

Employment risk planning in a time of COVID

Employers in Victoria are grappling with the major impact of the COVID-19 pandemic on their operations. Headlines such as “Hundreds of Hospital Staff in Isolation After Outbreak” appear too regularly.

Situations like this give opportunity to pause and consider “what challenges might Western Australian employers face” in a similar situation. In this article, we offer several thoughts that might help inform contingency and crisis planning for Western Australian health and aged care employers, small and large.

Unprecedented COVID challenges

We can only imagine the tremendous difficulties of dealing with a situation in which large numbers of employees or patients are infected with COVID-19 as well as dealing with a large workforce concerned about their health, their jobs and their patients.

Here in Western Australia, we have not had to face a challenge of this magnitude, however, if it were to occur, it causes us to reflect on some of the key employment issues an employer may face.

Some employment considerations

Employees will invariably need leadership, support, information and reassurance to deal with the challenges they could face in a COVID-19 outbreak.

In a fast-moving situation, however, the ability to provide leadership and guidance to staff will often depend on preparation and planning. Some obvious employment law considerations will be:

- What are my staff's leave entitlements?
- Am I required to report cases of COVID-19 to WorkSafe WA?
- Am I able to replace affected staff on a temporary basis?
- If I have to close down all or part of my facility, what are my options for dealing with staff?

We have written on many of these topics previously and summarise these considerations in the below summaries.

Should employers:

Report?	The Western Australian Occupational Health & Safety Regulations 1996 do not currently require mandatory COVID-19 reporting. Other guidance and reporting requirements apply however (see below).
Grant leave to an affected employee?	As well as paid personal/carer's leave, many awards entitle employees to unpaid pandemic leave. Some aged care employees are also entitled to paid pandemic leave (see below).
Replace critical staff?	Employers may employ additional staff to maintain operations. However, we recommend that employers record their casual, fixed term and temporary hiring arrangements in written employment contracts.

Should employers:

Manage leave for other employees?

Many federal awards have been amended to enable employer/employee agreements for taking annual leave at half pay. Record keeping requirements apply below (see below).

Give a JobKeeper enabling direction?

Employers may give directions about the duties an employee performs and where they work. Also, employees must not unreasonably refuse their employer's request to change workdays and times.

Use a JobKeeper stand-down?

Eligible employers may stand-down eligible employees who cannot be usefully employed because of business changes attributable to COVID-19 or government initiatives to slow COVID-19. However, employers must first satisfy procedural requirements.

Use a non-JobKeeper stand-down?

Some awards and the *Fair Work Act 2009* allow stand-downs if employees cannot be usefully employed for any cause the employer cannot be held reasonably responsible.

Further information

Reporting

Guidance given by Worksafe WA and Safe Work Australia recommends Western Australian Employers should contact the WA Health Department and follow their advice about notifying close contacts of an employee who has a confirmed or suspected case of COVID-19.

Additionally, a number of quarantine and isolation directions operate in Western Australia which require employees to quarantine or isolate if they have:

- a diagnosed case of COVID-19; or
- been informed they have had close contact with a person who has a diagnosed case of COVID-19; or
- been directed to quarantine whilst awaiting a COVID-19 test result.

An employee absent from work to comply with quarantine and isolation requirements should notify their absence to their employer if seeking leave.

Further information

Personal/carer's and pandemic leave

Western Australian based and national system employees are entitled to paid and unpaid forms of **personal/ carer's leave** when they are unable to work through sickness, or if a member of their household requires care and support.

Many federal awards have been modified this year to provide two weeks of **unpaid pandemic leave** for full-time, part-time and casual national system employees who are:

- required to self-isolate by government or medical authorities; or
- prevented from working due to measures taken by government or medical authorities in response to the COVID-19 pandemic.

The Western Australian Industrial Relations Commission COVID-19 General Order operates until 31 March 2021 and provides unpaid pandemic leave to Western Australian state system employees whether they are covered by a Western Australian state award or not. More information can be found [here](#).

Paid pandemic leave (for aged care employees)

The Aged Care Award 2010, Health Professionals and Support Services Award 2020 and the Nurses Award 2010 have been temporarily changed to include two weeks **paid pandemic leave** for employees working in aged care.

The Fair Work Commission has also indicated it may extend the same two weeks paid pandemic leave to other health care employees in the future.

More information about paid pandemic leave can be found [here](#).

Annual leave flexibility

Federal awards have been temporarily modified to enable full-time employees, part-time employees and their employers to make written agreements for taking twice as much annual leave at half pay.

The Western Australian Industrial Relations Commission COVID-19 General Order also enables the same agreements for state system employees.

More information can be found [here](#).

JobKeeper enabling directions – Employee duties and where work is performed

JobKeeper amendments to the *Fair Work Act 2009* and the Western Australian Industrial Relations Commission's "COVID-19 JobKeeper General Order" allow qualifying employers to give directions that change:

- the duties employees must perform; and
- where employees perform their work.

We have written about these change previously including qualifying requirements [here](#) and [here](#).

Further information

JobKeeper enabling requests – When work is performed

JobKeeper amendments to the *Fair Work Act 2009* and the Western Australian Industrial Relations Commission’s “COVID-19 JobKeeper General Order” allow qualifying employers to ask qualifying employees to change the **days and times** they work.

Employees must consider and not unreasonably refuse an employer’s request.

Qualifying requirements apply – see [here](#) and [here](#).

JobKeeper enabling stand-downs

JobKeeper amendments to the *Fair Work Act 2009* and the Western Australian Industrial Relations Commission’s “COVID-19 JobKeeper General Order” allow qualifying employers to stand-down qualifying employees or reduce their hours because of business changes attributable to:

- the COVID-19 pandemic; or
- Government initiatives to slow down COVID-19 transmission.

Qualifying employers must comply with a number of **procedural steps** and must **qualify for JobKeeper**, be enrolled in the scheme and entitled to receive JobKeeper payments for the employee being stood down.

Our previous blog on JobKeeper enabling stand-downs can be found [here](#).

Non-JobKeeper stand-downs

National system employers can use the stand-down provisions of the *Fair Work Act 2009* in circumstances where:

- an employee cannot be usefully employed because of a stoppage of work for any cause which the employer cannot reasonably be held responsible; and
- there is no enterprise agreement or employment contract provision applying to the parties that deals with stand-downs.

If an enterprise agreement or employment contract provision applies, the national system employer should comply with the requirements of that provision.

For **Western Australian system employers** – general stand-downs must be authorised by an applicable state award or industrial agreement as there are no general stand-down powers contained in Western Australian employment legislation.

We have covered this in a previous blog [here](#).

Further changes coming

When it extended paid pandemic leave to particular award covered employees in the aged care sector, the Fair Work Commission disclosed it would continue to monitor the suitability of applying paid pandemic leave to other health awards. That application is still currently on foot and able to be re-enlivened.

At the time of writing, the application has been listed for a further hearing on 21st and 22nd September, after which further award variations may be possible.

Additionally, the Australian government continues to make changes to the JobKeeper scheme. In legislation currently before parliament, as well as reducing the rate of future JobKeeper payments and extending the operation of the JobKeeper scheme, the government has indicated JobKeeper enabling directions given by an employer may be challengeable if the directions have an unfair impact on some employees compared to others.

Another forecast change is the ability for employers who were eligible for JobKeeper, but are no longer eligible, to be able to retain some JobKeeper enabling directions and labour flexibilities, provided business turnover has declined by 10% or more compared to relevant quarters last year.

Panetta McGrath Lawyers will continue to publish updates as the situation with awards and legislation becomes clearer.

Conclusion

The headline described at the start of this article, where COVID-19 cases forced the isolation of hundreds of hospital workers – is an extraordinary and very difficult event for the affected employer, employees and community.

It is the type of event that many employers in the health sector will look at and wonder if it could happen here, and if it did – how would we respond.

In the case of COVID-19, there are multiple options for how employers might respond to a business continuity event like this. This article has described some of those options in a very high-level way. The type of responses that an employer might use however will depend on their individual circumstances, whether they operate in the state or federal system and the state of COVID-19 laws and directions at the time.

As most employer's appreciate, the situation with COVID-19 is fast moving at times and our employment laws are developing constantly to meet those fast-moving challenges.

Do you have any questions?

If you would like more information, or to discuss employment options for business continuity planning, our Employment and Workplace Relations team would be happy to help.



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