

To assist our clients, we have put together a Document Kit of key documents that they may use to address some of the employment law issues that may be facing their business. I would ask that you let members know these templates are developed by HR Legal to support CIAVIC Members.

The kit contains the following documents:

1. Stand down letters for full stand down;
2. Stand down letters for partial stand down (or work from home);
3. Redundancy letter – where you are terminating employment for redundancy
4. Variation Letter – when you want to change terms of employment – for example reduce salary/or hours;
5. Working from home Agreement.

Each of these documents contain some highlighted fields that should be edited, filled or deleted depending on the circumstances (we provide further comments about each document below).

Depending on individual business circumstances there may be other documents they need, such as Individual Flexibility Agreements, or more general communications to staff about the government support available. We can assist with tailoring these documents for specific requirements.

On our website we have also included updates on other employment law aspects of COVID-19, and clients can access the webinars we have provided. We have included “Frequently Asked Questions” on our website that may address many of the issues business are dealing with.

**Stand down letters (Documents 1 and 2)**

The *Fair Work Act 2009* allows employers to stand down their employees in certain circumstances where they cannot be usefully employed. When an employee is stood down, they are not required to be paid for their ordinary hours of work.

Businesses may have specific stand down provisions in their employment contracts or Enterprise Agreements. Be aware of these and comply with them.

In the *Fair Work Act*, the circumstances in which employees can be stood down include “any stoppage of work outside of the employer’s control”.

The *Fair Work Act* was not written with COVID-19 in mind, and there are unprecedented situations facing employers. The stand down provisions are not generally meant to be used to compensate for a slowdown in business. However, the business effects caused by coronavirus clearly create a stoppage of work outside of an employer’s control in many cases. This interpretation is “unchartered waters” as there is no previous case law addressing this. However, we consider that the government requirements for many businesses to close (both directly and indirectly), or the need to close to achieve social distancing requirements, justifies the use of the “stand down” provisions.

Of course, with any “stand down”, where meaningful duties can be performed – these should be provided. This may be on reduced hours, or in different locations – including home. This is a partial stand-down.

Where this is the case, employees who are stood down do not need to be paid for their ordinary hours of work. However, they will still need to be paid for:

* Any approved periods of paid leave (including annual leave and personal/carer’s leave); and
* Any periods where they are authorised to be absent from work and would have been paid (i.e. public holidays).

During these periods, the employee is taken to be not stood down for the duration. This means that employees who are approved for annual leave, personal leave or long service leave will need to be paid as normal where that leave is authorised.

When standing down employees, while employers do not have to consult, we strongly recommend discussing the stand down with employees first and circulating the attached notice to staff in advance of the stand down going into effect.

Employers may also want to include information about other support that is available (for example government support, or employee support programs you may offer). The letters make reference to the recent JOBKEEPER support.

**Redundancy letter (Document 3)**

Redundancy occurs when an employer decides they no longer require a job an employee has been doing to be performed by anyone, and terminates their employment. The job itself, not the employee, becomes redundant. The principal legal risk in terminating an employee’s employment due to the redundancy of their position is that the employees will make an unfair dismissal claim. Affected employees will not be able to make a successful unfair dismissal claim if the Company can show the dismissal is a case of ‘genuine redundancy’. The economic consequences to the COVID-19 health crisis will in many cases justify redundancies.

In order to demonstrate that a redundancy is ‘genuine redundancy’, an employer must establish each of the following three requirements:

1. the employer **no longer requires the employee’s job to be performed by anyone**;

This usually involves a review of the Company’s current operations and consideration of future operational requirement and a decision, as a result of that review, that a reduction in the number of employees has become necessary.

1. it was not reasonable in all the circumstances for the person to be **redeployed** within either the employer’s enterprise an associated entity;

The Company is required to consider all reasonable redeployment opportunities across its own enterprise (and any associated entities). This includes positions that may be at a lower level, or a “permanent” part-time role. If a role at a lower level is available, the Company should not presume that an affected employee will refuse an offered position – especially in the current circumstances - and should make the offer in good faith to provide the opportunity to be redeployed into that role rather than being made “redundant”.

1. the employer has complied with any obligation in an applicable modern award or enterprise agreement to **consult** about the redundancy.

While technically consultation is required, in practice there may be little to consult about, and it will be difficult to undertake normal consultation for most organisations at present. However, to manage this risk, there may be benefit in seeking the views of the affected employees before formally notifying of the redundancy.

Generally, where the reason for termination is redundancy, in addition to notice, an employee is entitled to a redundancy payment upon termination of employment. The entitlement to redundancy pay may arise from the NES, contract, or binding policy.

Under the NES, redundancy pay does not apply to the termination of an employee’s employment if, immediately before the time of the termination, or at the time when the person was given notice of the termination (whichever happened first), the employer was a “small business employer” meaning it employs fewer than 15 employees at that time.

**Variation of Contract (Document 4)**

There may be circumstances where a business is seeking to vary the terms of an employee’s employment during the crisis. For example, different (or reduced) hours of work, or temporary changes to remuneration (eg: temporary pay cut). This may necessitate a variation to their contract of employment, as it goes to their basic conditions of work. As such, unlike a partial stand-down - this must be done by mutual agreement. If the employee refuses to reduce their hours of work, and there is not enough useful work for them to perform, then other options may need to be explored, including stand downs or redundancies.

**Working from Home Agreements (Document 5)**

Where employees are going to be working from home, this should be by mutual agreement. Where an employee does not agree to work from home, or otherwise cannot work from home, then other options may need to be explored if they cannot continue to attend from their usual place of work because of government directives (including utilising periods of paid leave, or standing them down until they can return to work).

Businesses continue to have occupational health and safety obligations for employees working from home, and there are other issues to consider like use of company property. The attached draft Working From Home Agreement addresses some of the key issues, and asks employees to do a self-assessment of safety issues. While they are not specifically required to return these checklists, ideally, they should be reviewed to ensure that all required safety conditions are met.

**Other Documents to Consider: Individual flexibility agreements / IFAs**

As an alternative to strict compliance with an applicable modern award, an employer and an employee may mutually agree to enter into an individual flexibility agreement (**IFA**) to vary the application of certain terms and conditions under the Award (such as overtime rates, shift allowances, penalty rates and leave loading). Some employers are using IFA’s to address COVID-19 issues – for example to change hours of work to accommodate employee’s carer responsibilities or to have staggered start times to maintain social distancing – but not have to pay shift allowances.

An employee cannot be compelled to sign an IFA. If an employee elects not to sign the IFA, they remain on the normal entitlements under their contract of employment. If the normal terms of employment are not currently sustainable (i.e. there is not enough work for them to perform), then other options may need to be explored, including stand downs or redundancies.

The IFAs can usually be terminated with 13 weeks’ written notice by either party, however in the circumstances we consider that employers should consider lower unilateral notice periods to assure employees that the changes to their employment are not indefinite. Terminating an IFA does not end the employment – only the operation of the particular IFA.

IFAs (and contracts) do not have to be lodged with the Fair Work Commission or any other body.

**Next steps**

I hope this Document Kit assists. We can assist in developing other letters and communications to staff, tailored for individual business requirements. We can also assist with advising on practical suggestions to maintain safety for businesses continuing to operate.

These are only templates and may not suit specific requirements. Also as mentioned previously, depending on employment contracts or Enterprise Agreements that apply to a business there may be limitations or conditions that apply to a right to stand down staff (especially “without pay”). So, these templates should not be relied on as “advice”.

Kind regards,

**Dan Feldman | Partner**

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