

## 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 Termination and Redundancy. 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.

### **Termination/Redundancy**

**We have an employee who has been with us for 3 weeks. Are we able to terminate their employment? Would we have to give them 1 weeks' notice and would any holiday pay be applicable?**

For the purpose of the below advice, we will assume this employee is a permanent employee.

Some employers may need to terminate employees during this difficult time (e.g. due to downturn). An employee who has been employed for 3 weeks is within the minimum employment period/qualifying period set out in the Fair Work Act (i.e. 6 months or 12 months for small businesses with less than 15 employees). This means that the employee will not be eligible to lodge an unfair dismissal claim. This does not mean that the employer can take unlawful adverse action against the employee. However, the employer may terminate due to the downturn associated with COVID-19.

Since the employee has been employed less than 12 months, they aren't eligible for redundancy. Also, small businesses are exempt from the requirement to pay redundancy pay.

Unless there is a higher notice period specified in the employee's contract of employment, the statutory notice period will be 1 week. The employee would have accrued some annual leave during their employment which must be paid out on termination including leave loading.

You can use the Fair Work Ombudsman's annual leave calculator - <https://calculate.fairwork.gov.au/Leave>

**I have a full-time employee that was nearing termination prior to the COVID-19 issue. Has had 2 written warnings. If required is it better to terminate on the grounds of performance rather than shortage of work? Is there less likelihood of problems later?**

This entirely depends on the performance issues including their seriousness, the employee's length of service, when the warnings were issued, what steps have been taken to address the performance issues etc. We recommend that you contact us for tailored advice.

**If we have employees that are in a probationary period, and work has slowed down and we are trying to minimise cost, can they be terminated within the probationary period due to shortage of work?**

Yes, however, usual obligations around consultation, notice periods etc. will continue to apply. We recommend that you contact us for specific advice before proceeding.

**If we currently have 18 employees and make 4 redundancies now and review it again in a few months (2 months or more) and need to do further redundancies. Does the less than 15 employee threshold count from the first round of redundancies (being 18 employees) or is it the number of employees at that time i.e. 14 Employees?**

The exclusion in section 121(1) of the Fair Work Act states:

(1) Section 119 [Redundancy Pay] does not apply to the termination of an employee's employment if, immediately before the time of the termination, or at the time when the person was given notice of the termination as described in subsection 117(1) (whichever happened first):

- (a) the employee's period of continuous service with the employer is less than 12 months; or
- (b) the employer is a small business employer.

To figure out whether the business is a small business, count all employees employed on the earlier of immediately before the termination or at the time the employee was given notice. This includes:

- the employee and any other employees being terminated at that time
- regular and systematic casual employees employed by the business at the time of the redundancy (not all casual employees)
- employees of associated entities, including those based overseas.

If you are not making the employees redundant at the same time, you may be able to rely on the small business exemption.

**If we need to terminate or make redundant then we lose our workforce and then when this is over how do we continue our business without employees**

As an alternative to redundancy, we encourage employers to work with employees to find an appropriate solution (e.g. mutual agreement to take paid or unpaid leave, reduction in hours etc.) during this difficult time.

## **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.

*This document is intended for general information purposes only and should not be regarded as legal advice. Please contact Employer Assist by Industry Legal Group if you require legal advice. 3466-1515-7519, v. 1*