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FACT SHEET

Stand Down

From time to time situations may arise in the workplace that an employer cannot reasonably be held responsible for, and which may require a workplace, or part of a workplace to shut down its operations for a period of time.

During these periods of shut down, employer's obligations to the employment relationship continue.

Employment contracts or formal workplace agreements, such as Enterprise Agreements, may provide a lawful right for an employer to stand down employees during a shut down period, however in the absence of any such rights, the default provisions in the *Fair Work Act 2009* (the 'Act') may be relied upon.

The Act provides the circumstances for which an employer can stand down employees. The effect of standing down an employee is that the employer is not required to make payment for ordinary hours of work to the employee for that period.

Section 524 of the Act states:

1. *An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:*
 - a. *industrial action (other than industrial action organised or engaged in by the employer);*
 - b. *a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;*
 - c. *a stoppage of work for any cause for which the employer cannot reasonably be held responsible.*

Where any of the above circumstances apply, an employer may stand down an employee for a period. It is noted that the above stand down provisions apply to full-time, part-time and casual employees.

With respect to section 524(1)(c), a stand down may only apply where the employer cannot reasonably be held responsible for the stoppage of work. Therefore, where the workplace is requiring fewer employees to attend work due to a downturn in demand for example, the employer cannot rely on the stand down provisions under the Act. This is because a stoppage of work has not occurred.

During a period of stand down the employer is not required to pay an employee for the stand down period. It is essentially an absence from work, at the employer's initiative (in accordance with section 524), that is unpaid. However it is noted that while a period of a stand down is unpaid, an employer can choose to pay employees at their discretion. If this is the case, and to avoid confusion, the employer should ensure employees clearly understand the payment is discretionary, not an entitlement.

Employees should be notified in writing of any period of stand down and the arrangements during that period. Please refer to attachment A of the Fact Sheet for a sample stand down letter.

EMPLOYEE ENTITLEMENTS DURING A STAND DOWN

Where an employee is stood down their *continuity of service* is not affected. Employees continue to accrue leave entitlements (eg annual leave and personal/carer's leave) while being stood down over a period. For example, a full time employee being stood down over a period of 6 months will accrue approximately 2 weeks annual leave and approximately 5 days personal/carer's leave during the period of stand down.

EXEMPTIONS TO SECTION 524

Employers with an Enterprise Agreement, collective agreement, or other such formally approved workplace agreement must refer to the terms of that agreement for guidance on any stand down provisions.

Section 524 will not apply where an agreement provides for stand down terms.

Where a contract of employment and/or any other formally approved workplace Agreement (such as a Collective Agreement) or policy in the workplace provides stand down provisions, the stand down provisions under section 524 will not apply. Please note that consideration should be given to any workplace policy in place in relation to stand down – employers have an obligation to comply with the provisions set out in the policy where the policy forms part of the contract of employment.

Further, it is noted that in accordance with section 525 of the Act (copied below), an employee may not be stood down when the employee is taking a period of paid or unpaid leave that is authorised by the employer or the employee is otherwise authorised to be absent from their employment.

Section 525 of the Act states:

*525 Employee not stood down during a period of authorised leave or absence
An employee is not taken to be stood down under subsection 524(1) during a period when the employee:*

- (a) is taking paid or unpaid leave that is authorised by the employer; or*
- (b) is otherwise authorised to be absent from his or her employment.*

Note: An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the employee would otherwise be stood down under subsection 524(1).

STAND DOWN - DISPUTES

Where a dispute arises about stand down under the Act, an application may be made to the Fair Work Commission to deal with the dispute. Pursuant to section 526, an application may be made by any of the following:

- An employee who has been, or is going to be stood down under the Act;
- An employee who has made a request to take leave to avoid being stood down and whose employer has authorised that leave;
- A union that is entitled to represent the industrial interests of the employee's described in the above two points;
- A Fair Work Inspector.

NOTE: prior to 1 January 2013, the Fair Work Commission was called Fair Work Australia.

WRITTEN NOTICE OF STAND DOWN

The QHA recommends that if an employer is standing down employees, the employees are notified in writing and are clearly advised of what a stand down means for them.

Employers are advised that simply telling an employee not to attend for work – as opposed to explaining the need for a shut down and that the employee is being stood down in accordance with the Act – may result with the employer having to pay the shift. This is because the employer requested the employee not to attend for work as rostered as opposed to advising of a stand down arrangement being in place.

Therefore, by providing notice of a stand down in writing, the employer can be satisfied that an employee is aware of the stand down being the reason for not attending work, as opposed to asking the employee not to attend for work.

ALTERNATIVES TO STAND DOWNS

Alternative options may be exercised by an employer prior to making the decision to stand down employees without pay. These options may include:

- Employees being given the option to utilise accrued paid leave entitlements, for example, annual leave;
- If permitted by the applicable industrial instrument, directing the employee to take a period of annual leave.
- Where appropriate, consider flexible working arrangements, such as working from home;
- Considering whether associated entities can share work and hours among sites.

EXAMPLE

Hotel XY has recently been affected by floods and consequently has been unable to operate.

The applicable industrial instrument and or contract of employment in the workplace do not contain any provisions that deal with business closure due to natural disasters such as floods. Consequently in the absence of any provisions, the provisions relating to stand down within the Act may be applied. In particular section 524(1)(c) may be relied upon due to the floods resulting in stoppage of work where an employee cannot be usefully employed and for which the employer cannot be held responsible. Subsequently the employer is able to stand down employees without pay until they are able to return to work.

The employer would prefer not to stand down the employees if possible, so they check whether any employees have unused leave entitlements which can be made available to the employees until they can return to work.

On this basis, the employer contacts each employee to advise them that as a result of the flooding, the hotel is unable to remain open and they cannot provide employees with useful employment at this stage. The employees are also advised that in accordance with the Act they will be stood down without pay until the business is able to reopen.

For those employees who have accrued leave entitlements, the employer offers them the option of accessing those entitlements as an alternative to being stood down, at least until they have been exhausted. During the conversation the employer makes it clear to the employees that this is entirely optional and there is no obligation to take the leave, however, if they were to apply for leave, the employer would approve it.

The employees that choose to take paid leave are required to complete the required documentation when taking leave.

After the discussions with all employees, the employer writes to each employee to confirm the arrangements that were discussed and provides them with contact details during the stand down period. The letter also advises that the employer will remain in regular contact with the employees throughout the period of closure and that they will be notified when the business is up and running again.

Further Assistance

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

The information contained in this document is intended for general information only. Whilst due care has been taken in preparing this document, no responsibility is accepted by the author for the accuracy of the information therein contained.

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ATTACHMENT A

SAMPLE STAND DOWN LETTER

<Place on company letterhead>

<Insert date>

<Insert name of employee>

<Insert address of employee>

Delivered by Hand

Dear <insert name of employee>,

Due to the recent <insert reason for stand down> affecting the <insert name of hotel>, the hotel has ceased operating from <insert date>.

As a result of the <insert reason for stand down>, over which we have no control, the business has temporarily ceased operation and a stoppage of work has occurred. In accordance with section 524 of the *Fair Work Act 2009* (the "Act") your employment has been stood down for the period of the stoppage.

It is expected, but to be confirmed, that the <insert name of hotel> will recommence operation on <insert date> and at this date you will be required to return to work. Please note that you will be contacted to confirm the end of the stand down period and our requirement that you return to work.

In line with section 524(3) of the Act, during the period of stand down the <insert name of hotel> will not be paying you any wages for the hours that you would have ordinarily been required to work, however you will continue to accrue annual leave and personal/carer's leave entitlements during the period.

If you have any further question please do not hesitate to contact me.

Kind regards

<insert name>