

COVID-19: PEOPLE: EMERGING FROM THE CRISIS: MANAGING YOUR LABOUR THROUGH THE POST-LOCKDOWN RECOVERY (AUSTRALIA)

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Legal Briefings - By **Adam Lambert**

The Australian economy remains in a period of forced hibernation. Although each industry has been impacted differently to others, no business is unaffected by the COVID-19 pandemic.

For the last month or so, all businesses have been required to dedicate substantial resources to rapidly developing and executing reactive labour strategies to protect themselves. Many of these responses have been unprecedented, and would have been unimaginable at the start of the year.

As the number of new infections continues to drop each day and governments start to ease restrictions, the focus of many businesses has now shifted towards proactive planning for the future.

These strategies will differ between businesses and industries.

From an industrial and employment law perspective, some key considerations include the following:

- **Rostering**

After the period of hibernation, there may be a need to substantially increase or decrease production or operating hours (either indefinitely or temporarily).

Some businesses may experience a surge in demand and need to introduce a new shifts in order to accommodate this change. Days which had previously been non-working days, such as weekends and public holidays, may need to be used in order to make up for lost time.

Conversely, other businesses may need to scale back their usual working patterns in order to minimise the number of redundancies.

Whilst many businesses are able to avail themselves of the Jobkeeper directions, this is only a temporary measure. For many, the need to be operationally nimble will continue well after the Jobkeeper scheme concludes in September.

Changes to ordinary hours or regular rosters will typically be subject to consultation processes under applicable modern awards and enterprise agreements. Such agreements often impose a variety of other restrictions or requirements on certain roster changes. Employment contracts too can be restrictive. Navigating these obligations will be critical in ensuring that recovery efforts are not hampered by workplace regulations.

It pays to think now about what rostering arrangements your business may need to remain operationally agile.

• **Supplementary labour**

Supplementary labour is likely to be heavily relied upon by many businesses.

The flexibility associated with casual workers and labour hire providers is appealing during these uncertain times.

Until there is a vaccine that has been widely distributed amongst the population or we achieve an acceptable level of herd immunity (which may not be anytime soon), the virus will continue to present ongoing health and operational risks for businesses.

It is clear that government policies will involve acting swiftly to contain and trace COVID-19 outbreaks (much like the Tasmanian government has done recently with respect to the hospitals in its north-west coast). Businesses should prepare for the risk that following a worker testing positive for the virus, entire work groups may be immediately required to isolate and be unable to work for an extended period of time.

The ability to quickly draw upon additional labour resources will be a key to minimising operational disruptions.

Like with roster changes, there may be various consultation and other legal requirements under the applicable instruments that need to be followed in order to utilise supplementary labour for this purpose.

- **Labour costs**

A key issue for all businesses will be in managing labour costs.

The Jobkeeper reforms have provided eligible employers with a great deal of flexibility to recalibrate the hours and pay of their workforce in order to soften the blow associated with the crisis. Those flexibilities, however, are only temporary (they are due to expire on 28 September 2020) and only available for eligible employers and employees.

Managing these types of changes under existing enterprise agreements or employment contracts will usually be difficult. It is very uncommon for either to afford the level of flexibility that businesses will now require.

This will likely lead to employers pursuing strategies aimed at varying their existing obligations. Varying employment contracts will require individual agreement. Varying enterprise agreement will require majority agreement (whilst also needing to satisfy a range of other statutory requirements).

The Fair Work Commission also has the power to approve enterprise agreements that do not pass the better-off overall test in exceptional circumstances where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer (see s.189 of the *Fair Work Act 2009*). This rarely utilised power may become more prevalent in the future.

As a minimum, template employment contracts for new hires should be revisited. The labour market will be different to when those templates were last reviewed.

Risk vs. reward arrangements with low fixed remuneration, but high performance based incentives, may become the 'new normal' for more than just the executives and senior managers.

There may be other additional flexibilities worth exploring for new staff.

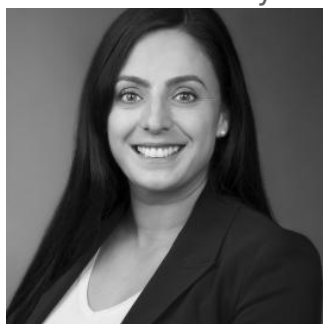
The Reserve Bank of Australia has identified workplace reform as a key factor in determining the success of Australia's economic recovery from the virus. It is not yet clear what those reforms might involve.

In the meantime, it is incumbent on all businesses to test the limits of the existing legal framework. In many cases, some beneficial changes will be possible within the existing laws provided, of course, that employers plan carefully and execute their strategies effectively.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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