

# Standing Down Staff



A downturn in business because of COVID-19 does not necessarily mean you can stand your employees down without pay.

Stand down provisions can generally only be exercised in limited circumstances. The first thing you will need to do is check whether you have specific stand down provisions in an **Enterprise Agreement** or any **Contract of Employment**.

If you do, you should contact ERAC or our Workplace Relations legal team and get specific advice on your provisions and the options available to you.

If you do not, then the Fair Work Act stand down provisions are likely to apply and in the context of COVID-19, it is necessary that:

- a. There is a **stoppage** of work for any cause which the employer cannot reasonably be held responsible; and
- b. An employee cannot be **usefully employed** because of that stoppage.

A downturn in trade, difficult business conditions or other economic challenges resulting from the COVID-19 situation are unlikely to satisfy these requirements, because while they may slow down your business operations or reduce the amount of work that needs to be done, unless it has resulted in a complete stoppage of work, then the first limb will not be satisfied.

This does not need to be a stoppage for your entire business, it may be a stoppage for one part of your business.

However, if this does apply to part of your business, your entire business will need to be considered before you can stand down any employees. You will need to consider whether employees can be usefully employed elsewhere in your business. This can be on a temporary basis and does not need to be doing their ordinary role or duties.

Being usefully employed has been described by courts and tribunals as a circumstance where the business is able to obtain some benefit or value for work that could have been performed by an employee.

The business would need to demonstrate that it took reasonable steps to find useful employment for their employees but does not require them to make significant changes to their business structure to create useful employment.

For example, if you are in the hospitality industry, running a bar that has to close following the Australian Government's direction but your business also sells take-away alcohol and food, then you may be able to usefully employ staff to assist with any increased demand in those other areas, even though that is not what they were previously employed to do, particularly in light of recent amendments to the Hospitality Industry (General) Award to provide flexibility for reduced hours and employees to work across different classifications.

Conversely, if you run a bar that is only licenced to sell alcohol for on-premise consumption and has no food preparation facilities or any other avenue to usefully employ your staff, then following the Australian Government direction to close, you are more likely to satisfy the requirements of the Fair Work Act stand down provisions.

If you incorrectly stand employees down without considering all of the options, it is open to an employee to make a claim for a denial of contractual benefits claim or back payment of wages or to file an application for the Fair Work Commission to deal with a stand down dispute.

Employers should also make every effort to find alternatives and mitigate the adverse effects of a stand down, such as offering any accrued leave entitlements to the employee.

If you are suffering a downturn in business because of COVID-19, but do not meet the criteria for a stand down, there are other options you could consider including:

- a. Explore temporary adjustments to rosters that better align with any downturn and reduce the business's exposure to penalty or overtime rates – but be sure to check any relevant award or enterprise agreement for consultation requirements.
- b. Implement flexible working arrangements that may benefit both the business and the needs of individual employees. For example, wherever reasonably possible, allowing an employee to work from home.

- c. Your employees may agree to a reduction in hours. For example, your workforce may wish to temporarily convert to a three or four-day week, or seek job sharing arrangements. Ensure that any agreement is agreed to with each individual employee and that any temporary variation to contracts are recorded.
- d. Seek an agreed temporary reduction to salary or wages, provided that the temporary salary or wage meets the requirement minimum award or enterprise agreement rate
- e. Voluntary retirement may be an option which allows those employees the opportunity to leave the business, which may assist in delaying or stopping the need to make forced redundancies on employees.
- f. Consider redistribution of your workforce; more significantly impacted parts of your business may have skills that can be temporarily redistributed to those less impacted.

Before implementing a stand down, redundancies or any of the above changes, you should contact ERAC or our Workplace Relations legal team for further advice on your individual circumstances.