

# Employers Consider Return to Work Plans post COVID-19

*Written by Shawn Skyring on 25 Jun 2020*

As restrictions begin to ease across the state and we begin to return to our daily routine pre-COVID-19, most employers are now preparing for the return to work. Understandably, employers have a number of concerns over what is the best action plan to put in place, whilst employee concerns include health and safety risks and whether there will be any significant changes made to their employment.

There are several things employers should take into account when devising a 'Return to Work' plan.

## **Employer Considerations**

The most important thing is ensuring that employees are consulted about any changes made and that they feel supported during these times. It's important to understand what the key concerns are for employees and consider how employers can best accommodate. Constant communication is vital.

### ***Who and how many employees should return?***

This is a key consideration for employers. It's important to consider firstly, who and what employees are necessary for the running of the business (e.g. in an office environment, having at least one member from each team in the office to ensure each team has a physical presence). In determining who should return, a risk assessment must also be undertaken.

In looking at how many employees should return, firstly consider the space of the workplace. In deciding how many can return to the office, physical distancing rules must be adhered to, which will affect how many employees can be in the office at any given time. Safework Australia has stated that people should be at least 1.5 metres apart and there needs to be a space of 4 square metres per person.

### **How should employees return?**

It's important that employees have an action plan in place as to how they plan to return to the workplace. Consider whether it would be a staggered reintroduction, or would employees be split into teams and physically come into work on a rotational basis.

It's important to receive input from employees e.g. surveys, about the proposed plans before finalising the plan.

### **Workplace hygiene – Work, Health and Safety Risk**

Health and safety risk is an important consideration. As mentioned, Safework Australia has released information on physical distancing which would require many workspaces to be restructured in order to abide by these guidelines.

You must also ensure that the workplace has adequate facilities in order to minimise health risks e.g. hand sanitisers, face masks etc. You should also consider having the workplace cleaned more frequently (e.g. wiping down desks, door handles, keyboards etc).

Where an employee has raised concerns over work, health and safety, employers should approach this carefully and ensure consultation with employees to alleviate some of these concerns.

## Employers Consider Return to Work Plans post COVID-19 cont.

### Work Health & Safety Procedure Changes

Consider changes made to your workplace health and safety procedures and be sure to communicate those changes to employees in a timely fashion

### Getting to and from work

As employees return to work, public transport is understandably a key concern. The following social distancing restrictions have been put in place:

- about 12 passengers per bus;
- about 32 passengers per train carriage;
- seats will be blocked off to enforce social distancing; and,
- 15-20-minute train station shut down period to prevent overcrowding.

It's encouraged that people travel during off-peak periods (10am to 2pm).

A solution is directing employees to use nearby car spaces if available. Another solution for both employers and employees would be to consider staggered start and/or finish times in order to allow time for employees to get to work/home. This would also lessen the traffic for workplaces that have lifts.

### COVID-19 Return to Work Policy, Information and Training

A policy needs to be developed providing information to employees which would also include directions not to come into work if sick, identifying COVID-19 symptoms etc.

Employers must provide employees with necessary information and training in order to minimise health and safety risks. Policies should include:

- information on protective equipment regime and use;
- employee expectations e.g. requiring employees to practice good hygiene;
- physical distancing measures;
- guidelines on practising good hygiene e.g. washing hands; and,
- information on working from home Such as:
  - setting expectations;
  - equipment and facilities at home;
  - WHS considerations; and,
  - security and Code of Conduct.

Training on the use of protective equipment should also be provided.

For employees working from home, employers should ensure regular communication and check in on the wellbeing of employees.

## Employers' responsibilities during COVID-19 cont.

### Employee Consultation

As mentioned, employers need to consult employees about any changes, and it is important that employees are a part of the decision process. Awards and enterprise agreements set out consultation requirements and it is important that employers refer to these.

#### *When to consult employees?*

- when a risk assessment is conducted;
- when decisions are made in relation to control measures e.g. working from home, physical distancing taking place in the workplace;
- determining and making decisions on the current adequacy of the workplace to minimise risk;
- any changes affecting employee health and safety; and,
- any changes to WHS policies.

#### *Considerations when consulting employees*

When consulting employees about any changes made to the workplace, it is important to consider the following, especially in the current circumstances:

- challenges employees may face returning to work and obstacles e.g. travel;
- solutions to those obstacles;
- concerns over their own health and safety – measures in place to minimise that risk;
- whether the employer can do anything to accommodate;
- workspace and physical distancing; and,
- other commitments employees may have such as juggling childcare rosters or carer responsibilities etc.

### Consultation Process

In accordance with Award requirements, the following is best practice when conducting consultations:

- notify affected employees of proposed changes;
- give them an opportunity to respond and to provide you with any information that is relevant to your decision, before you make it;
- confirm discussion at the meeting in writing (email/letter);
- consider the responses;
- make your final decision;
- communicate and follow up in writing; and,
- implement decision with appropriate paperwork.

## Employers' responsibilities during COVID-19 cont.

### Directing employees to return to work

In directing employees to return to work, notice should be provided, and this should be in writing. Employers may also need to consider contractual amendments. Employers must make reasonable directions and when directing employees to return work, employers should consider:

- vulnerable workers; and,
- whether deciding which employees will return could raise discrimination arguments.

### JobKeeper Provisions

For eligible employers, the implementation of JobKeeper provisions must be considered given that it is in operation until 28 September 2020. The JobKeeper provisions provides more flexibility to employers as opposed to section 524 of the Fair Work Act 2008. JobKeeper provisions allows for partial stand downs, reduction of work hours, change in work location and/or duties etc. However, it must be reasonable and take into account all circumstances.

Giving directions requires notification in writing at least 3 days before the direction is given (unless the employee agrees to a shorter timeframe). There should be a consultation with the employee (or their representative) about the direction and there must be a written record of that consultation. The actual direction must then also be in writing.

### Employers refusing to return to work

The direction to return to work must be reasonable. Employers must ensure that consultation and notice requirements have been complied with as well as consideration of what was agreed to previously (e.g. contracts, amendments to contracts including emails and discussions).

It is important to consider the reason for refusal. Requesting further information from the employee is also prudent in determining whether refusal to come back to work is reasonable or not. Where it is not reasonable, the business has the right to take disciplinary action against the employee.

The following vulnerable groups of people will have reasonable grounds:

- 65 years of age and over;
- an Aboriginal or Torres Strait Islander person over 50 years; or,
- have a chronic condition.

Pregnant women whilst not officially a vulnerable group, may have a reasonable basis for refusal if they have medical evidence to justify their refusal.

This also applies for carers who have responsibilities for someone in the above vulnerable groups of people.

Where it is a reasonable direction and the employee's reason for refusal is not reasonable, the employee's absence from work will be an unauthorised absence and a failure to comply with a reasonable direction which can result in disciplinary action.

## Employers' responsibilities during COVID-19 cont.

### The disciplinary process

The reasonable direction to return must be in writing. The employer must discuss with the employee their concerns as to why they do not want to return to work and consider if they are legitimate concerns.

- Yes, the concerns are legitimate: e.g. carers responsibilities, unwell/vulnerable group.

As an employer, firstly see if you can accommodate and provide any solutions. Employers must tread carefully in refusing to accommodate as there can be a risk of discrimination/general protections/adverse action claims. Consider if it is a flexible work arrangement scenario or a mere temporary accommodation.

- No, they are not legitimate concerns.

Explain to the employee why the refusal is unreasonable/can't be accommodated, and notify the employee of the reason in writing, and that ongoing refusal to comply could lead to disciplinary action. Refer to relevant policies, contract, PD, code of conduct etc and check if there are any internal policies about the disciplinary process that you need to follow.

Employers should avoid making unilateral decisions without consultation as this is likely to lead to a disgruntled employee and an increased likelihood of legal action.

### Requests for flexible work arrangements

What if an employee wants to amend their employment indefinitely and request a flexible work arrangement? E.g. change in their hours of work, patterns of work or location of work.

The following groups are entitled to make a request for a flexible work arrangement (s65 FW Act):

- a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
- b) the employee is a carer;
- c) the employee has a disability;
- d) the employee is 55 or older;
- e) the employee is experiencing violence from a member of the employee's family; or,
- f) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

The employee is not entitled to make the request unless:

- a) for an employee other than a casual employee-the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or

## Employers' responsibilities during COVID-19 cont.

- b) for a casual employee-the employee:
- i) Is a long-term casual employee of the employer immediately before making the request; and
  - ii) Has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

The request must:

- a) be in writing; and,
- b) set out details of the change sought and of the reasons for the change.

### **Refusal on reasonable business grounds**

The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.

The employer may refuse the request only on reasonable business grounds, such as:

- the new working arrangements requested by the employee would be too costly for the employer;
- there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
- that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
- that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity; and,
- That the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

If the employer refuses the request, the written response must include details of the reasons for the refusal.

These reasonable business grounds apply to refusals for requests for flexible work arrangements but can also be guidelines justifying why a direction to return to work, is reasonable.

As we prepare to transition back into our normal daily routine, the above are some key considerations that employers must take into account in devising their 'return to work' plan. If you require any assistance with your return to work plan, please do not hesitate to contact a member of Coleman Greig's Employment Law Team, who would be more than happy to assist you today.

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