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Coronavirus (COVID-19) pandemic
Shorter working hours arrangements, variations to enterprise agreements and stand down

SUMMARY

The COVID-19 pandemic is leading to considerable hardship for businesses and their employees.

Many businesses that are under pressure as a result of the crisis are looking for ways to meet their liabilities, preserve jobs and avoid the loss of necessary skills over the months ahead until the pandemic passes.

This Member Advice deals with shorter working hours arrangements, applications to vary enterprise agreements and the stand down provisions in the *Fair Work Act 2009* (**FW Act**).

Shorter working hours arrangement

In the past, during times of crisis (e.g. during the Global Financial Crisis) some businesses reached agreement with their employees to implement shorter working hours arrangements for a temporary period. This option is also being considered by various businesses during the COVID-19 crisis.

It is important to note that an employer cannot convert a full-time employee to a part-time employee without the employee's agreement. Also, most award provisions relating to part-time employment and most part-time provisions in employment contracts require that a fixed number of ordinary hours are set for a part-time employee, with the number of hours only able to be reduced by agreement with the employee.

For award-covered and enterprise agreement-covered employees, any provisions in the relevant award, enterprise agreement and employment contract must be complied with (e.g. part-time employment provisions, hours of work provisions, and consultation provisions).

All modern awards impose a requirement on employers to consult with employees and their representatives (if any) about changes to an employee's regular roster or ordinary hours of work. Here is the clause from the *Manufacturing and Associated Industries and Occupations Award 2010* as an example:

> ***9.2 Consultation about changes to rosters or hours of work***
>
> *(a) Where an employer proposes to change an employee's regular roster or ordinary hours of work, the employer must consult with the employee or employees affected and their representatives, if any, about the proposed change.*
>
> *(b) The employer must:*
>
> *(i) provide to the employee or employees affected and their representatives, if any, information about the proposed change (for example, information about the nature of the change to the employee's regular roster or ordinary*

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hours of work and when that change is proposed to commence);

(ii) invite the employee or employees affected and their representatives, if any, to give their views about the impact of the proposed change (including any impact in relation to their family or caring responsibilities); and

(iii) give consideration to any views about the impact of the proposed change that are given by the employee or employees concerned and/or their representatives.

(c) The requirement to consult under this clause does not apply where an employee has irregular, sporadic or unpredictable working hours.

(d) These provisions are to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements.

In addition, all enterprise agreements made under the FW Act are required to have a consultation term (section 205). If a consultation term is not included, the model consultation term in Schedule 2.3 of the *Fair Work Regulations 2009* is taken to be a term of the agreement. Section 205 of the FW Act and the model term in the Regulations impose obligations on employers to consult about changes to an employee's regular roster or ordinary hours of work.

It can be seen from the above that it is necessary to consult with award-covered and agreement-covered employees about any significant changes in their hours of work. It is of course also important to consult with award-free employees. Further, as mentioned above, an employer cannot convert a full-time employee to a part-time employee without the employee's agreement.

If agreement is reached with an employee to introduce a temporary reduction in ordinary hours of work for a specified period, this could be implemented by:

- Agreeing that the employee will become a part-time employee for the period; or

- Agreeing that the employee will apply for unpaid leave on particular days during the period (e.g. on one day each week for the period).

In the past, where shorter working hours arrangements have been implemented in workplaces to enable jobs to be preserved during a crisis, some or all of the following measures have been implemented by particular businesses:

- The employer and the employees agreeing on the period of time (e.g. three months) that the arrangement will operate for, with the ability for the period to be extended by agreement;

- The employer agreeing that accrual of annual leave, personal/carer's leave and long service leave will be treated as though the employees are still working the same number of hours as they were working before the arrangement was implemented; and

- The employer agreeing that if an employee's employment is terminated while the shorter working hours arrangement is in place, the employee's termination of employment and redundancy entitlements will be treated as though the employee was still working the same number of hours as they were working before the arrangement was implemented.

Members who are considering introducing shorter working hours arrangements during the COVID-19 crisis are urged to contact Ai Group or Ai Group Workplace Lawyers for specific advice.

Variations to enterprise agreements

Enterprise agreements can be varied by agreement between an employer and the employees covered by the agreement.

The Better Off Overall Test applies to variations. Each employee must be better off, on an overall basis, than if the relevant modern award applied.

For businesses with enterprise agreements that contain provisions which inhibit the business in dealing with the impacts of COVID-19, consideration could be given to seeking the agreement of the employees to vary the agreement. For example, a variation could:

- Implement more flexible working hours arrangements;

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- Remove any restrictions on part-time employment;
- Implement more flexible leave arrangements;
- Give the employer more rights to direct employees to take accrued leave; or
- Delay or cancel future wage increases that are scheduled to be paid over the next six months.

The Fair Work Commission (**FWC**) has implemented a fast-track process for urgent applications to vary enterprise agreements to deal with the impacts of COVID-19. These can be sent to: COVID-19Applications@fwc.gov.au.

Ai Group's Workplace Relations Advisers are available to provide detailed assistance to any Member that wishes to apply to vary an enterprise agreement.

Stand down

Section 524 of the FW Act gives an employer the right to stand down employees without pay in certain circumstances. There are a number of requirements that must be met before an employer can stand down its employees. These requirements are complex to apply in practice and there is a considerable amount of case law about the meaning of the expressions used in section 524.

If a stand down is held by a Court or the FWC to not meet the requirements of the FW Act, the employer will have an obligation to pay the employees who were invalidly stood down. Therefore, it is essential for employers to carefully consider whether the various requirements are met before proceeding to stand down any employees.

Members are urged to contact Ai Group or Ai Group Workplace Lawyers for advice before standing-down employees.

Section 524 of the FW Act states: (underlining added)

> ***Employer may stand down employees in certain circumstances***
>
> *(1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:*
>
> *(a) industrial action (other than industrial action organised or engaged in by the employer);*
>
> *(b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;*
>
> *(c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.*
>
> *(2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:*
>
> *(a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and*
>
> *(b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.*
>
> *Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.*
>
> *Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).*
>
> *(3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.*

In the context of the COVID-19 pandemic, key questions that would need to be asked in considering whether there is a right to stand down employees include:

1. Can the employees that the employer is proposing to stand down be 'usefully employed'? The 2011 decision of the FWC

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in [AMWU v McCain Foods](), is one of many decisions on this topic.

2. Has there been a 'stoppage of work' for the relevant employees, or just a significant slow-down? A stand down relates to circumstances where there is a stoppage of work for the relevant employees – not just a slow-down.
3. Is the stoppage of work for a cause that 'the employer cannot reasonably be held responsible'?
4. Will the stoppage of work be temporary? Stand downs are not able to continue for an excessive, indefinite period.

Some enterprise agreements contain limitations on an employer's right to stand down employees, so any relevant provisions in an applicable enterprise agreement need to be considered as well as the provisions of section 524 of the FW Act.

As mentioned above, Members are urged to contact Ai Group or Ai Group Workplace Lawyers for advice before standing-down any employees.

Can an employer stand down an employee who is on annual leave or another type of authorised leave?

This issue is dealt with in section 525 of the FW Act, which states: (underlining added)

> ***Employee not stood down during a period of authorised leave or absence***
>
> *An employee is not taken to be stood down under subsection 524(1) during a period when the employee:*
>
> *(a) is taking paid or unpaid leave that is authorised by the employer; or*
>
> *(b) is otherwise authorised to be absent from his or her employment.*
>
> *Note: An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the employee would otherwise be stood down under subsection 524(1).*

It can be seen from the above that an employer cannot stand down an employee if they are on approved leave.

Do you require further advice?

Ai Group has set up a special section on our website to provide access to Ai Group advice and assistance relating to the COVID-19 pandemic.

For further information or assistance, please contact the **Ai Group Workplace Advice Line** on 1300 55 66 77 or email us at workplaceadvice@aigroup.com.au and an adviser will call you back.

For detailed advice about COVID-19 workplace relations issues, including shorter working hours arrangements, enterprise agreement variations and stand down, the team of lawyers and advisers at Ai Group and Ai Group Workplace Lawyers is available to assist you.

Stephen Smith
Head of National Workplace Relations Policy

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