

STAND DOWN OF EMPLOYEES

WHAT IS A STAND DOWN OF EMPLOYEES & DOES THE GOVERNMENT'S SHUTDOWN TRIGGER THE STAND DOWN PROVISIONS?

A stand down of full-time and part-time employees can arise where there is stoppage of work for which the employer cannot reasonably be held responsible for, **AND** the employees cannot otherwise be usefully employed.

The shutdown of hospitality venues by the Government represents a stoppage of work for which the employer cannot reasonably be held responsible for.

Provided that the employees cannot be usefully employed, it is the Association's view that the Government's shutdown of hospitality venues triggers the operation of the stand down of employee/s provisions in the *Fair Work Act 2009*.

A period of stand down will count as service, including towards the minimum period of employment.

Importantly, the standing down of employees should be the last option and only where the employee cannot be usefully employed. The Australian Hotels Association and the United Workers Union sought changes to the **Hospitality Industry (General) Award 2010** which may provide alternative options for employers.

WHAT IF AN ENTERPRISE AGREEMENT OR EMPLOYMENT CONTRACT SAYS DIFFERENTLY?

Enterprise Agreements or employment contracts may provide for alternative stand down provisions. If this applies to your circumstances, you must refer to, and apply, the stand down provisions in the Enterprise Agreement or contract.

CAN I STAND DOWN CASUAL EMPLOYEES?

No, casual employees are not stood down. Consistent with the nature of casual employment, casual employees should be advised that there is no further work for them at this time.

CAN A STAND DOWN APPLY IF PART OF THE BUSINESS IS STILL OPERATING ACCOMMODATION OR TAKEAWAY/DELIVERY SERVICES?

Yes. A stoppage of work triggering a stand down can apply to a part or parts of a business which have been shut down, even if another part of the business continues to operate. A stand down can also be applicable to certain employees within those parts of the business still operating with reduced capacity, because those employees cannot be usefully employed.

WHAT HAPPENS DURING A STAND DOWN OF EMPLOYEES?

During a stand down the employees do not attend work and the employer is not required to make payments to employees for the period of the stand down.

HOW LONG CAN A STAND DOWN PERIOD LAST?

There are no time limits specified in the *Fair Work Act 2009*. The duration of any stand down period will be referable to the stoppage of work and whether or not the employees can be usefully employed. For example, while a business may close for 8 weeks, it may be able to usefully employ some or all of the employees after 7 weeks in order to set-up or prepare for re-opening.

However, the current Government shutdown of hospitality venues in response to the Coronavirus COVID-19 Pandemic is likely to result in many venues closing and implementing a stand down of employees for an indefinite period of time.

DO I NEED TO INFORM MY EMPLOYEES IN WRITING?

An employer introducing a stand down will be a distressing and confusing period for many employees. Therefore, it is recommended that written notification is provided.

DO I NEED TO KEEP MY EMPLOYEES UPDATED?

As stated above, a stand down will be a distressing and confusing period for employees. It is recommended that you maintain regular communication and updates with your employees.

IS A STAND DOWN THE SAME AS A TERMINATION?

No, they are different concepts. During a stand down, an employee remains employed.

DO I NEED TO GIVE STOOD DOWN EMPLOYEES A SEPARATION CERTIFICATE?

No, because a stand down is not a termination, an employee who is stood down should be given a stand down letter. A separation certificate is only given to an employee when their employment is terminated.

If providing a separation certificate during a stand down, an employee may later claim to seek that their employment was terminated unfairly. This leaves an employer open to a claim of Unfair Dismissal with the Fair Work Commission.

AN APPRENTICE WHO HAS BEEN STOOD DOWN CAN STILL ATTEND CLASSES AS PART OF THE APPRENTICESHIP. DO I HAVE TO PAY THEM?

Yes. Normal payment arrangements will apply in this situation. Please note that when the apprentice is at class (which could be conducted on-line) they are working – as per their employment and training contracts.

Therefore, the employee will need to be advised that for attendance at a class, they are not on a period of stand down, and that when the class finishes, the stand down is reinstated.

If you are considering suspending training obligations under the apprentice training contract, you should contact the relevant apprenticeship or training authority.

CAN AN EMPLOYERS'S DECISION TO STAND DOWN EMPLOYEES BE CHALLENGED?

Yes. An employee, a union or Fair Work Inspector can file a stand down dispute in the Fair Work Commission.

INTERACTION OF PUBLIC HOLIDAYS AND LEAVE DURING A PERIOD OF STAND DOWN AND/OR BUSINESS SHUT DOWN

DOES ANNUAL LEAVE AND PERSONAL LEAVE ACCRUE DURING A PERIOD OF STAND DOWN?

Yes, the period of stand down is considered service for the purposes of the Fair Work Act 2009. Therefore, annual leave and personal will accrue as normal.

DOES LONG SERVICE LEAVE ACCRUE DURING A PERIOD OF STAND DOWN?

That depends on the State or Territory jurisdiction.

CAN AN EMPLOYEE TAKE ANNUAL LEAVE OR LONG SERVICE LEAVE DURING A PERIOD OF STAND DOWN?

Yes. If an employer agrees to an employee's request to take annual leave or long service leave, the employee will not be considered stood down and all the usual rules and payments relating to the particular leave will apply, including payment for public holidays falling during the period of annual leave or long service leave, and the payment of annual leave loading.

If you do approve a period of leave, and if at the end of the approved period of leave, the stoppage of work still exists **AND** the employee cannot be usefully employed, you can then stand down the employee.

An employee already on a period of approved (paid or unpaid) leave at that time of stand down is taken not to be stood down until that leave period ends.

The Fair Work Commission has approved a range of changes to the *Hospitality Industry (General) Award 2010* relating to annual leave, including allowing annual leave to be taken for twice as long at half pay – **[CLICK HERE](#)**

CAN I REFUSE AN EMPLOYEE'S REQUEST TO TAKE ANNUAL LEAVE OR LONG SERVICE LEAVE DURING A PERIOD OF STAND DOWN?

Yes. An employer can refuse an employee's request to annual leave or long service leave, provided the refusal is reasonable.

An example of a reasonable refusal would include no capacity to pay the leave during the current trading restrictions arising out of the Coronavirus COVID-19 Pandemic.

IS AN EMPLOYEE ENTITLED TO PAID SICK LEAVE OR CARERS LEAVE (PERSONAL LEAVE) DURING A PERIOD OF STAND DOWN?

No, in our view an employee is not entitled to receive payments for personal leave during a lawful period of stand down.

However, an employee already on a period of personal leave (paid or unpaid) leave at that time of stand down is taken not to be stood down until that leave period ends.

The stand down provisions, and in particular their interaction with personal leave, are yet to be tested before a court. While we consider the views we have provided are correct, it is noted that provisions in the *Fair Work Act 2009* are not free from doubt.

IS AN EMPLOYEE ENTITLED TO BE PAID FOR PUBLIC HOLIDAYS FALLING DURING A PERIOD OF STAND DOWN?

No, in our view an employee is not entitled to receive payments for public holidays falling during a lawful period of stand down.

The stand down provisions, and in particular their interaction with public holidays, are yet to be tested before a court. While we consider the views we have provided are correct, it is noted that provisions in the *Fair Work Act 2009* are not free from doubt.

CAN AN EMPLOYEE TAKE A PERIOD OF PARENTAL LEAVE?

Yes, a period of parental leave will generally operate as normal. An employee taking a period of unpaid parental leave will not be considered to be stood down. It is important to note that unpaid parental leave will not count as service, but will not break an employee's continuous service.

STAND DOWN PROVISIONS – GENERALLY

The stand down provisions in the Fair Work Act 2009 are yet to be tested before a court. While we consider the views we have provided are correct, it is noted that provisions in the *Fair Work Act 2009* are not free from doubt.

EMPLOYEE SUPPORT

ARE THERE ANY EMPLOYEE SUPPORT MEASURES IN PLACE?

The following Government agencies and organisations can assist employees:

- Services Australia
– <https://www.servicessaustralia.gov.au/individuals/subjects/affected-coronavirus-covid-19>;
- National Coronavirus COVID-19 Helpline – 1800 020 080;

- Lifeline – 13 11 14;
- Kids/Young Adults (5-25 years) Helpline – 1800 55 1800.

ARE THERE ANY EMPLOYER/BUSINESS SUPPORT MEASURES IN PLACE?

The Government has announced a range of employer and business support packages, which can be accessed here:

<https://business.gov.au/risk-management/emergency-management/coronavirus-information-and-support-for-business>

FURTHER INFORMATION

The following information and tools are available at our online member portal:

- Employer Guide;
- Template letter for stand down of full-time and part-time employees;
- Template letter for casual employees.

If you require further advice or information, please contact WOR Chair Chris Gillard on 0409 434 188 or EO Annalee Nolan on 0430 023 916.