Ways to ensure that employees and customers have fully recovered before they are allowed back into the workplace.
- Rehabilitation for sick employees returning to the workplace.

Communication with employees and flexibility on enforcing requirements imposed on employees under their contract of employment will be important in maintaining employee relations and reducing anxiety and panic during an outbreak. Therefore, depending on the circumstances, employers may wish to:

- Discuss with staff the possibility of a workplace closure prior to closing.
- Allow employees to take annual leave or unpaid leave once sick leave has been exhausted.
- Allow employees to work from home.
- Explore salary reduction or unpaid leave as an alternative to termination of employment where business has slowed down.

Employers should make visitors to its offices aware of any health and safety hazards associated with entering the workplace before any intended visit, where reasonably practicable.

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