

IEU Member Advice – COVID-19

13 March 2020

As COVID-19 has reached the pandemic stage and is likely to spread more widely in Australia it raises questions for workers regarding their rights and entitlements under scenarios ranging from work closure to forced quarantine.

Employers will need to balance competing and overlapping demands of their public health, Workplace Health & Safety (WHS) and industrial responsibilities. This unprecedented event is not well catered for in a “normal” industrial sense.

The IEU is calling on our employers to go beyond the bare industrial minimum of what they **could** do and venture into what they **should** do. In the interests of WHS and public safety, there should be no disincentives or barriers to workers who may be impacted by COVID-19 in self-isolating.

Yes, personal leave is available as normal if an employee is actually sick or has caring responsibilities and would have been absent from the workplace any way. That will invoke the use of personal leave, infectious disease leave or workers compensation depending on the circumstances.

Problems arise however when otherwise fit and healthy workers are told to not come to work. In situations where there are whole school closures or individuals who are stood down, the IEU position is that these people should have access to paid ex gratia leave, not debited from other forms of accrued leave – preferably a minimum of 2 weeks.

Not every role or school is set up for people to work from home, but if that is possible it should be explored and people paid normally during any period of exclusion. Where employees are required by their employer to not attend the workplace, that time should be covered by ‘special leave with pay’. This will not be a financial impost on schools as their funding and fees will continue through any period of disruption. *It is just the right thing to do.*

Public Health Measures

Public health measures are based on a precautionary approach which includes rapid detection, rapid response and then control of sources of infection. As such, it will be reasonable for employers to take proactive and reactive measures to prevent widespread outbreaks.

Responses need to be proportionate to the risk. For example, a person with a mild runny nose and no travel risk factors may not need to be medically cleared before returning to the workplace. If the school sets that low bar for risk, the employee's wages should still be paid as it is at the employer's direction and not an employee choice.

One can expect that school closures would not normally be longer than 2 days to allow for cleaning and tracing of contacts (depending on the availability of specialised cleaning services).

The latest public health information can be found at

<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/health+topics/health+topics+a+-+z/covid+2019/latest+updates/latest+updates+-+covid-19>

Work Health and Safety Laws

Employers are required to provide healthy and safe work, so far as is reasonably practicable. The obligation on the employer is to provide healthy/safe "work" whilst workers are at work. There are also obligations for an employer to monitor, so far as reasonably practicable, working conditions and the health of workers.

Employers will have obligations to ensure that workers are not exposed to known cases or contacts and will be required to provide any contacts of cases to public health authorities.

Workers also have obligations to take reasonable care that their acts or omissions do not adversely affect the health of other persons.

Employers have an obligation to inform all staff of any WHS measures they take in relation to the safety of staff, so workers can fully comply with their own obligations to not put themselves or others at risk.

Workers have rights to refuse to carry out work if the worker has reasonable concern the work would expose themselves to a serious risk from an immediate or imminent exposure to a hazard. In that instance they need to remove themselves from danger and stay available to undertake other work.

Industrial Relations

If workers are unable to attend the workplace, or are directed to not attend, a range of industrial issues arise. One needs to check one's own Enterprise Agreement (EA) in the first instance.

The vast majority of EAs approved in South Australia have an infectious diseases clause, which allows for up to 52 weeks paid leave for diseases caught through the workplace. Failing that, there may be grounds for a Workers Compensation claim which could include treatment costs as well as salary. This however would not strictly cover a period of precautionary-enforced exclusion, as the employee has not actually acquired any disease. The principle is nevertheless of some guidance as to a suitable strategy.

Most EAs also have provision for non-teaching staff (however called) to be paid for school closure days which occur on days normally worked.

Most EAs also have provision for the granting of special leave. This is the emerging option with various Catholic school employers around the country, as well as large corporations such as Woolworths, Telstra and Macquarie University, committing to such arrangements.

The IEU supports the ACTU call for the provision of up to 2 weeks ex gratia pay for people who are stood down because of the COVID-19 virus. This will need to be agreed to by individual employers if the government does not eventually mandate it.

There would be little detriment to schools for paying staff who are stood down as school income of funding and fees is not dependent on them actually being open and/or operating normally. Other businesses may have greater difficulty paying wages without any income generation.

General Considerations:

The following considerations apply to workers who contract, are exposed to or otherwise are affected by, COVID-19 outside of the course of their employment. Various considerations, including workers compensation (discussed above) would apply to workers who are affected by COVID-19 in connection with their employment.

1. Workers who contract COVID-19

For a worker with a confirmed case of COVID-19, the situation is reasonably clear.

A worker on continuing or fixed term employment has the right to take accrued paid personal leave to cover any absence. However, if the employment is for a short term and at casual rates, no personal leave accrues. The IEU and ACTU support the provision of 'special paid leave' for casual employees.

A person who contracts COVID-19 overseas and remains overseas will have the same rights.

Employers, in consideration of their broader duties to their entire workforce, would have an obligation to ensure that a worker with a known case of COVID-19 does not attend the workplace.

2. Workers who provide care

A worker may need to provide care if their child's school or day care is closed. The worker may access personal leave to do so.

Paid personal leave may be taken for caring purposes, including care of children in quarantine status. Employees who have exhausted their paid personal leave can seek access to unpaid personal leave.

If the worker's personal leave is exhausted, the worker could ask their employer for access to other leave accruals, or, the employer may ask the employee to work from home.

Compassionate leave is also available where a serious illness affects a person's family or household member.

3. Workers who may have contracted COVID-19

The situation is more complex for workers who suspect, or may be suspected of, having COVID-19. Where there is potential exposure to COVID-19, workers should advise employers of exposure and the need to isolate in accordance with issued health guidance. Employers should be encouraging self-reporting of such instances and ensuring that there are no barriers or disincentives to reporting. Accordingly, in these instances employers should be providing paid leave to ensure that workers are not financially disadvantaged by making such reports.

An employer may direct a worker to remain at home until a medical clearance is obtained. If doing so, the employer would have to continue to pay that worker's wages. This should be the course adopted when exposure or potential exposure is work related.

Some complexity arises for a worker who (responsibly) self-excludes on the basis of their thinking that they may have contracted COVID-19. Personal leave is generally available when a worker has an illness or injury. If a worker does not attend work for fear they may have contracted COVID-19, they should seek medical advice and obtain medical certificates to assist them in claiming personal leave. Alternately, a worker could canvas other options, such as working from home. However, given appropriate caution in endeavouring to contain the spread, those workers who are self-excluding should be supported with 'special leave with pay'.

4. High risk workers

Some sectors within education will be at an increased risk of exposure. Additional guidance is available to assist those workers.

Some older workers, or workers with immune suppression disorders may be at increased risk of contracting COVID-19. In the event of an outbreak in Australia these workers should carefully consider their need to attend work and take the necessary precautions to avoid exposure. If necessary, they may consider self-isolation and be provided with 'special leave with pay' as outlined above.

5. Workers affected by a Travel Ban

A worker affected by a travel ban (who was not travelling for work) – such as the current ban on incoming travel from China, Iran, Republic of Korea and Italy – should be able to draw down on existing leave entitlements, and, could subsequently have arguments to make in relation to the General Protections if they are prejudiced in seeking access to those entitlements.

A worker who was travelling for work should not lose wages as the result of a travel ban.

6. School closures and stand downs

The *Fair Work Act 2009 (Cth)* (FW Act) allows employers to stand-down employees in certain circumstances when employees cannot be usefully employed. In the event of an outbreak of COVID-19 in Australia, where workplaces are shut down for quarantine purposes, it is possible that employers may seek to rely on stand-down provisions. The scale of the outbreak would need to be significant for this to occur.

The IEU would oppose the use of stand-down provisions.

If schools are closed due to the virus, essentially the employer (either of its own initiative or based on directives from government/health authorities) is directing employees not to attend work. Our union's view is employees should not be forced to use accrued leave entitlements to be paid during such an absence.

There are several alternatives to stand-down which employers should explore instead. These include the provision of additional 'special leave with pay' and access to flexible working arrangements, such as working from home.

7. Harassment and discrimination

Employers cannot discriminate against workers on the basis of race or disability (which can include disease or illness).

In addition to this, workers would have actions if they were discriminated against on the basis of being, for instance, from a country with a high incidence of the disease. This does not prevent an employer acting in relation to a person who presents a particular risk, such as someone who has been to an affected area or who has in fact contracted COVID-19.

8. Workers compensation

Workers compensation is a relevant consideration for workers who contract COVID-19 in connection with their employment. Attributing the contraction of COVID-19 to the workplace could present difficulty if COVID-19 is widespread in the community.

While there is no community spread or while numbers are low, it will be possible to trace contacts. If a worker contracts COVID-19 and the contacts can be traced to work, the person will be able to claim workers compensation benefits for any time lost or medical care required.

9. 'Special leave with pay' and support for casuals

It is the view of the IEU that specific measures should be provided by employers to support casual workers who are impacted by COVID-19 and employers should be encouraged to provide 'special leave with pay' for casuals. In the interests of WHS and public safety there should be no disincentives or barriers to workers who may be impacted by COVID-19 in self-isolating.

UNION SUPPORT

Your Union is available to provide support to any member who needs specific advice.

Email enquiries@ieusa.org.au or call 8140 0122.

We would also appreciate being kept abreast of examples of good and poor practice in your workplace.

Authorised by Glen Seidel, Secretary IEU(SA) Branch

Sources:

<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/health+topics/health+topics+a+--+z/covid+2019/latest+updates/latest+updates+--+covid-19>

<https://www.homeaffairs.gov.au/news-media/current-alerts/novel-coronavirus>