Quality check — COVID-19 decision-making to reduce workforce legal claims

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Date: 20 April 2020

The COVID-19 pandemic necessarily requires quick-fire action from management and HR.

Many businesses will be doing all they can to reduce their labour costs due to the ever-worsening business climate, while some businesses will be facing unprecedented demand for supply or services, requiring a labour input beyond the capacity of their current workforces.

Measures taken by business must comply with workplace laws. Now is the time to do a quality check of business decisions to reduce the risk of legal claims.

- Affirm approach to notice and evidence requirements

Employees are not entitled to paid statutory leave entitlements if the employee fails to provide satisfactory evidence which justifies the employee's absence when asked. Employers should consistently communicate expectations around the need to provide satisfactory evidence and update their policies if needed to reflect the requirement. This will help an employer address the improper claiming of leave entitlements.

- Underpayments of salary

If a salaried employee is working additional hours to meet untapped demand and is covered by an industrial instrument, ensure those additional hours are recorded either by the employer (if feasible) or the employee. The employee's periodic salary payments must be at or above the minimum amount set out in the applicable industrial instrument.

If the employer does not have time recording systems in place, employees could provide the employer with records of hours worked through the "*Record my hours app*" on the Fair Work Ombudsman website.

- Failure to properly accrue/deduct personal/carer's leave

Many payroll systems still record personal/carer's leave by hours rather than days and pro-rate personal/carer's leave for part-time employees. This may lead to an underpayment, especially for employees who are not "9–5" or who work part-time and do not receive their full entitlement of 10 days' per year (accrued progressively).

- Inadvertently dismissing casuals

When reducing the casual workforce, employers need to make sure they do not inadvertently "unfairly dismiss" a casual employee. Casuals qualify for protection under unfair dismissal laws if they have worked for the minimum employment period (ie, 6 or 12 months, depending on the size of the employer's workforce) and during that period they had a reasonable expectation of continuing employment on a regular and systematic basis.

Communications should be focused around the availability of shifts during the COVID-19 crisis rather than stating that "regretfully, we no longer require your services".

- Failing to consult with employees during redundancy

Employers will not be able to plead the genuine redundancy exception in answer to an unfair dismissal claim if they fail to notify and consult with employees as required under applicable industrial instruments.

- Investigation failures where there are remote-based participants

The stress and anxiety of coping with a widespread pandemic may promote bad behaviour in the workplace (as it does in the supermarket).

Normal processes should be followed, including an investigation if required. If participants are based remotely, additional steps may need to be taken to ensure confidentiality, eg, conduct investigations by video so that you can see if anyone else is in the room and seek confidentiality undertakings.

- Pandemic whistleblowers

Pandemic-related concerns, such as health and safety, may be protected disclosures under the *Corporations Act 2001* (Cth), triggering confidentiality obligations and protections against detrimental treatment (eg, termination of employment and loss of a contract in a supply chain). Ensure that these types of concerns are routed through the appropriate channels.

- Imposing ”self-isolation" measures when not supported by government recommendations

Forcing employees to not attend work and take unpaid leave, without the support of government recommendations, is likely to lead to unfair dismissal or general protection claims. At the same time, government recommendations need to be closely monitored and working arrangements need to be reassessed in “real time” to ensure that workers are not exposed to risks of catching COVID-19. Applicable industrial instruments, employment contracts, policies and ”stand-down" provisions in *Pt 3-5* of the Fair Work Act 2009 (Cth) (FW Act) are also relevant.

This is a difficult one for businesses to handle and there is no “right answer”.

If an employee can perform duties at home and the employer provides a “home office setup” (ie, desk, computer, internet connection) then this direction is more likely to be reasonable as the employee would continue to be paid during the absence. The employee’s duties could be modified by agreement to better suit home working.

However, if work can only be performed in the workplace (eg, a factory), an unpaid “not attend” direction would be a high-risk strategy in the absence of an employee’s agreement. In this situation, an employer could try to seek agreement by offering the employee a one-off incentive, eg, providing additional “special paid leave” if the employee agrees to use accrued annual or long service leave entitlements during a set period of absence.

- Unsafe home-based working and workers’ compensation claims

If adequate risk assessments of home-based working environments are not conducted and a worker is injured (including both employees and contractors), the business will be potentially exposed to a claim for workers’ compensation. Conduct assessments and ask for photos of the work environment.

- Health and well-being

If steps are taken to care for and engage with its remote-based workforce, employers will reduce the stress and anxiety of a workplace in flux. This will reduce the likelihood of ongoing “return to work issues” where an employee develops a mental illness during the crisis. This is a win for both the business and the employee.

- Ensure the jobkeeper scheme is properly implemented

The Federal jobkeeper scheme implements a wage subsidy for eligible employers/employees and temporarily amends the FW Act to permit jobkeeper enabling directions and requests.

When participating in the jobkeeper scheme, employers must not contravene the workplace rights of employees, including by discriminating (eg, selecting only some employees to participate in the jobkeeper payment), making unreasonable or unsafe directions (eg, which may be unlawful), failing to consult with employees or their representatives (eg, for jobkeeper enabling directions), misclassifying ‘long-term casuals” or “contractors”, failing to pay the jobkeeper payment as required (eg, the correct amount at the correct time), failing to accrue service

correctly (eg, during unpaid stand downs) or taking adverse action against employees in respect of the jobkeeper workplace rights.

Separate but interlinked with these legal risks is the need to promote and maintain a good business reputation. Businesses must be mindful that if they are able to support their workforce this will reap reputational benefits once the COVID-19 crisis abates.

Click to view the *COVID-19 Toolkit for Employers*, *Dealing with the impact of widespread disease on the workplace, Jobkeeper scheme – Jobkeeper payment and changes to the FW Act* and *Whistleblowers' protection*.