

# COVID-19: PEOPLE: EMPLOYMENT RELATED IMPLICATIONS OF CORONAVIRUS PLANNING (AUSTRALIA)

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Legal Briefings - By **Steve Bell**

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Employers are making decisions about adapting the way their workforces operate in the context of the novel coronavirus COVID-19.

These are plainly circumstances without parallel or precedent, and so many businesses are relying on fundamental principles of risk management and business continuity planning, and attempting to apply them in this rapidly developing situation.

The purpose of this article is to provide some general guidance on a framework through which employers might consider the issues as they arise. Of course, on this issue, all guidance is out of date almost as soon as it is published, but this note is intended to provide some principles upon which immediate decision making and longer term planning can be undertaken.

We consider that the employment and workplace health and safety implications for Australian businesses can perhaps be divided best into three broad categories:

1. **Now:** Immediate planning and response.

2. **Next:** Preparing for changes to the manner in which work is performed.
3. **Later:** Planning for the gradual return to work of large numbers of the workforce, but also contingency planning for a significant illness and absenteeism.

## **CONTEXT**

The framework for decision making should have regard to the overall societal context of this unique situation, including that reporting on the COVID-19 virus confirms that the general view is that:

1. It is highly contagious, including before infected persons necessarily have any symptoms of the virus.
2. Because it is novel, there is no pre-existing immunity in society (no 'herd immunity', currently no immunisations) - which means most people who come into contact with it, will get ill to some degree.
3. For most people - the consequences of catching COVID-19 will be generally unpleasant, but ultimately benign. However, the consequences for some members of the community (to the tune of 2 or 3%) are likely to be more severe, possibly fatal - and at present it appears that this is related to the elderly or immune compromised.
4. The cumulative effect of elements (1), (2) and (4) above have meant that governments are taking drastic (unprecedented) steps to try to 'flatten the curve' of infection so that the health systems on a State and National level can keep up with those affected by element (4).

Employers have a role to play in assisting with the public health response being led by the State and Federal Governments. Although, employers are entitled to take note of element (3) in planning the nature of their response and in calibrating their general duty of care to workers.

## **APPARENT CONSEQUENCES OF THE OUTBREAK**

In all, the current literature and scientific reporting suggests that regardless of containment efforts, society will nevertheless be affected by large-scale illness, and this will lead to many people being unable to work for periods of time.

Businesses should prepare for this, and meet their duty of care to take reasonable steps to minimise infections within their workforce as far as it reasonable for an employer to do so.

More broadly though, Government responses including containment and ‘social isolation’ efforts are focussed on achieving public health outcomes such as deferring the effects of the virus for as long as possible across *society as a whole*, so as to ‘smooth’ the peak period. In this regard, employers have seen that they have a larger, social role to play supporting these efforts; although there is some distinction to be drawn between taking societal steps to support the public health strategy, and any perceived immediacy to take sudden or dramatic steps to isolate workers now.

Managing these two compatible, but different, responsibilities sets an important context for how Australian employers can respond to this virus.

### **PHASE 1: “NOW” (PLANNING, SYSTEMS TESTING, PREPARATION FOR CHANGE)**

If we consider the “Next” stage is likely to involve directions or decisions to change the location of those who have office based roles (working from home) or changes to rostering other practices, the immediate need is to plan for that now. Of course, workers still continue to attend work today.

Our advice in relation to this current phase is:

- **Communication:** Business should ensure it has a clear pathway to communicate with workers on this issue beyond face-to-face meetings or briefings. Many employers are developing or implementing apps or other communication methods.
- **Information:** To ensure that the business relies on current, reputable, information sources on COVID-19. This may involve engaging with the Department of Health website, or other external risk management providers.
- **Workforce assessment:** Consider any particular ‘at risk’ workers, and consider whether specific arrangements need to be taken for these people now.
- **Managing travel:** At present there is a heavy emphasis on the management of international travel. At a macro level, federal and state governments are seeking to limit the spread of the virus within the community. Given the virus originated overseas, the logical extension of this is that they are seeking to limit the introduction of those infected into Australian communities and workplaces.

This stage will pass in due course, but it is important that business have in place arrangements that are clear for workers about their self-isolation obligations when they return from overseas travel. The Government has recently intervened to mandate a minimum 14 days isolation period for all travellers returning from overseas, and so this is a reasonable measure to expect employees comply with.

- **Workplace management:** From a health and safety point of view, this stage will include consideration of fundamental matters like workplace hygiene, protection of customers, protecting staff from potential exposure, and managing supply chain issues with those rare community items such as soap and hand wash so far as is able to be done.
- **Consultation and engagement with workers:** Employers continue to owe an obligation to consult with employees regarding changes to work practices, or risk management measures. Accordingly, consideration must be given to engagement of workforces in relation to contingency planning even at this early stage.
- **Guidance material:** Some guidance material is available from health and safety regulators and Safe Work Australia in relation to general risk management principles, although, given the highly evolving nature of the situation, these are generally less specific rather than more.
- **Workplace mental health:** Consideration should also be given to the emotional impact of the continued press and messaging in relation to this matter. It is to be expected that workers will be subject to higher than normal degrees of anxiety and stress, and consideration should be given to this at the line manager level. Reasonably practicable steps to manage this including ongoing and detailed communication with workers in relation to both existing decision making, and also to provide comfort that the decision-making framework exists.
- **Pandemic procedure:** Pandemic planning should involve the development of clearly documented escalation procedure. In our view, it's important in preparing this documentation that the language used by business is consistent with the language that is being used by health professionals, or likely to be used by the Government Agencies through which directions will be given. Clarity should be provided, for example, about what the consequences are for "close contact" with an infected person, and what the required "social isolation" requirements in that context are. At the time of writing this article, there is no basis to believe that there is a legal duty to evacuate a workplace for an unconfirmed infection, or even if an infected person attended a part of a workplace (there is a clear precedent in Federal Cabinet), but guidance on this issue is likely to evolve.

In terms of language, terminology, etc, in our view it will be important for organisations not to seek to "reinvent the wheel" in providing those communications.

This might be set in phases from 'Business as usual', to 'Voluntary changes to working arrangements (where they can be accommodated)' all the way to likely Government directions to fundamentally change work attendance requirements or 'Not attend the workplace'.

- **Business continuity:** A range of business continuity issues will arise in relation to client communications, contingency planning, supply chain planning and receipt and delivery of goods, services or other receivables in changes circumstances. Again, in this “Now” stage, the best pathway forward is to undertake considered planning in relation to these matters.

As a management tool, it may be appropriate that workers/managers are tasked with a specific responsibility in relation to each element of this contingency planning.

- **Leave and employment benefits:** Employees will have a range of questions associated with their leave and other entitlements. Casual employees will have concerns regarding their proposed payment arrangements in the event of a shut down.

While business will of course take steps to ensure that it seeks to demonstrate its appropriate corporate care at this early phase, consideration will also need to be given to the implications of potential long-term changes to its working arrangements, and so this may lead it to avoid making commitments which may later need to be recanted.

- **Engagement regarding essential services:** Consideration should be given to any required governmental engagement to ensure proper consideration is given to any ‘essential’ community purpose served by the business. The aim here is to ensure that a business is not subject to a blanket directions to cease work in the “Next” phase, where there is an urgent need to continue operations. This engagement should start now.

## **PHASE 2: “NEXT” (LARGE-SCALE WORK FROM HOME OR ISOLATION)**

It seems clear that the “Next” phase of this pandemic response will involve large-scale directions to those workers who can ‘work from home’ to do so. Importantly, though, this will also include a need to ensure that ongoing essential services (food, power, petrol, etc) can continue to be provided into the economy.

### **Large-scale working from home**

There is very likely to be a significant dichotomy here between workforces. There will be those workers in office-based support roles who are able to socially isolate, whereas those in customer-facing or supply chain critical roles required to be available to continue to provide those services.

From an employment point of view, consideration should be given to the available levers to issue appropriate directions to workers in this context.

Consideration will also need to be given to directions regarding changes to existing practices (for example rostering and other practices) as well as the management of leave accrual and payment in these circumstances. A review of industrial arrangements and contracts of employment may be important here.

From a health and safety point of view, those working at home are nevertheless owed a duty of care to be able to work at home safely, and this might include consideration of the 'home office' set up.

### **Managing those remaining operations**

In addition, consideration should also be given to the manner in which health and safety of workers who remain at the workplace can continue to be monitored by those in remote circumstances (as circumstances may require).

Again, these are plainly uncharted waters, but the ordinary principles of risk management, risk control, and active supervision will continue to be legal requirements, even if there is an overarching obligation to perform work in different circumstances.

### **Thinking about changed work practices - ensuring safety**

It may also be the case that during this "Next" phase workers are required to perform tasks that are different to those which they are otherwise routinely trained and expected to perform in the ordinary circumstances. Close consideration will need to be given (from a health and safety point of view, at least) to ensuring that these workers are in fact trained to perform any alternate duties, and that there is a clear record of this.

### **Planning for alternate rosters**

From an employment and management point of view, there is very likely that workforces will begin to enforce separation between teams, and management of key-person risks. Many employers are already developing "Team Red, Team Blue" (eager to avoid branding one "Team A" or another "Team B").

The purpose of this planning is to provide general workforce redundancy in the event that one team is unavailable for services.

Again, careful consideration will need to be given to this analysis and clarity sought regarding steps which can be taken to implement these sorts of arrangements. To some extent existing industrial arrangements or agreements may be inhibitive to doing this, and business will need to reflect what if any changes need to be made now, to facilitate this “Next” phase.

### **PHASE 3: “LATER” (IE. MONTH 3 OR 4 OF RESTRICTED MOVEMENT)**

Whilst a great deal of attention is currently placed on this existing phase, as well as the “Next” phase, of course there will be gradual return to ordinary arrangements over the coming period.

It can be imagined that within say the coming three to four months, there will be a general societal exposure and general workforce recovery from illness – ie. with many workers having contracted the illness and likely fully recovered.

### **Employment planning**

In these circumstances businesses will be in a position to progress a gradual return to normal operations.

That said, there will likely be a higher than normal degree of worker absenteeism – either as a result of workers having a need to care for household members who may be gradually contracting this illness, or otherwise dealing with the illness themselves.

Again, business should have clarity regarding how its existing policies and procedures will apply in those circumstances, particularly in relation to access to personal, long service or annual leave by those workforces.

### **Monitoring employee illness during this return to work situation**

From a health and safety point of view, it will also need to consider the arrangements through which it monitors employee illness in the workplace, and the steps it proposes to take to direct or otherwise seek assurance that workers are fit and able to return to work.

It is to be imaged that over the journey of the infection rate throughout the workforce and society, there may in fact be less cause for concern regarding potentially infected persons. That is, over the coming months, there is likely to be less concern about detection of the illness and “isolating” as there is a general acceptance that many individuals have been infected and are now in a recovered, likely immune state.

In this context, setting rigid requirements for medical assessments prior to a worker returning to work may well be entirely appropriate as we seek to generally limit societal levels of community infection. It may be less relevant as general infection levels progress through the general workforce.

## CONCLUSION

This is an evolving situation of course, and employers are doing the best they can with the information to hand.

We trust that the general outline above provides some assistance to business in thinking through planning over the coming week.

[More on navigating the COVID-19 outbreak](#)

## 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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