

COVID-19 Toolkit: NSW Government COVID-19 Support

The NSW State government, in its efforts to reduce the spread of COVID-19 in the community, has imposed further lockdowns and restrictions on Greater Sydney.

These restrictions will place further pressure on individuals, households and businesses which are already feeling the effects of reduced trade, and income over the past 18 months as we have learned to live with COVID-19.

The NSW government, in conjunction with the federal government as announced further COVID-19 business support (2021).

Gilchrist Connell and RSM have prepared this joint information sheet answering some questions around employment law considerations and available business support in light of the lockdowns.

Please do not hesitate to reach out to a Gilchrist Connell or RSM team member for further support and assistance with eligibility and application on the below.

Employment matters for consideration

The following are some questions employers may find themselves asking:

Can employees be stood down?

Many employers across the country, especially those in Victoria and New South Wales, are asking whether they can stand down employees during the current lockdowns.

If an enterprise agreement, award or employment agreement contains provisions relating to stand down in such circumstances, those provisions must be followed.

In the absence of any other industrial instrument or contract, the *Fair Work Act 2009* (Cth) (**the Act**) will apply.

Under section 524(1)(c) of the Act, an employer may lawfully stand down any one of its workers without pay during a period in which the employee cannot be usefully employed because of, amongst other reasons, a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

There is not a great deal of case law to help interpret section 524(1)(c) of the Act. However, it is likely that, if you are required to shut your business or a work division of your business due to a Government shutdown direction, you will be entitled to stand down employees working in your business/the affected division without pay.

However, you will not be able to stand down workers without pay on the basis of section 524(1)(c) of the Act in those parts of the business that remain unaffected by such Government shutdown direction.

Section 524(1)(c) does not permit partial reductions in employee hours; only a full stand down.

Further, the wording of section 524(1) requires the employer to consider how an employee may be “*usefully employed*”. An employer can have a stoppage in one area/division but not another, so could redeploy workers who would otherwise be stood down. Before enacting a stand down under this section, first consider whether the affected employee may be usefully employed elsewhere in the business.

A stoppage of work which occurs in one area, but not others, could result in redeployment, with consent, including on part-time hours.

While an employee is stood down without pay, they still accrue leave entitlements including both personal and annual leave.

You cannot stand down employees without pay solely due to a downturn in work/reduction in business.

Accessing accrued leave while on stand down

Employers standing-down employees can agree, with their employees’ consent, for employees to draw down on annual leave or long service leave (where there is an entitlement to access the leave), or to cash out or take such leave in advance (subject to legal requirements such as those under modern awards). These options can only be utilised by agreement; you cannot direct an employee to take annual or long service leave for a period of stand-down.

Cancelling approved leave

Employers cannot cancel an employee’s pre-approved annual leave.

Employees may request that their pre-approved annual leave be cancelled at any time. If the employer consents to this, then the employee will be required to attend work as directed.

What about sick leave?

Where employees can be usefully employed (i.e. not stood down) and become unwell, then they may take personal (sick) leave.

However, where your business is affected by a Government shutdown direction, and there is no work available for the employee (and they are currently stood down), then personal leave may be paid with the employer’s consent.

Casual employees are not entitled to paid sick leave under the Act.

Varying employees’ hours

Reducing an employee’s hours is different to standing down an employee. Where an employee is employed for a minimum/guaranteed number of hours, a reduction of those hours can only be achieved by voluntary agreement with the employee.

It is unlawful for an employer to unilaterally direct an employee to vary their hours.

Paying employees in Government mandated self-isolation

Generally, if an employee is required by law to self-isolate, they are not entitled to pay if they cannot work at home. Other than casual employees (see above), the employees can use any accrued paid annual leave or, if they are sick or caring for someone in their immediate family or household who is sick, accrued paid personal/carer's leave.

Additionally, the NSW and Victorian State Governments may offer employees disaster payments upon meeting the relevant criteria.

What happens to employees who cannot return to work due to border restrictions?

If an employee is unable to attend work to perform their duties because they are in another State or Territory (or country) and prevented from leaving (or entering the State in which they work), they are not entitled to be paid. Employers may consider if they can accommodate such employees working remotely but are not obliged to do so.

Conclusion

Any business considering taking any of these measures or standing employees down without pay should seek employment law advice before proceeding, due to the significant risks if any decision taken is wrong. We are offering discounted rates for any employers needing advice about the impacts of COVID-19.

Available support for business

2021 COVID-19 Business Grant

Eligible businesses can claim a one-off grant of up to \$15,000 from 19 July 2021 which can be used for business expenses such as rent, utilities and wages.

There are eligibility criteria (listed below) which determine which stream your business is eligible for, however the fundamental criteria is that the business must demonstrate a decline in turnover of at least 30%. The higher the decline, the higher the potential grant.

Decline in turnover test

The turnover test is satisfied if your business has experienced a decline in turnover of 30%/50%/70% due to the Public Health Orders over a minimum 2 week period from 26 June 2021 to 17 July 2021 compared to the same period in 2019, 2020 or the two weeks immediately prior to the lockdown commencement date of 26 June 2021.

A 30% decline will equal a \$7,500 grant (tier 1)

A 50% decline will equal a \$10,500 grant (tier 2)

A 70% decline we equal a \$15,000 grant (tier 3)

There has been indication that alternative tests will be available for businesses which were not operating in June/July 2019.

Once the decline in turnover is established, further eligibility conditions need to be met as follows:

Small Business COVID-19 Support Grant - Eligibility

- Have annual turnover of between \$75,000 and \$50 million
- Hold an Australian Business Number and can demonstrate that you are physically located or primarily operating in NSW
- Maintain their employee headcount as at 13 July 2021
- Have total Australian annual wages of below \$10 million
- Have business costs for which there is no other government support available.

Evidence – highly impacted industry

Eligible businesses from highly impacted industries applying for tier 1 & 2 grants are required to:

- Declare they have experienced the required decline in turnover per the above
- Declare they have eligible expenses for which no other Government support is available
- Declare their employee headcount at 13 June 2021
- Declare they will maintain their employee headcount as at 13 July 2021 for the period the business is receiving payments under this grant or the JobSaver (discussed below) program.
- Provide details of their qualified accountant, registered tax agent or BAS agent for compliance checking
- Submit an annual income tax return or notice of assessment to support annual turnover requirements.

Eligible businesses from highly impacted industries applying for a tier 3 grant will, in addition to the above, provide evidence that they have experienced decline of 70% or more in turnover over the relevant test period in the form of a letter from their accountant or registered tax/BAS agent.

Evidence – not highly impacted industry

Eligible businesses outside highly impacted industries applying for tier 1, 2 & 3 grants are required to:

- Submit evidence that they have experienced decline of 30%/50%/70% or more in turnover over the relevant test period in the form of a letter from their accountant or registered tax/BAS agent
- Declare they have eligible expenses for which no other Government support is available
- Declare their employee headcount at 13 June 2021
- Declare they will maintain their employee headcount as at 13 July 2021 for the period the business is receiving payments under this grant or the JobSaver (discussed below) program
- Submit an annual income tax return or notice of assessment to support annual turnover requirements.

Cashflow Support - JobSaver

A cashflow payment of between \$1,500 to \$10,000 per week calculated on 40% of your NSW Payroll payments of your business.

Businesses without employees (sole traders) will be able to access payments of \$1,000 per week.

Eligibility is determined as follows

- Have annual turnover of between \$75,000 and \$250 million
- Demonstrate a 30% decline in turnover
- Maintain your staffing level as of 13 July 2021
- Be impacted by the current Greater Sydney COVID-19 restrictions.

The decline in turnover test is the same as the test applied for the Covid19 Grant application in that you compare a minimum two week period from 17 July 2021 to the same two week period in 2019, 2020 or the two weeks immediately prior to the lockdown commencement date of 26 June 2021.

Micro Business Grant

A new grants program for micro-businesses with a turnover of between \$30,000 and \$75,000 which experience a decline in turnover of 30 percent. The businesses will be eligible for a \$1,500 payment per fortnight of restrictions.

Payroll tax

Payroll tax waivers of 25 per cent for businesses with Australian wages of between \$1.2 million and \$10 million that have experienced a 30 per cent decline in turnover, as well as payroll tax deferrals and interest free repayment plans.

Additionally, an administrative concession has been provided to extend the due date of the 2020-21 annual payroll tax reconciliation lodgement to 7 October 2021.

Attention items for landlords

Landlords with commercial and residential properties should also be aware of the following developments

- Land tax relief equal to the value of rent reductions provided by commercial, retail and residential landlords to financially distressed tenants, up to 100 per cent of the 2021 land tax year liability
- A capped grant of up to \$1,500 for residential landlords who are not liable to pay land tax who reduce rent for tenants
- Introduction of legislative amendments to ensure a short-term eviction moratorium for rental arrears where a residential tenant suffers loss of income of 25 percent due to COVID-19 and meets a range of criteria
- No recovery of security bonds, or lockouts or evictions of impacted retail and commercial tenants prior to mediation.

Listen. Engage. Solve.



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