

People & Culture Leader Guide – Stand Down

Purpose

As a Leader, it is important that you are aware of Endeavour Foundation's use of the stand-down provisions of the Fair Work Act, 2009. This is to help with ensuring that we afford an employee procedural fairness and natural justice.

The stand-down provisions within the Fair Work Act, 2009 (the FWA) envisage only two scenarios:

- A. **Paid Stand-Down** for all other circumstances not covered by Section 524 of the Fair Work Act; and
- B. **Un-paid Stand-Down** under Section 524 (as commonly experienced with the COVID-19 pandemic).

Key Information

A. Paid Stand-Down

Generally, employers use paid stand-down during a disciplinary investigation or proceedings so that they have time to conduct an investigation before delivering a decision, in order to comply with procedural fairness and the principles of natural justice.

When Stand-Downs are Utilised

Stand-downs with pay associated with disciplinary action are usually taken by employers for the following reasons (which are not exhaustive):

- The alleged conduct is deemed serious misconduct which might place an employee's employment at risk of termination and this risk is high enough to materially affect the employee from safely performing their role from a mental health perspective;
- The employer may hold serious concerns about the safety and welfare of complainants & witnesses (assault, intimidation, victimisation, vilification, bullying or harassment) if the employee is allowed to continue working at the workplace with access to those persons;
- The employer holds serious concerns that the misconduct may continue if the employee remains in the workplace (ie: theft, fraud etc);
- The employer holds serious concerns that the employee may attempt to contaminate or destroy evidence of their misconduct and / or attempt to intimidate another employee into corroborating their story; or
- The employee is deemed unfit for work (eg: returns a non-negative result to a random drug & alcohol test).

Approvals

Approval to stand down any employee must be obtained in line with the Delegations of Authority, before any action to advise the employee of stand down is taken. People Experience can assist with this part of the process.

Written Notice of Stand-Down

If an employer reasonably holds any of these concerns, it may issue a written notice to the employee that notifies them that they are being stood-down with pay either for a fixed period (ie: until the NTA meeting) or indefinitely when circumstances warrant (ie: complex investigation involving many parties or the employer having to wait until a Police investigation has concluded).

Conduct whilst Stood-Down

Whilst the employee is stood-down on pay, they must follow our reasonable directions because we are paying them as if they were still at work. They must:

- remain away from the workplace and not make any form of contact (physical or electronic) with current employees, complainants and / or witnesses;
- maintain their fitness for work (sobriety) so that they may attend the workplace at short notice if we wish to interview them or require them to participate in a workplace re-enactment (safety incident);
- consider formulating a written response to our allegations and sending that response by the due date / time to their Manager (not compulsory); and
- comply with any other reasonable management direction given to them (provided that it is delivered by the Manager in a reasonable manner).

Failure to Comply with Stand-Down Notice

If the employee fails to comply with our stand-down directions without a reasonable excuse, this conduct alone may place their employment at risk of termination instead of or in addition to the initial allegations.

The reason for this risk of termination is that the FWA deems '*failure to follow a reasonable direction*' as a form of serious misconduct which provides an employer with a valid reason to terminate [FWA: Regulation 107(3)(c)].

B. Un-Paid Stand-Down

Section 524(1) of the FWA allows an employer to stand-down without pay an employee/s in three (3) specific circumstances only:

1. Industrial action (other than industrial action organised or engaged in by the employer);
2. Break-down of machinery or equipment (if the employer cannot reasonably be held responsible for the break-down); or
3. Stoppage of work for any cause for which the employer cannot reasonably be held responsible.

It is this last reason that stand-downs without pay are legal in the COVID-19 pandemic environment because the Government imposed nation-wide public health orders that either shut-down whole industries or sectors of the economy (ie: tourism & hospitality) and / or ordered employees to work from home where reasonably possible.

More traditional uses of this clause 3 (stoppage of work) have been in relation to extreme weather events that cut-off road access to employer premises. If employees cannot access the site due to the effects of extreme weather events, the employer is entitled to stand them down without pay, but only for the minimum time permitted for access to be restored. This is a harsh impact on employees because it is beyond their control too (the extreme weather event) – so from an engagement perspective, it is best practice to offer and allow employee to utilise other “paid” leave entitlements to cover this period.

It is only in these three (3) specific circumstances can employees be stood-down without pay. If an employer breaches the FWA by standing down an employee without pay outside of these circumstances, they will be liable for an underpayment of wages claim and / or substantial penalties for breaching the FWA.

Payroll Notification

Managers who are standing-down an employee with pay, must complete the timesheet with the absence marked as “non-attendance hours” in order for the employee to be paid for the stand-down period.

Managers who are standing-down an employee without pay, will send an email to Peopleexperience@endeavour.com.au. This will ensure notation as to why the employee is not working is recorded.

Further Support

Your People Experience Team are well equipped to support you in managing any requirements to stand-down an employee and should be consulted prior to implementing any stand-down.