

March 2020

# A VISION IN THE WORKPLACE

In this COVID-19 special edition for March 2020:

- Stevens & Associates is OPEN for business while working remotely, and well placed to assist you in these unprecedented and evolving times; and
- **Coronavirus (COVID-19): How to Map Your Covid Contingency Plan** - A checklist and tips for employers.

## A message for our clients

As we navigate these uncertain times, I would like to take a moment to update you on our operations at Stevens & Associates Lawyers.

- We are OPEN for business and able to advise our clients on any employment law or industrial relations issue you may be facing in these difficult and evolving times.
- To slow the spread of the coronavirus, we are practicing social distancing and working remotely.
- We are well equipped to advise our clients online and through teleconferencing or videoconferencing services.
- If you would prefer to attend our office to meet in person, we can still do that. We aim to keep a minimal presence in our Pitt Street office, and can accommodate small meetings with just two-four participants.
- We have hand sanitiser and hand washing facilities available at our office and encourage

any visitors to use them. In keeping with social distancing guidelines, we will also avoid shaking hands during this period.

We welcome the opportunity to discuss how we might be able to support your organisation through this challenging and concerning period. The restrictions on social contact and economic downturn will, unfortunately, impact many businesses.

Whether you need advice on the coronavirus pandemic, or any other employment law issue, we assure you that we are ready and able to assist you and your business with the challenges the upcoming months will bring. Please see below for some helpful tips and a COVID-19 checklist for employers.

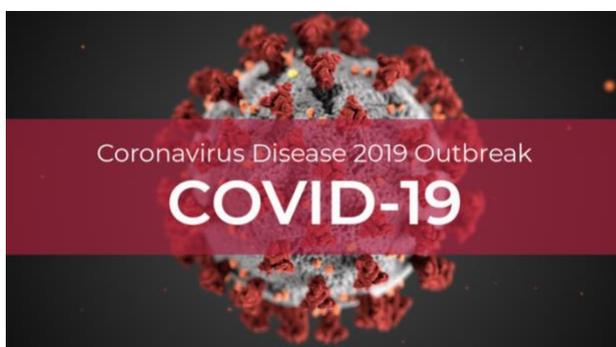
Our contact details remain the same. You can call our 'office' on (02) 9222 1691 or reach us via email. Nick Stevens, Jane Murray, Angharad Owens-Strauss, or David Wells

We will continue to keep you updated and hope that you, your families, and colleagues stay safe.

Kind regards

Nick Stevens

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## CORONAVIRUS (COVID-19): How to Map Your Covid Contingency Plan

Brace yourself, there's no doubt we are navigating uncharted waters and unique challenges.

As your employment lawyers, it's our job to take the stress out of it for you! If Covid is affecting your business and workforce, please don't hesitate to get in touch to discuss whether there's a solution or workaround – temporary or ongoing – that may suit your business.

Below we have designed a brief **check-list** for you to read through and ensure you have turned your mind to the key issues that, if not managed, might expose your business (from an employment law perspective).

Unfortunately, we are being asked more and more frequently to advise on workarounds where the labour cost is exceeding output, particularly in industries that have seen a dramatic downturn in

work as a result of Covid. Accordingly, we will also address that below and set out some ideas to stay afloat if there isn't enough work for your staff.

### CHECK-LIST FOR COVID SURVIVAL – Have you considered?

#### 1) How will you deal with **isolation**?

For example:

- Do you have a clear policy around who needs to self-isolate and in what circumstances?
- Do you need to update your **leave policy** to make it clear what leave is available in circumstances of isolation?
- Under what circumstances will you require medical clearance to return to work? Has that been communicated to employees?

#### 2) How will you manage your **work health and safety obligations**?

For example:

- Does this require work from home arrangements to mitigate the risk of exposure?
- Is work from home viable for everyone?
- Do you need to implement new cleaning measures?
- Do you need to provide PPE?

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3) Is your **work from home policy** adequate? Does this need to be updated to accommodate new arrangements.

For example:

- Does your policy contain a section requiring information about the dedicated “home work” space to ensure the space is safe?
- Does your policy clearly set out how and when the home worker will communicate with the office?
- Does your policy have adequate measures for communication within the team to mitigate against mental health issues arising out of self-isolation?

4) Do you need to modify your **policy suite**?

For example:

- Do you need an overarching Covid policy that addresses all the novel measures you are implementing?
- Can you instead update relevant policies. For example, **workplace surveillance** policies to canvass home working arrangements; **drug and alcohol** policies to canvass use of substances during home working.

5) How will you deal with **privacy**? - before disclosing an employees’ Covid status, have

you considered the relevant state legislation pertaining the health records.

If you do not feel you’re adequately prepared in any of these key areas, please do not hesitate to reach out.

## WHAT ARE YOUR OPTIONS WHEN MEANINGFUL WORK IS DRYING UP?

### Using Leave

Unfortunately, every day more and more businesses are finding that they cannot operate as they once did or operate at all!

As a starting point, you should request that employees take annual leave or long service leave from their balance. This is an opportunity to reduce those balances, particularly where they’re excessive.

We are finding that employers and employees alike see this as a win-win as employees are still being paid.

It may also be time to conduct an audit of leave balances to identify any employees with an excessive balance. Certain awards (or your enterprise agreement) may allow you to direct employees to take annual leave.

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Some modern awards also contain a term allowing employers to direct employees to take annual leave where the requirement is reasonable.

Employers need to be careful when offering use of sick leave balances and ensure they're used only when the employee would, in ordinary circumstances, be entitled to sick leave. Where paid leave is not available, employers can consider reaching agreement with employees to take unpaid leave.

This needs to be broached carefully to ensure there is no suggestion that any employee was coerced to take leave or subjected to undue influence. Again, this is where it is crucial to keep a record of employees genuinely agreeing to the arrangement.

## Reduction of Days / Hours

Employers should consider whether temporarily reducing employees' days or hours (by agreement) could preserve permanent employment longer term and reduce labour costs.

For instance, full-time employees may be agreeable to a 7-day fortnight.

To "sweeten" the deal, you may want to offer paid annual leave (if accrued) on the days they would have ordinarily worked.

## Voluntary Pay Cuts

The media has reported that many CEOs have agreed to take a haircut on their multi-million dollar salaries to retain other workers.

There's no reason this can't be broached business wide. Some employees will be open to a reduction in pay, on a temporary basis, to retain their employment longer term.

Again, genuine consent without coercion is crucial to any such arrangement.

## Forced Shut Down

Some Modern Awards (for example, the Manufacturing Award) make expression provision for more than one shutdown period per year. This may be a good work around if business is quiet at the moment, but you're working on rolling out changes to your goods or services to adapt to the current climate and, once implemented, your staff will have work to do.

## Stand Down Employees under the Fair Work Act

No doubt you've heard the news that Qantas has stood down 20,000 employees and there's no reason that stand down can't be a viable workaround for business of all shapes and sizes as a last resort.

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Under section 524 of the *Fair Work Act*, an employer may stand down employees without pay in various circumstances, including where there is a stoppage of work for which the employer cannot be held responsible and where the employee cannot be usefully employed.

Businesses should be careful to first exhaust other options (including work from home arrangements); consider how an employee's role might be lawfully changed so that they can be usefully employed; and ensure it has adequate evidence of the stoppage of work and the inability to usefully employ people before enacting a stand down. It is crucial that employers don't conflate a financial downturn with a genuine stoppage of work.

Employers also need to ensure employees are first provided with the opportunity to take any accrued annual or long service leave for the period during which the employee would otherwise be stood down. If the employee requests to take paid leave, provided they are entitled to take that form of leave and have sufficient accrual of the same, the employer should agree to use that leave rather than standing the employee down.

As stand down becomes increasingly popular, unions and the Fair Work Commission are likely to closely examine (and dispute) these on a case by case basis.

Before considering this, first review your contracts. If there is an express contractual provision for stand down, this should be utilised instead of section 524.

## **Redundancy – taking into account who isn't entitled to redundancy pay**

Unfortunately, some businesses need to face the reality that redundancies are inevitable.

In terms of costs to the business, it's worth bearing in mind that employees who have worked for the business for less than 12 months are not entitled to redundancy pay.

Small businesses (with less than 15 employees) do not need to provide redundancy pay.

## **TAKEAWAY POINTS:**

### **Collaboration is Key**

The general approach should be collaborative. We are all in this together, and your employees will hopefully be happy to work *with* you to map out a contingency plan!

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## Records are Gold

Although it's a busy and stressful time, it's not the time to be lax with records. In particular, ensure you keep a record of any agreement reached with your employees to change the way they work or to take leave (particularly unpaid leave) – do not rely on a verbal agreement, to avoid later disputes or backpay claims.

If you require assistance in drafting workplace policies to help address the implications of COVID-19, or require advice on any other employment issues relating to COVID-19, please do not hesitate to contact [Nick Stevens](#), [Jane Murray](#) or [Angharad Owens-Strauss](#).