

CORONAVIRUS COVID-19

HOSPITALITY VENUE SHUTDOWN EMPLOYMENT Q&A



31 MARCH 2020

The information contained in this Q&A document is provided as general information.

QHA members are encouraged to contact the QHA's Employment Relations team to discuss their own specific workplace situation.

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HIGA SCHEDULE L: NEW PROVISION IN EFFECT

On 24 March the Australian Hotels Association successfully varied the *Hospitality Industry (General) Award 2010* ('HIGA') to include a new Schedule that has effect due to the COVID-19 Pandemic.

Schedule L had effect from the first full pay period on or after 24 March 2020, and stays in effect until 30 June 2020 (unless otherwise extended by the Fair Work Commission).

The Schedule enables a number of flexibilities to be implemented by an employer. They are:

- Employees can be directed to work across classifications to assist with work requirements;
- An employer can direct that a full time employee's hours of work be reduced;
- An employer can direct for a part time employee's hours of work be reduced;
- An employer direction for an employee to take annual leave with only 24 hours' notice in certain circumstances.

Restrictions and other criteria apply to the above prior to any flexibilities being implemented.

The intention of the Schedule is for it to be utilised where an employer and an employee cannot reach agreement to vary hours of work, or for when annual leave is to be taken.

Please refer to the QHA Fact Sheet titled HIGA: Schedule L.

STAND DOWN OF EMPLOYEES

WHAT IS A STAND DOWN OF EMPLOYEES & DOES THE GOVERNMENT'S SHUTDOWN (as of 23/3/20) TRIGGER THE STAND DOWN PROVISIONS?

A stand down of employees can arise where there is stoppage of work for which the employer cannot reasonably be held responsible for **AND** the employees cannot otherwise be usefully employed. The *Fair Work Act 2009* (the 'Act') section 524 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.

The shutdown of hospitality venues by the Government represents a stoppage of work for which the employer cannot reasonably be held responsible for.

Provided that the employees cannot be usefully employed, it is the QHA's view that the Government's shutdown of hospitality venues likely triggers the operation of the stand down of employee/s provisions in the *Fair Work Act 2009*.

WHAT IF AN ENTERPRISE AGREEMENT OR EMPLOYMENT CONTRACT SAYS DIFFERENTLY?

Enterprise Agreements or employment contracts may provide for alternative stand down provisions. If this applies to your circumstances, you must refer to, and apply, the stand down provisions in the Enterprise Agreement or contract.

**Please read this in conjunction with QHA's Fact Sheet titled Stand Down.
It contains a template stand down letter for use.**

CAN I STAND DOWN CASUAL EMPLOYEES?

Casual employees can be stood down as section 524(1) applies to all employees.

CAN A STAND DOWN APPLY IF PART OF THE BUSINESS IS STILL OPERATING ACCOMMODATION OR TAKEAWAY/DELIVERY SERVICES?

Yes. A stoppage of work triggering a stand down can apply to a part or parts of a business which have been shut down, even if another part of the business continues to operate. A stand down can also be applicable to certain employees within those parts of the business still operating with reduced capacity, because those employees cannot be usefully employed.

WHAT HAPPENS DURING A STAND DOWN OF EMPLOYEES?

During a stand down the employees do not attend work, and the employer is not required to make any wages payments to employees for the period of the stand down.

HOW LONG CAN A STAND DOWN PERIOD LAST?

There are no time limits specified in the *Fair Work Act 2009*. The duration of any stand down period will be referable to the stoppage of work and whether or not the employees can be usefully employed. For example, while a business may close for 8 weeks, it may be able to usefully employ some or all of the employees after 7 weeks in order to set-up or prepare for re-opening.

However, the current Government shutdown of hospitality venues in response to the COVID-19 Pandemic is likely to result in many venues closing and implementing a stand down of employees for an indefinite period of time.

Although a stand down period might be for an indefinite period of time, it is still recommended that an initial/projected timeframe be communicated to employees – but with a clear indication that this timeframe is subject to review.

Example wording to this effect is included in the QHA's template stand down letter, which is included in the QHA Fact Sheet titled Stand Down.

DO I NEED TO INFORM MY EMPLOYEES IN WRITING?

Yes. In addition, Centrelink has advised that they will accept a stand down letter from a person seeking benefits.

DO I NEED TO KEEP MY EMPLOYEES UPDATED?

Yes. A stand down will be a distressing and confusing period for employees. It is recommended that you maintain regular communication and provide regular updates to your employees, including where the stand down period has to be extended.

IS A STAND DOWN THE SAME AS A TERMINATION?

No, they are different concepts. During a stand down, an employee remains employed.

DO I NEED TO GIVE MY EMPLOYEES A SEPERATION CERTIFICATE?

No, because a stand down is not a termination, an employee who is stood down should be given a stand down letter.

A separation certificate is only given to an employee when their employment is terminated.

If providing a separation certificate during a stand down, an employee may later claim to seek that their employment was terminated unfairly. This leaves an employer open to a claim of Unfair Dismissal with the Fair Work Commission.

AN APPRENTICE WHO HAS BEEN STOOD DOWN CAN STILL ATTEND CLASSES AS PART OF THE APPRENTICSHIP. DO I PAY THEM?

Yes. Normal payment arrangements will apply in this situation. Please note that when the apprentice is at class (which could be conducted on-line) they are working – as per their employment and training contracts.

Therefore, the employee will need to be advised that for attendance at a class, they are not on a period of stand down, and that when the class finishes, the stand down is reinstated.

CAN AN EMPLOYER'S DECISION TO STAND DOWN EMPLOYEES BE CHALLENGED?

Yes. An employee, a union or Fair Work Ombudsman Inspector can file a stand down dispute in the Fair Work Commission. If you receive a stand down dispute notification please contact us immediately.

LEAVE DURING A BUSINESS SHUT DOWN PERIOD

DOES ANNUAL LEAVE AND PERSONAL/CARER'S LEAVE ACCRUE DURING A PERIOD OF STAND DOWN?

Yes, the period of stand down is considered service for the purposes of the *Fair Work Act 2009*. Therefore annual leave and personal/carer's leave will accrue as normal.

DOES LONG SERVICE LEAVE ACCRUE DURING A PERIOD OF STAND DOWN?

In Queensland, long service leave does not accrue during a period of stand down.

CAN AN EMPLOYEE TAKE ANNUAL LEAVE OR LONG SERVICE LEAVE DURING A PERIOD OF STAND DOWN?

Yes. If an employer agrees to an employee's request to take annual leave or long service leave, the employee will not be considered stood down during the period of the leave.

This means that all the usual rules and payments relating to the particular leave will apply, including payment for public holidays falling during the period of annual leave or long service leave, and the payment of annual leave loading.

If you do approve a period of leave, and if at the end of the approved period of leave, the stoppage of work still exists **AND** the employee cannot be usefully employed, you can then stand down the employee in writing.

An employee already on a period of approved (paid or unpaid) leave at that time of stand down is taken not to be stood down until that leave period ends.

CAN ANNUAL LEAVE BE TAKEN AT 'HALF PAY'?

No. The *Fair Work Act 2009* at section 90 is very prescriptive on how annual leave is to be taken. Section 90 states:

"Payment for annual leave

- (1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.*
- (2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave."*

However, HIGA Schedule L , specifically L.2.3(c), enables an employer and an employee to agree to "take twice as much annual leave at half the rate of pay for all or part of any period of annual leave".

For example: *Three weeks of annual leave becomes six weeks*

Jenny has 3 weeks of annual leave accrued. Jenny's weekly rate of pay is \$500.00. Jenny enters an agreement with her employer, as per Schedule L, agreeing that rather than taking 3 weeks annual leave at \$500.00 per week, she will take 6 weeks of annual leave at \$250.00 per week.

CAN I REFUSE AN EMPLOYEE'S REQUEST TO TAKE ANNUAL LEAVE OR LONG SERVICE LEAVE DURING A PERIOD OF STAND DOWN?

Yes. An employer can refuse an employee's request to annual leave or long service leave, provided the refusal is reasonable.

An example of a reasonable refusal would include no capacity to pay the leave during the current trading restrictions arising out of the Coronavirus COVID-19 Pandemic.

IS AN EMPLOYEE ENTITLED TO PAID PERSONAL LEAVE OR CARER'S LEAVE DURING A PERIOD OF STAND DOWN?

No, during a period of stand down these payments are not required to be made to employees.

IS AN EMPLOYEE ENTITLED TO PAYMENT FOR A PUBLIC HOLIDAY THAT FALLS DURING A PERIOD OF STAND DOWN?

No, during a period of stand down the employee does not have ordinary hours, meaning these payments and resulting entitlements eg to do with RDOs are not required to be made to employees.

CAN AN EMPLOYEE TAKE A PERIOD OF PARENTAL LEAVE?

Yes, a period of parental leave will generally operate as normal. An employee taking a period of unpaid parental leave will not be considered to be stood down. It is important to note that unpaid parental leave will not count as service, but will not break an employee's continuous service.

LEAVE WITHOUT PAY

AN EMPLOYEE HAS ASKED TO TAKE LEAVE WITHOUT PAY FOR A PERIOD EG UNPAID LEAVE. DO THEY ACCRUE ENTITLEMENTS DURING THAT PERIOD?

No. The employee will not accrue any entitlements during a period of unpaid leave as this period is not considered continuous service.

THE EMPLOYEE IS STILL WORKING IN THE BUSINESS

WHERE I CAN STILL USEFULLY EMPLOY AN EMPLOYEE, CAN I REDUCE THEIR RATE OF PAY BECAUSE THEY ARE DOING LESSER DUTIES?

No. The only way to reduce an employee's rate of pay is with agreement. An employer cannot make a unilateral change to anyone's employment contract. To do so is unlawful and may represent a termination of employment (which carries risk for an employer).

CAN I REDUCE A PERMANENT EMPLOYEE'S HOURS OF WORK?

In the absence of agreement with the employee to reduce their hours of work, Schedule L in the *Hospitality Industry (General) Award 2010* may apply for reducing hours of work in limited circumstances. This Schedule was inserted into the HIGA on 24 March 2020.

Please refer to the QHA Fact Sheet titled HIGA: Schedule L.

I MAY NEED TO EXPLORE REDUNDANCIES

AFTER CONSIDERING THE IMPACT OF THE GOVERNMENT'S CLOSURE OF NON ESSENTIAL BUSINESSES, I WILL NEED TO MAKE A NUMBER OF POSITIONS REDUNDANT

QHA's Fact Sheet on Redundancy provides detailed information on the process that an employer needs to follow when considering the redundancy of a position or positions. As a redundancy of a position results in the termination of an employee's employment, should that (now former) employee feel aggrieved with the outcome, they may seek redress with a Fair Work Commission Unfair Dismissal claim.

For this reason it is still essential, despite the COVID-19 situation and resulting business closures, to ensure there is a valid reason for termination (which is redundancy) and a procedurally fair process has been followed, including consultation where applicable

QHA's Employment Relations team can assist you with this process.

WHERE AN EMPLOYEE IS STOOD DOWN, DOES THE STAND DOWN PERIOD COUNT TOWARDS SERVICE FOR PURPOSES OF NOTICE OF TERMINATION AND REDUNDANCY PAY?

Yes, a period of stand down counts as continuous service under the *Fair Work Act 2009*. Therefore, the stand down period will count in terms of calculating notice of termination and redundancy pay entitlements, if the employee's position is later terminated due to redundancy.

STAND DOWN PROVISIONS - GENERALLY

The stand down provisions in the *Fair Work Act 2009* are yet to be tested before a court. While we consider the views we have provided are correct, it is noted that provisions in the *Fair Work Act 2009* are not free from doubt.

SUPPORT FOR EMPLOYEES AND THE BUSINESS

ARE THERE ANY EMPLOYEE SUPPORT MEASURES IN PLACE?

The following Government agencies and organisations can assist employees:

- Services Australia has a dedicated COVID-19 section on their website - click [HERE](#)
- National Coronavirus COVID-19 Helpline - 1800 020 080;
- Lifeline – 13 11 14;
- Kids/Young Adults (5-25 years) Helpline – 1800 55 1800.

ARE THERE ANY EMPLOYER/BUSINESS SUPPORT MEASURES IN PLACE?

- The Government has announced a range of employer and business support packages, which can be accessed [HERE](#).
- The [QHA's website](#) (landing page) is regularly updated with information to assist employers.
- To view a copy of the Queensland Health directive for non-essential business closures, click [HERE](#).

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.

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31 March 2020