

INDUSTRIAL RELATIONS NOTICE

STAND DOWN SUMMARY

FAIR WORK COMMISSION AUSTRALIA



STAND DOWN – BACKGROUND INFORMATION AND RELATED LETTER

INSTRUCTIONS

Given the 'JobKeeper enabling stand down directions' that were legislated into the *Fair Work Act* and Awards have now expired (as at 29 March 2021), an employer that now finds itself in circumstances of a similar kind to that experienced last year may need to consider applying the terms of section 524 of the *Fair Work Act* 2009. This section permits an employer to stand down an employee under circumstances whereby the stoppage of work cannot 'reasonably' be held to be the responsibility of the employer and the employee cannot be usefully employed as a result.

Section 524

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.**

To cover all bases from a risk perspective, if an employee does consider challenging the direction in the Fair Work Commission, such an objection is usually based on the reasonableness of the direction to stand down, unless there is otherwise a breach of contract of enterprise agreement if applicable.

That potential challenge should be minimised through the consideration of possible alternatives as outlined in overleaf. If an employee is successful in challenging a stand down, an employer may be liable for backpay to an employee.

THE REAL MEDIA COLLECTIVE

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Alternatively, and if possible, prior to the implementation of a stand down direction, employers should consider attempting to make other arrangements with their employees, such as agreed arrangements to take accrued annual leave, or an agreement with employees so that they may utilise some long service leave (if accrued and entitled) during a stand down period. Additionally, can an agreed change of, or reduced, work hours/days/duties be implemented for the relevant period?

Although an employee is not paid during a stand down period, it is considered part of their continuous service, and does attract the accrual of personal leave and annual leave. An employee is not usually entitled to use personal leave during a period of stand down. If a public holiday occurs during a stand down period, employees are entitled to be paid for that public holiday.

If a stand down is the only available option, please consider using the Stand Down letter template overleaf as the basis for a letter to stand down employees as a result of the recent COVID related lockdown.

Please ensure the yellow highlighted sections are addressed prior to distribution to each individual employee.

INDUSTRIAL RELATIONS NOTICE STAND DOWN SUMMARY FAIR WORK COMMISSION AUSTRALIA



On company letterhead

Employee name

Delivered by [hand/email]

[insert date]

Dear [employee name],

Stand down

Regrettably, due to the recent deterioration of business conditions directly related to the current Victorian government COVID-19 lockdown and its effect on [insert business name], over which we have no control, the company will temporarily cease operations and a stoppage of work will occur from [insert date].

In accordance with section 524 of the *Fair Work Act 2009*, you will be stood down from your employment from the abovementioned date. At this time, although it is yet to be confirmed, the company will recommence operations from [insert date]. Please note that the company will confirm the end of the stand down period with you and the requirement that you return to work.

In accordance with section 524 of the *Fair Work Act*, you will not be paid any wages or other amounts that you would ordinarily be paid for the period of the stand down. However, you will accrue annual leave and personal leave during this stand down period.

As discussed with you prior to giving this stand down direction, if you wish you may apply to use accrued annual leave or long service leave (if entitled) during the period of the stand down.

[consider interleaving a personalised message here, such as affirming the company's intentions to recommence work as soon as possible, or similarly worded text]

Please contact the undersigned should you have any questions.

Yours sincerely,

[insert name and job title]

FOR FURTHER INFORMATION CONTACT

Charles Watson / GM – IR, Policy and Governance
charles@thermc.com.au

Resource hub: www.therealmediacollective.com.au/covid-19

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