

STANDING DOWN EMPLOYEES

Can you stand down employees because of the impact of COVID-19 on your business?

In certain circumstances, section 524(1)(c) of the *Fair Work Act 2009* allows an employer to stand down employees during a period in which they cannot usefully be employed. This includes where there is a stoppage of work for a cause for which the employer cannot reasonably be held responsible. Many businesses are now considering whether these provisions can be used to stand down employees as a result of the impact of the coronavirus. In this article we will breakdown what employers need to consider when determining whether it is possible to stand down employees.

A stoppage of work for a cause for which the employer cannot reasonably be held responsible

It needs to be the case that there is a stoppage of work for a cause for which the employer cannot reasonably be held responsible. It's likely that work stoppages caused by the coronavirus situation would fit into this category, because most stoppages will stem from causes outside of the employer's control. However, it is not as clear what situations will be considered a "stoppage of work". We will give you our considerations on this, but with the caveat that we are heading into largely untested territory so much of this is yet to be fleshed out by the courts.

Work stoppages versus business downturns

A key distinction to make is the difference between a stoppage of work and a business downturn. A stoppage of work usually requires a particular event to be identified that caused work to be consciously halted for some reason. Ordinarily the stoppage would be for an identified period of time. The Explanatory Memorandum to the *Fair Work Bill 2008* used the following example:

"A flash flood has prevented employees at Beaver Corporation (Beaver) from entering the premises. It is likely that it will take two days before the premises are safe for employees to return to work. Beaver is able to stand down its employees during the period that the premises are flooded and are unsafe to work at (subject to other requirements set out in this Part)."

Compare this to a business downturn. A business downturn is more general and is often caused by the prevailing economic conditions. It is usually an ongoing situation and rather than for an identified period of time. Where employees are no longer needed because of a business downturn, it will usually be a redundancy situation rather than a stand down situation.

The Fair Work Ombudsman states on its website that employers can't stand an employee down just because the business is quiet or there isn't enough work. The Fair Work Ombudsman does not make the law, so this statement does not have legal force, but it gives you some idea of the thinking in relation to stand downs where there is a business downturn.

An example of a business downturn is where a helicopter company experienced a reduction in the work available for a particular class of helicopter. Among other things, the company tried to claim that they could stand down workers on the basis that it was a stoppage of work for which they could not reasonably be held responsible. The Commission found that the reduction in available work was not a “stoppage of work” and therefore a stand down was not permitted for that reason.

Qantas stands down 20,000 employees

Another example is Qantas’ recent decision to stand down about 20,000 of its employees. The airline was largely ground to a halt because of the efforts to contain the coronavirus. While it’s pretty clear that this situation was not in Qantas’ control, it gets grey when you consider whether it was a stoppage of work or a business downturn. Qantas CEO Alan Joyce was quoted as saying: “*The efforts to contain the spread of coronavirus have led to a huge drop in travel demand, the likes of which we have never seen before*”. Qantas has taken the position that this is a stoppage of work, but you do have to wonder how a drop in demand is any different to the helicopter company that saw a reduction in the work available for its helicopters.

We’ll see whether the unions challenge the Qantas stand down, but it does illustrate how this area is in need of clarification by the courts. You also have to ask: if Qantas can stand down employees because of a lack of demand, can other businesses not do the same thing? The situation is a little more complicated with Qantas, because they have enterprise agreements with stand down provisions, but similar considerations still apply.

Government mandated closures

The situation is different if the closure of a business has been caused by a government mandated closure. On 22 March 2020 the Prime Minister announced that pubs, clubs, restaurants, cafes, gyms, entertainment venues, cinemas, casinos, nightclubs and places of worship would be required to close. A closure as a result of these requirements would almost certainly be considered a stoppage of work. It is not the result of a business downturn, but rather of action that has been taken by the government.

Scenarios related to the coronavirus

Let’s look at some different scenarios to help clarify what will be considered a stoppage of work:

- If a workplace is forced to close because of a government shut down, it would be a stoppage of work for which the employer cannot reasonably be held responsible.
- If a workplace is shut down because staff were found to be infected by the coronavirus, it would be a stoppage of work for which the employer cannot reasonably be held responsible. However, if the employees are able to work remotely they could not be stood down because they can still be usefully employed (more on this below).
- If a project is suspended because equipment supplies have been curtailed, it could be a stoppage of work for which the employer cannot reasonably be held responsible. The stoppage would last until the equipment becomes available and the project commences again.

- If a project is suspended because of the travel restrictions it could be a stoppage of work for which the employer cannot reasonably be held responsible. The stoppage would last until travel restrictions are lifted and the project can continue again.
- If company A has been supplying labour to company B and company B states that it does not require labour to be supplied by company A until further notice, it could be considered a stoppage of work.
- If there is no work to do because a contract was cancelled it may be a stoppage of work for which the employer cannot reasonably be held responsible. However, it would be a fine line as to whether this is a stoppage of work or a business downturn. In our view, there would at least need to be a direct connection between the cancellation and the work stoppage, and there would need to be some expectation that the employees could be usefully employed in the near future.
- If there is not enough work to do because of a slow-down caused by the overall economic situation, it would ordinarily be a business downturn and therefore not a stand down situation. However, as noted above in relation to Qantas, it will depend on whether the unique situation presented by the coronavirus means that a downturn in demand will be sufficient to enable the stand down provisions to be used.

Can the employee be usefully employed?

To be able to stand down an employee it must be the case that the employee cannot be usefully employed by the employer. The Explanatory Memorandum to the *Fair Work Bill 2008* put it this way:

“If the employer is able to obtain some benefit or value for the work that could be performed by an employee then the employer would not be able to stand down an employee.”

This means employers need to consider whether there is other work that employees could do. The work does not need to be work that the employees ordinarily carry out but would need to be within their skills and experience. Also, if the reason for the work stoppage is that the workplace has closed down, employers need to consider whether remote working is possible. If it is possible for an employee to keep working, it will not be possible to stand them down.

Fairness considerations

Section 526 of the *Fair Work Act* allows an employee who has been stood down to dispute the stand down by applying to the Fair Work Commission to deal with the dispute. If this occurs the Commission must take into account fairness between the parties concerned. This opens the door for the Commission to assess whether a stand down is appropriate by reference to overall considerations of fairness.

These provisions have been used by the Commission to find that a stand down that lasted longer than two months was too long and therefore unfair. The Commission found that the stand down was not permitted and left it to the parties to agree whether the person would be employed elsewhere in the business or would be made redundant.

This dispute resolution mechanism effectively allows the Commission to review the fairness of any aspect of a stand down situation. One way it could be used is to place limitations on

the length of time that employees can be stood down, such as in the case mentioned above. While the Commission will consider the employer's circumstances, it will also take into account the fact that an employee is not entitled to be paid while they are stood down. The Commission could find that fairness requires that an employee be made redundant and paid their redundancy entitlements, rather than be subjected to stand down without pay for an extended period of time.

Payments and accruals during stand down

Employers do not have to pay employees while they are stood down under the Fair Work Act provisions. Of course, an employer can agree to pay the employee during this time if it is able to.

Employees' leave entitlements will continue to accrue during a period of stand down. Time spent on stand down will also count as service for the purpose of calculating service-based entitlements, like minimum notice periods and redundancy entitlements.

Taking leave during stand down

An employee can take leave during all or part of a period of stand down, which includes annual leave or long service leave. During that time, they will be taken to be on leave rather than stood down.

Cost implications of stand down versus redundancy

Where stand down is an option, employers will often be looking at the choice of whether to stand employees down or make their positions redundant. For businesses with cash flow issues stand down could be the more attractive option. The following are the cost implications of each option:

- If an employee is stood down, there will be no immediate cost and the employer can stop paying the employee's salary. However, the employer could use paid leave entitlements and continue to be paid that way.
- If an employee's position is made redundant, there will be an immediate cost to the employer but no ongoing cost. Employers with 15 or more employees will need to make redundancy payments to employees with at least 1 year of service. The payment must be per to the [NES redundancy scale](#). They will also need to provide the employee with notice or payment in lieu of notice. The notice period must be at least the [NES minimum notice period](#) or their contractual notice period if it is higher. Employers will also need to pay out any accrued but untaken annual leave and make a long service leave payment if the employee qualifies.

Employers should keep in mind that a stand down cannot last forever and there could become a point where they need to make the employee's position redundant (eg if the length of the stand down is unfair). If that occurs, the employer will need to pay the employee their redundancy entitlements, which will include any entitlements that have accrued while the employee has been stood down.

If an employee resigns while they are stood down (eg if they find alternative employment) there would be no entitlement to redundancy pay. The employer would just need to pay the employee their accrued annual leave and, if they qualify, long service leave.



It is also possible for an employer to apply to the Fair Work Commission for a reduction in the amount of redundancy pay it has to pay employees if it is unable to pay employees their usual entitlements.

Working elsewhere during stand down

During a stand down period employees remain employed and bound by all of their usual obligations as an employee. This means they would not usually be permitted to work elsewhere and if they did it could constitute a termination of their employment. However, it is also possible for an employer to agree with employees to work elsewhere while they are stood down. If this occurs, employees should be reminded that they must still act in the best interests of the employer and avoid any conflict of interest situations.

Consultation requirements

Most awards and enterprise agreements have provisions that require employers to follow a consultation process when they have made a decision to make major changes that are likely to have a significant effect on employees. Whilst it is relatively untested whether consultation obligations apply to a decision to stand down employees, employers should consider whether there are consultation provisions that apply. If there are, before employees are stood down it may be necessary to give them relevant information about the changes in writing, discuss the changes with the impacted employees and promptly consider any matters raised by the employees.

Stand down provisions in enterprise agreements and employment contracts

Some enterprise agreements and employment contracts contain provisions allowing employers to stand down employees. If they cover the circumstances covered by the Fair Work Act, those provisions will apply instead of the Fair Work Act provisions. This includes any provisions dealing with whether an employee needs to be paid during a period of stand down. It is also possible for an enterprise agreement or employment contract to allow stand down in a wider range of circumstances. Enterprise agreements or employment contracts may also contain additional procedural requirements for standing down employees that would need to be followed.

Stand down letter

If an employee is stood down it should be communicated to them in writing. Attached to this article is a stand down letter template that employers can adapt to their situation.

Other workforce reduction options

If it is possible, one way to avoid the uncertainty associated with standing employees down is to agree with the employees to take a period of unpaid leave. This would have a similar effect to a stand down (except that the employee will not continue to accrue leave entitlements) and avoid the risks associated with standing an employee down.

Other actions that employers can take to reduce their workforce in response to the coronavirus situation are set out in our guide to [Workforce Reduction Options](#).

Need help?

We are able to help you manage your workforce during this difficult time. Contact [Sean Melbourne](#) if your business needs assistance. Also, check out other COVID-19 resources on the Source website: <https://www.sourcelegal.com.au/covid-19-response/>.



Stand down letter template

<date>

<employee name>
<employee address>
<employee address>

By email: <email address>

Dear <employee name>,

Stand down from your employment with <employer name>

As you know, we are in very uncertain times that are causing significant disruption to our business. Unfortunately, we have had to make the difficult decision to stand down some of our employees.

As a result of <reason for work stoppage> there has been a stoppage of work and we will not be able to usefully employ you in our business for a period of time. This situation is beyond our control.

We have considered whether it is possible for you to do other work in our business or work from home, but at the moment that is not possible. Therefore, regrettably, we will be standing you down for the period of the stoppage of work.

The period of stand down will commence on <date>. We will let you know when the period of stand down will end and you will return to work.

During the period of stand down you will not be paid your normal wages. However, you are welcome to take any accrued annual leave or long service leave that is available to you. You will also continue to accrue leave while you are stood down.

If you have any questions or would like to discuss anything, please don't hesitate to contact <name>.

Yours sincerely,

<name>
<employer name>