

## **COVID-19 and holidays: have you got enough leave to leave?**

The question of who pays for an employee's time spent in self-isolation due to possible exposure to COVID-19 is not easy to answer, but confusion is rife so here follows some general guidance<sup>1</sup>:

**If you're sick** and you are a permanent employee with a sick leave accrual, use your personal leave.

**If you're quarantined, but not sick** it gets tricky. Are you 'not fit for work because of a personal illness, or personal injury affecting you'? If you're showing no signs of illness, there's an argument that you're not entitled to paid personal leave.

**If your boss directs you to self-isolate** that gets tricky too. Employees who are not 'ready, willing and able' to work are not entitled to be paid. Employees required to pass a drug test don't get paid until they do. That's because if they're not able to prove they can work safely, they're not 'able' to work. The situation gets less clear when employees suffer loss of a licence. Are they 'able' to work even without their licence? The answer would depend on their terms of employment and the nature of their work.

Similarly, not posing a risk to others' health is a worker's obligation under WH&S legislation. Complying with WH&S law is an inherent requirement of any job. Having COVID-19 clearly poses a risk to others' health, but does 'maybe having COVID-19' constitute a risk to health that means an employee is not 'ready, willing and able' to work? The situation appears pretty similar to drug test cases.

A theme that arises in discrimination law cases is that doctors are the experts when it comes to health; not employers. The current medical advice appears to be quite consistent in recommending self-isolation for 14 days for those who may have been exposed to the virus. For me, that's sufficient to say that healthy employees under self-isolation would normally be required to take a period of unpaid leave.

There will be arguments that such medical advice is purely precautionary, or unreasonable, or inapplicable in a particular situation. If an employee wants to challenge an employer's view on this they could explore what work might be performed at home, or obtain medical advice about what other measures (if any) could be taken to ensure they are able to work safely.

**What about people who travel for work?** It would be pretty unfair if you had to pay for the privilege of working overseas by taking two weeks of unpaid leave every time you return home. If your boss wants to you to go overseas, make sure they are prepared to cover the full cost of the trip.

**What if it's not safe at work?** No employee can be lawfully instructed to work in an unsafe environment. Again, doctors are the experts in health. Personal decisions to stay home contrary to medical advice would normally result in unpaid absence from work. If the absence is unauthorised then disciplinary measures could be implemented.

**There's less work available because of COVID-19.** Reduced demand for labour may result in redundancy of some positions. Alternatives to consider first are choosing to use up your accrued leave entitlements, negotiating reduced hours of work and calls for voluntary redundancies.

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<sup>1</sup> The information provided is general in nature and does not constitute legal advice.

**What is stand down?** This is different to a direction that an individual employee self-isolate at home while everyone else keeps working. When an employer stands down an employee they are lawfully sending the employee home without pay. Generally speaking, employers can do this during a period in which the employee cannot be usefully employed because of a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

A stand down may occur if a government authority has made a direction to close down part or all of a business for a period of time to contain the virus. Employers should consider first whether there is any other way that employees can be usefully employed (eg working from home).

**Why isn't the advice about COVID-19 and work clearer?** One of the problems with questions surrounding the effect of self-isolation on the right to be paid is that there's not a lot of case law to guide us. It's rarely been worth an employee's while to go all the way to trial over underpayment claims for brief periods of non-payment.

**If my boss isn't paying me, who will?** Australian businesses hit with the economic impact of COVID-19 are not necessarily well-placed to cover the cost of employees self-isolating. The UK government is offering payment to workers to stay home rather than risk the spread of the virus. Our government has not yet chosen to do the same. Those particularly hard hit will be casual workers and the self-employed.

If you have more questions about COVID-19 and work, contact Thea Birss by email ([thea@ndalaw.com.au](mailto:thea@ndalaw.com.au)) or mobile (0413 301 185).