

## COVID-19 WEBINAR Q&A

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Below are high-level responses to some of the questions raised in the COVID-19 Webinar on Wednesday 25 March 2020. Please contact us for specific advice.

We consolidated some similar questions relating to Stand Downs and Closures. We recommend you read through all questions and answers within this Q&A as some questions provide more detailed information than others and may more closely relate to your particular circumstances.

Please note this information may be subject to change as the crisis continues to develop.

### **Stand Downs and Closures**

#### **Is there a technical difference between standing down and redundancy?**

Yes, they are two very different things. During a stand down in accordance with the Fair Work Act, employees are still employed and continue to accrue entitlements. If an employee's position is made redundant, their employment has been terminated.

#### **You discussed businesses with less than 15 employees, how about businesses with 50 employees in terms of suitable/viable options standing down employees or reducing their hours?**

The size of the business will not have any bearing on whether the business can stand down employees in accordance with the Fair Work Act. As a refresher, employees can be stood down without pay under the Fair Work Act if they can't be usefully employed because of a stoppage of work for any cause for which the employer can't reasonably be held responsible (e.g. due to an enforceable government order, a lack of vital supply or a large portion of workforce self-isolating with the result that the remaining workforce cannot be usefully employed). Employers should exercise the option to stand down cautiously, because if they stand down their employees unlawfully, they will likely be able to recover unpaid wages.

In the first instance we suggest that employers consult with employees regarding the taking of annual leave, long service leave and/or leave without pay.

In regard to reduction of hours, this can be achieved by mutual agreement with the employee.

The distinction being made with small businesses was that employees of small businesses who are terminated within their minimum employment period (i.e. 12 months for small businesses) will not be eligible to lodge an unfair dismissal claim. Also, small businesses (less than 15 employees) are exempt from the requirement to pay redundancy pay.

### **What are your thoughts about wholesalers supplying resellers staying open?**

We don't know what the government directions will be at this stage. Keep an eye on updates from the Australian Government which includes updates from State and Territory Governments - <https://www.australia.gov.au/>. We will also endeavor to keep members updated as things progress.

### **So if you run both a showroom for sales and a separate workshop for fitting, you could potentially be able to remain open with your workshop?**

This will depend on the orders/directions from the government. However, if part of your business is ordered to close, you may be able to stand down those staff who cannot be usefully employed. Those who can be usefully employed may continue to work.

### **If we have to close/stand down do we how best provide workers with entitlements? If we choose to close, do we need to continue to pay our staff their normal wages? or can we ask them to take their paid leave, or leave without pay?**

It will depend on the circumstances in which you close / stand down. For instance, if you are able to stand your employees down without pay in accordance with the Fair Work Act (e.g. due to an enforceable government order, a lack of vital supply or a large portion of workforce self-isolating with the result that the remaining workforce cannot be usefully employed), then you do not need to pay any notice or leave entitlements. You may elect to pay entitlements to an employee instead of or prior to standing them down. An employee is not taken to be stood down during a period when the employee is taking paid or unpaid leave that is authorised by the employer or the employee is otherwise authorised to be absent.

However, as above, if you are not able to rely on the stand down provisions in the Fair Work Act but want to close your business voluntarily, we recommend that you try to reach an agreement with your employees in relation to taking leave (paid or unpaid) or working from home while the business is closed.

### **If we believe that we might need to shut down the business in the future - can we give 4 weeks' notice of a shut down (according to the award) and pay employees via their Annual Leave entitlements and for employees without entitlements left over are on unpaid?**

In accordance with clause 29.12 of the VMRSR Award, employees can be directed to take annual leave during a close-down. They have to be given at least 4 weeks' notice before the leave needs to be taken.

The Fair Work Ombudsman refers to a close-down or shut down as "when a business temporarily closes during slow periods of the year, such as Christmas and New Year." However, the clause does not appear to be expressly limited to such periods or prohibit its use in these circumstances.

The current scenario with COVID-19 is unprecedented and while there is no clear authority to draw on as to whether clause 29.12 can be relied on in the current circumstances, a representative for the Fair Work Ombudsman indicated that it could when we contacted them for their opinion.

In any event, separate to this clause, employers can negotiate and reach agreements with their employees to take a period of leave (paid or unpaid) during a shut down. Parties may agree to take leave immediately. We recommend employers explore all options with employees.

Clause 29.12 of the VMRSR Award states:

29.12 Annual close-down

Where an employer closes down a plant, or a section or sections thereof, for the purpose of allowing annual leave to all or the bulk of the employees in the workplace or section or sections concerned, the following provisions apply:

(a) An employer may by giving not less than four weeks' notice of their intention to do so, stand off for the duration of the close-down all employees in the workplace or section or sections concerned. In such event the employer may allow to those who are not qualified for the full entitlement to annual leave for the total close-down period paid leave up to the total amount of leave accrued as at the commencement of the close-down. Such leave will be at the appropriate rate of wage as prescribed in clause 29.9. The balance of the close-down for which the employee does not have sufficient accrued leave to cover such period will be leave without pay.

(b) An employee who has accrued enough leave for the close-down period must be allowed the leave, and be paid at the appropriate wage rate in clause 29.9.

(c) An employer may close-down for one or two separate periods for the purpose of granting annual leave in accordance with this subclause. If the employer closes down in two separate periods one of those periods must be for a period of at least 21 consecutive days.

(d) Provided that where the majority of the employees in the workplace or section or sections concerned agree, the employer may close down in accordance with this subclause in two separate periods neither of which is of at least 21 consecutive days or in three separate periods. In such cases the employer must advise the employees concerned of the proposed dates of each close-down before asking them for their agreement.

Over the weekend, the Fair Work Commission made temporary amendments to the Clerks Award in response to COVID-19. One of the temporary amendments included reducing the notice period for a close down to take annual leave to 1 week. As at the time of writing, no such amendments have been made to VMRSR Award.

### **What do we need to demonstrate a mutual agreement?**

If parties have genuinely reached a mutual agreement, it should be recorded in writing. For instance, if an agreement has been reached to reduce hours, there should be a written agreement to vary hours for a period of time. This can take the form of a simple letter prepared by the employer and signed by both parties or exchanged and confirmed via email.

### **If there is a government mandated shut down of everything, and we are deemed an essential service, but there is no work (as everything is shut down) surely we would fit the criteria of something the employer has no control over?**

Employers cannot generally stand down employees simply because of a deterioration of business conditions. While the downturn isn't within the control of businesses, this isn't the only criteria for standing employees down without pay.

Employees and employers are encouraged to work together to find appropriate solutions. Other options that an employer may consider instead of stand down include:

- seeking employees' agreement to take a period of paid or unpaid leave;
- directing employees to take paid annual leave (see Award);

- negotiating with employees to change regular rosters or hours of work (see Award re consultation requirements); and
- terminating the employment of the employees, in which case the employer may have to provide redundancy pay if they are not a small business.

**If a shutdown is enforced that qualifies stand downs without pay, is it beneficial to pay employees annual leave at all even if only a partial amount of their regular pay by agreement?**

This is a decision for the business and its employees. If the employee has requested to take their annual leave and/or the business can afford to pay the annual leave instead of standing down the employee without pay, the business can do so.

As at time of writing the government has flagged wage subsidies for employees who have been stood down the details of which remain unclear. We will provide updates as more details become available.

**Is there a difference with stand-down entitlements if your employees are under the federal award?**

No, there are no additional provisions in the VMRSR Award for stand downs.

**So the key is whether the work is defined as a stoppage or a shortage of work? A stoppage of work being a total shutdown because of a temporary closure versus a shortage of work where redundancy can be offered? And that then determines how employees are treated?**

If an employee cannot be usefully employed because of a “stoppage of work” for any cause for which the employer can’t reasonably be held responsible, the employer may be able to stand them down without pay under the Fair Work Act.

In the event of a shortage of work, that alone won’t necessarily entitle the employer to stand down an employee without pay under the Fair Work Act. Instead, the employer should consider other options instead of a stand down (e.g. agreements to take leave, changes to rosters or hours of work etc.). If there are none, the employer may need to consider redundancies.

**What if you don’t have the cash surplus to pay all staff entitlements and you are forced to shut down?**

If the business is required to shut down (e.g. due to an enforceable government order, a lack of vital supply or a large portion of workforce self-isolating with the result that the remaining workforce cannot be usefully employed) you may be able to stand your employees down without pay.

In the event that you aren’t able to rely on the stand down provisions but want to close, it is best to consult with your employees around taking a period of unpaid leave.

**Is there an expectation on a shut down that staff would still be paid?**

As mentioned above, if the business is required to shut down (e.g. due to an enforceable government order, a lack of vital supply or a large portion of workforce self-isolating with the result that the remaining workforce cannot be usefully employed) you may be able to stand your employees down without pay. If an employer unlawfully stands down employees without pay, the employees will likely be able to recover unpaid wages.

**Do employees continue to accrue all leave when stood down without pay?**

Yes. Employees accrue leave as normal for the duration of the stand down. However, in a circumstance where the employer and employee have agreed to a period of leave without pay the employee does not continue to accrue entitlements.

**If the business is shut down as a consequence of a full lock down then why would you be concerned about paying wages. Wouldn't the business move to a standing down of employees at this stage?**

Yes. Employers are not required to make payments to employees for the period of a stand down but may choose to pay their employees.

Again we note that, as at time of writing the government has flagged wage subsidies for employees who have been stood down the details of which remain unclear. We will provide updates as more details become available.

**If the government says total lockdown but we are classified as an essential service but not needed in our area, can we choose to close?**

Yes. However, you may not be able to rely on the stand down provisions (e.g. due to an enforceable government order, a lack of vital supply or a large portion of workforce self-isolating with the result that the remaining workforce cannot be usefully employed). Meaning that you may need to come to alternate arrangements with your employees (e.g. take a period of paid or unpaid leave).

## **CONTACT EMPLOYER ASSIST**

If you require further advice, please contact Employer Assist on **1300 735 306** or email [aaaa@employerassist.com.au](mailto:aaaa@employerassist.com.au)

As we are experiencing a high volume of calls and we are taking the time to talk through multiple scenarios and options with members it may take us a little longer to respond to your telephone enquiries. As such, it is our preference if you are able to email enquiries in the first instance and we will call you if we require more information.

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