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# COVID-19

## OPTIONS TO MANAGE EMPLOYMENT COSTS

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PREPARED BY:



# AN INTRODUCTION FROM ALLAN HALL HR



The coronavirus (COVID-19) pandemic has meant that employers are having to make some very difficult employment decisions within a very short time frame in order to keep their business afloat or sadly, shut their doors.

The COVID-19 situation has now progressed to a point where most businesses are seriously considering all means to manage their way through the crisis, including, where necessary, reducing labour costs.

A resounding sigh of relief was heard from many employers when the JobKeeper wage subsidy was officially passed by parliament. The \$1,500 (before tax) payment will be a welcomed relief to those eligible employers and employees. But what about those employers who are not eligible? Sure, it is usually seen as a positive sign when you are not eligible for the JobKeeper subsidy as your business does not anticipate experiencing a 30+ % drop in turnover. But what about a 20% drop? This is still a significant change, particularly to those small business employers.

Or what about those businesses that have managed to escape the financial thorn of the pandemic, however their business operations have completely transformed. Perhaps employees with a specific set of skills are no longer required or are required in a completely different capacity? Or worse yet... what happens when the JobKeeper subsidy expires?

What we are clear on is that the JobKeeper subsidy is only in effect for 6 months. So, what happens after this? Enclosed are a number of labour altering and labour cost reduction options that may be utilised to help maintain financial viability during the crisis.

This paper is intended to provide a broad overview of the main options presently available, although the landscape is changing quickly in response to the increasing seriousness of the situation.

It is important to keep in mind that there are also specific contractual, award and legislative requirements that need to be considered in each situation.

Accordingly, we strongly recommend that employers seek advice to confirm the specifics of their particular situation.

At Allan Hall HR, we have a team of experienced specialists dedicated to helping clients work through these issues.

# OPTIONS FOR EMPLOYERS TO MANAGE EMPLOYMENT COSTS

BELOW ARE A NUMBER OF OPTIONS THAT EMPLOYERS CAN TAKE TO ASSIST THEIR BUSINESSES IN REMAINING FINANCIALLY VIABLE DURING THE COVID-19 PANDEMIC WITH RESPECT TO STAFFING.

## ANNUAL LEAVE

If an employee has an excessive accrual of annual leave, an employer can direct them to use a specific portion of this. If your employee is covered by an award, there are strict provisions outlining how the direction to take excessive leave must be made and how leave must be taken. These provisions also vary between different awards. It is therefore important to check if your employees are covered by an award and what the specific provisions are that relate to them.

As a general rule, if an employee has more than 8 weeks of annual leave accrued or a shift worker has more than 10 weeks of annual leave accrued, this balance is considered 'excessive'. Under the NES, when directing an employee to take annual leave, the direction must be 'reasonable.'

The following factors should be considered to determine if it is reasonable to direct the employee to take annual leave:

- The needs of the employee and the employer's business
- Any agreed arrangement with the employee
- Custom and practice of the business
- Timing of the direction or requirement to take leave
- The length of the period of notice given

## LONG SERVICE LEAVE (LSL)

LSL entitlements vary between states and are determined by individual state or territory laws, unless an employee is covered by a more generous LSL scheme such as in an enterprise agreement. Some states have introduced changes to LSL legislation which has allowed greater flexibility for employers and employees to access LSL leave during the COVID-19 crisis.

For example, the NSW Long Services Leave Act 1955 was amended to;

- waive the one-month notice period for taking leave (it can now be agreed upon sooner by mutual agreement between employee and employer) and;
- provides greater flexibility for employees to take LSL in shorter blocks (rather than traditional monthly blocks) if they wish.

If your employee is entitled to LSL, you can meet with them to discuss the possibility of taking their LSL entitlements, or in certain circumstances an employer can direct an employee to take LSL with appropriate notice. Please ensure you refer to the relevant State or Territory legislation surrounding LSL when determining LSL entitlements.

## LEAVE WITHOUT PAY

An employer and employee can agree to an employee taking a period of leave without pay. It is important to note that in this circumstance the employer cannot coerce, assert undue influence or force an employee to take leave without pay.

If the employer and employee agree to such an arrangement, the arrangement and period of time should be documented to ensure clarity around the leave period.

If an employee takes leave without pay, they do not accrue annual leave or personal/carers leave entitlements during this period, however, leave without pay does not break the continuity of service.

## REDUCING LABOUR ARRANGEMENTS

Another way to reduce labour expenses is to rationalise your use of labour hire and casual workers. It is important to remember that casual employees are those that are not employed on a regular and systematic basis. If a casual staffing arrangement is more similar to that of a part-time employment relationship e.g. the employee has the same set shifts each week and have an ongoing expectation of work, then they may be incorrectly classified as a casual staff member and care should be exercised in terminating the arrangement.

## REDUCING HOURS

An employer and employee can agree to reduce an employee's hours of work. As above, it is important to note that in this circumstance the employer cannot coerce, assert undue influence or force an employee to reduce their hours of work and this must be agreed to by both parties (the employee and the employer). Furthermore, the agreement should be documented for clarity and transparency.

## REDUCING PAY

An employer and employee can agree to reduce an employee's pay. Again, it is important to note that in this circumstance the employer cannot coerce, assert undue influence or force an employee to take a pay cut and reduction to pay must be agreed to by both the employee and the employer. Pay cuts can be made for a specified or indefinite period of time. However, you must ensure that you still meet the minimum Award and NES requirements.

## REDEPLOYMENT

Redeploying a staff member to a different area of the business may be a viable option for your business. Things that should be considered before redeploying a staff member include:

- Whether a job or a position is available and exists for redeployment
- Whether the employee is in agreement and if not, whether the employment contract permits it
- The nature of the job
- The qualifications required to perform the job
- The employee's skills, qualifications and experience
- The location of the job in relation to the employee's residence and the remuneration (pay and entitlements) which is offered.

Redeployment arrangements should be clearly documented.

## TERMINATING EMPLOYEES DURING THE MINIMUM EMPLOYMENT PERIOD

When hiring a new employee, there is a minimum employment period (commonly known as a probation period) whereby employees cannot make an unfair dismissal claim if terminated, provided the termination is not for a prohibited reason (e.g. discrimination, exercising a workplace right, temporary absence for illness or injury).

For businesses with 15 or more employees there is a 6-month minimum employment period from the time the employee commenced work. For small businesses of fewer than 15 employees, there is a 12-month minimum employment period.

## REDUNDANCY

In the event of a financial downturn businesses can consider if redundancy is an option for certain employees. For a redundancy to be genuine there are 3 key requirements:

- 1.The position is no longer required
- 2.The employer must follow consultation requirements as applicable (e.g. under an Award or agreement)
- 3.The employer must have considered alternatives to redundancy e.g. redeployment options within the business

It is important to keep the above points in mind when considering or implementing a redundancy.

## STAND DOWN

The Fair Work Act 2009 allows employers to stand down employees without pay, if 'the employee cannot usefully be employed' and standing them down is 'because of...a stoppage of work for any cause for which the employer cannot reasonably be held responsible.' This is a legitimate course of action for employers to take, and is possible under the FWA, in certain circumstances. This provision may apply if the COVID-19 situation directly or indirectly prevents an employee from conducting useful work. A direct prevention may be a government order for a business or industry to cease operations and as a result of this order an employee cannot usefully be employed working from home.

A stand down, is not a termination of employment. It is simply a 'freeze on work' for a set period of time. Once the stand down has been lifted, it is expected that an employee will resume their previous duties again. During a stand down, it is also reasonable to allow employees to access their accrued leave entitlements. However, if they have exhausted their leave accrual or if they are casual employees, it may present a situation whereby they are simply stood down without pay. An employer cannot stand down employees simply due to a financial downturn in their business. If a business has experienced financial downturn, they may be eligible for the government JobKeeper wage subsidy.

Businesses should exercise caution when considering standing down an employee as there are limits to the provision. If an employer is found to have unfairly or unlawfully applied a stand down, they may be liable for a backpay, recovering all unpaid wages.

## NEED FURTHER SUPPORT?

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