

CFMEU Construction & General Division and Maurice Blackburn release on coronavirus

As the outbreak of COVID-19 - or “coronavirus” - continues to spread through Australia’s general population, CFMEU Construction & General Division members should be aware of their rights and responsibilities when it comes to taking personal leave, Workcover entitlements and accommodating quarantine requirements.

This article explains you and your employer’s rights and obligations.

This advice is only general in nature and may vary in specific circumstances. Always consult your union before taking action.

What rights do workers have when quarantined?

If an employee is diagnosed with COVID-19 and is declared unfit to work by a doctor, they must take paid personal leave in accordance with the National Employment Standards in the *Fair Work Act 2009* (Cth) (**FWA**) or their industrial instrument. The employee would likely be required to provide a medical certificate for that period.

Where an employee is not sick, and is ready, willing and able to work, a request by an employer that they not attend work is effectively a direction to stop work. This should be followed by the employee, as such a direction is likely lawful and reasonable.

However, the employee should not be required to take personal leave. The employer should continue to pay the employee at their normal rate of pay while the direction to stop work remains. If an employee obtains a medical certificate clearing them to return to work the employer should allow the employee to return to work. If practicable, the employer may direct the employee to work from home during that period. An employee cannot be directed to take annual leave under the FWA. However they can under a term of an industrial instrument if that term is reasonable.

If an employee is required to look after a dependent who has been quarantined, the employee should use their personal leave as normal. Employees are also entitled to two days unpaid carer’s leave, and in rare circumstances,

two days compassionate leave. Alternatively, the employee may request to implement a “flexible working arrangement” with their employer. Such a request can only be denied on reasonable business grounds, for example, if it would be impractical or too expensive for the employer to implement.

Can employees be treated differently after a coronavirus diagnosis?

If an employee is diagnosed with coronavirus, they are entitled to take their personal leave just as if it were the common cold or flu. If an employer were to take any “adverse action” against them for exercising such a right - for example, by terminating their employment, or reducing their shifts - they may be in breach of the FWA, as well as State and Federal anti-discrimination legislation.

When the employee has recovered and is declared fit for work, their employer must allow them to return. If the employee’s illness has left them with some impairment, the employer cannot discriminate against them on the basis of that impairment, provided they can still meet the inherent requirements of the role.

In the event that an employee is dismissed due to having been diagnosed with coronavirus, or for taking leave to self-quarantine or look after family in quarantine, the dismissal may be unfair under the FWA.

What are the rights of casual workers?

Casual workers are not entitled to paid sick leave. However, they may be entitled to two days unpaid carers leave if they are required to look after an immediate family member who has been quarantined, and in rare circumstances two days unpaid compassionate leave.

If a casual employee is not able to work any of their rostered shifts, they must inform their employer and may be required to provide a medical certificate. Importantly, it is also unlawful for employers to discriminate against casual employees who have been unwell or have had to take time off work to self-quarantine. Employers are not entitled to dismiss those casual employees or to stop giving them shifts on that basis.

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What if a workplace closes?

If an employer has no choice but to close the workplace, they may initiate a "stand down". In that situation, employers do not have to pay employee wages. This can only be used where the cause of the stoppage is one for which the employer cannot be reasonably responsible. Examples of such situations include natural disasters or extreme weather events, but may possibly be extended to include disease pandemics. Whether an employer can do a coronavirus shut down would depend on the particular circumstances.

Employees should also be directed to their employment contract, or applicable modern award or enterprise agreement for specific terms outlining workplace "shut downs", and when their employer may force them to take annual leave.

What are the obligations on employers?

Employers must take "reasonable steps" to ensure the health and safety of their employees. This may include directing an employee to obtain a medical certificate declaring them fit to work. If they are not fit for work, the employee must take personal leave. However, if they are ready, willing and able to perform their duties, the employer must allow them to do so. An employer's direction to an employee to take personal leave when they are not sick may be an unlawful and unreasonable direction.

If an employer does not want an employee to attend work, even though they are not unwell, they should be prepared to pay them at their base rate of pay for that period. Alternatively, employers may look to implement flexible work arrangements, such as the direction for employees to work from home on full pay.

Can I make a Workcover claim?

To be able to make a Workcover claim, an employee must be able to demonstrate that work was a reasonable significant factor in catching the disease. Medical evidence would need to be obtained confirming that to be the case. To date general practitioners have been reluctant to confirm that catching a common cold or flu was obtained from work. However if a medical practitioner is prepared to confirm that the likely cause was from work exposure then a claim may be open. Either way please reach out to the CFMEU Construction & General Division or Maurice Blackburn Lawyers for advice on this issue.

Can I claim on insurance through my super fund?

Most superannuation funds provide default life and disability insurance for members over 25, with an account balance greater than \$6,000. If you have income protection and are unable to work due to any injury or illness, including Coronavirus, you may be able to claim monthly payments while you are unwell. Waiting periods apply and can vary from a few weeks, to several months depending on your policy. Lump sum insurance is also common and members will be able to claim if they become totally and permanently disabled due to any injury or illness.

Members may also have cover for time off work through EBA, employer, or personal insurance policies and it is important to check. Some policies may have exclusions for pandemic or epidemic related illnesses. If you are unsure if you are covered, Maurice Blackburn provides members with a free super & insurance check so you know where you stand.

What if I had to cancel travel plans?

As a result of the coronavirus or COVID-19, many people have been forced to cancel their bookings due to newly imposed travel bans. How travel insurance responds to Pandemic related cancellations will depend on when the bookings were made, and the approach taken by accommodation, airline and other travel companies. Not all travel insurance policies are the same, and the exclusions put in place by insurers vary. If you or your members have been affected, more information can be found here: <https://www.mauriceblackburn.com.au/blog/2020/february/28/coronavirus-and-travel-insurance-cover-and-claims/>.

Information correct as at March 2020

For further information, contact us today:

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