



WORKING THROUGH COVID-19

CONSULTATION AND REDUNDANCY

28 JULY 2020



PLANNING

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HOW TO USE THIS INFORMATION

Private practice employers are having to comply with changing restrictions and public health orders introduced by the Government as the COVID-19 pandemic continues. Many of our members are having to make difficult decisions about operational requirements as they deal with the economic impact of COVID-19. We have prepared this guide to consultation and redundancy to help you navigate your way through your obligations and provide you with some practical guidance in the current COVID-19 environment.



If you have any questions in relation to this document or the issues raised, please contact our **Workplace Relations team on 02 9439 8822 or email workplace@amansw.com.au**

WORKING THROUGH COVID-19

CONSULTATION AND REDUNDANCY

The COVID-19 pandemic has caused unprecedented challenges for businesses globally. Employers are having to comply with changing restrictions and advice announced by Government and health authorities as the situation escalates. These measures are aimed at reducing the transmission of COVID-19 but they are causing significant disruption and change in the workplace.

Some private practice employers are dealing with financial strain as a result of business downturn and others are facing a shut down of all or part of their business. Regardless of the extent to which your practice is currently affected, it is likely that you will turn your mind to cost saving measures at some point.

Many of our members are having to make difficult decisions about operational requirements as they deal with the economic impact of COVID-19. We have prepared this guide to consultation and redundancy to help you navigate your way through your obligations and provide you with some practical guidance in the current COVID-19 environment.

The two modern awards that apply to most employees in private practice are the **Health Professionals & Support Services Award 2020** and the **Nurses Award 2010**.

PLANNING

In the first instance, we recommend you consider what options are available to control staffing costs and ensure the viability of your practice during these difficult times. This may include:

- agreeing on a reduced rate of pay, even for a temporary period;
- agreeing to reduced hours of work, even for a temporary period;
- agreeing that the employee take accrued annual leave or long service leave;
- agreeing that the employee take unpaid leave.

If you are unable to reach agreement on a mutually acceptable cost saving measure, you may wish to consider whether you are able to direct your employees to take leave. This may include:

- directing your employee to take annual leave if they have an excessive leave accrual with 8 week's notice;
- directing your employee to take long service leave with 1 month's notice (less than 1 month's notice by agreement).

If you are not in a position to direct your employees to take leave, or the notice requirements mean that this option is not feasible, you may have no other choice but to implement more drastic cost saving measures such as redundancies.

You may be covered by the temporary JobKeeper provisions that have been added to the Fair Work Act. These provisions apply to eligible employers and eligible employees from 9 April 2020 to 28 September 2020. If you are covered by these provisions, you may also be able to stand down your employees under a JobKeeper enabling stand down direction. Information on these provisions is available from the **Fair Work Ombudsman**.

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REDUNDANCY

If you have decided to make a position at your practice redundant, you will need to be satisfied that:

- the person's job is no longer required to be performed by anyone;
- you have consulted with affected employees in accordance with the modern award;
- it must not have been reasonable in all the circumstances for the person to be redeployed within the business or an associated entity.

If these three elements are satisfied, the termination will be a "genuine redundancy". When there has been a genuine redundancy, the employee will not be able to make an unfair dismissal claim.

If you do not satisfy these three elements, because:

- you still need someone to perform the employee's job;
- you haven't complied with your consultation obligations under the modern award; or
- you could have reasonably redeployed the employee within the business or an associated entity,

then the termination will not be a "genuine redundancy".

Before terminating an employee because of redundancy, we recommend you prepare a business case to demonstrate that the redundancy was necessary due to the operational requirements of your practice. For example, in the current COVID-19 environment, your business case may refer to fewer patients, fewer doctors, reduced revenue and business downturn generally.



MORE INFORMATION

The Fair Work Ombudsman's [website](#) contains helpful information on redundancy.

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CONSULTATION OBLIGATIONS

Modern awards include provisions for:

- consultation about changes to rosters or hours of work; and
- consultation about major workplace change, such as redundancies.

If you are proposing changes to an employee's regular roster or hours of work (other than an employee with irregular, sporadic or unpredictable working hours), such as splitting rosters, averaging hours, changing days or reducing hours of work, you will need to comply with the provision of the modern award on consultation about change to rosters or hours of work. These provisions require you to:

- provide to the employees and their representatives (if any) information about the proposed change;
- invite the employees and their representatives (if any) to give their views about the impact of the proposed change on them (including any impact on family or caring responsibilities); and
- consider any views given about the impact of the change.

If you have made a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, such as redundancies, you will need to comply with the provision of the modern award on consultation about major workplace change. These provisions require you to:

- give notice of the changes to all affected employees and their representatives (if any);
- discuss the changes with affected employees and their representatives (if any) and provide them with all relevant information in writing about the introduction of the changes, the likely effect on employees and measures to avoid or reduce adverse effects on employees;
- commence discussions as soon as practicable after a definite decision has been made;
- promptly consider any matters raised by the employees and their representatives in relation to the changes.



MORE INFORMATION

The Fair Work Ombudsman's [website](#) contains helpful information on consultation.

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CONSULTATION IN PRACTICE

In practice, you may wish to take the following steps when consulting with your employees:

Meet or hold a discussion with affected employees.

Before COVID-19, this discussion would usually be held in person. In the current circumstances, you may wish to hold the discussion by phone or video link;

Explain the need for change.

In your discussion, you may wish to provide information about COVID-19, describe the impact it has had on your business and explain how it has affected the employee's position. It may be helpful to refer to specific examples of how it has impacted your practice and the employee's position in order to help the employee understand the need for change;

Explain the proposed changes.

 In your discussion you should provide information about the changes you are proposing and detail what it means for the employee;

Invite feedback on the proposed changes.

 For consultation to be meaningful you should encourage the employee to express their views. The employee should be given the opportunity to ask questions, raise concerns and propose options. Before COVID-19 we would generally recommend that a subsequent meeting be held for the employee to provide any feedback. In the current circumstances, you may wish to schedule another discussion by phone or video link and/or ask for the employee to provide any feedback in writing within a specified timeframe;



Confirm the matters discussed in writing.

We recommend you send the employee a consultation letter confirming all relevant information in writing. The discussion is often stressful for the employee and it may assist to provide a record of the matters discussed. The consultation letter may also help prove compliance with your consultation obligations.



Review feedback and communicate your decision.

You should consider the feedback provided by the employee against the operational requirements of your practice and factor this feedback into your decision-making process before informing the employee of your decision.

Consultation does not mean that you must change your decision or base your final decision on any matters raised by affected employees, but you should take any feedback into account.

NEXT STEPS

After you have consulted with the employees you need to consider next steps.

If the employee agrees to your proposed changes to rosters or hours of work, you should record the agreed changes in writing. This can be done formally or informally. For example, you may wish to amend or reissue the employee's contract of employment or otherwise record the agreed variation in writing. For example, the Fair Work Ombudsman has templates on its website for **hours of work** variations, but an email exchange which clearly records the agreed variation would suffice.

If you have decided to terminate the employee because of a "genuine redundancy", you must notify the employee of your decision in writing. We recommend you send the employee a redundancy letter informing them of your decision to terminate their employment because of redundancy. In addition, you may wish to record the steps taken in the consultation process and provide a summary of their final pay.

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FINAL PAY

When terminating an employee because of redundancy, in addition to your consultation obligations, you will also need to consider your obligations to provide:

- notice of termination in writing (or payment in lieu);
 - redundancy pay (if applicable) (see below);
 - payment of any annual leave and annual leave loading (if applicable);
 - payment of long service leave (if applicable).
- agreeing to be a referee for any future employment opportunities;
 - directing your employee to Centrelink for information and support.



MORE INFORMATION

The Fair Work Ombudsman's [website](#) contains helpful information on on final pay including a calculator [here](#).

If you are a small business (that is, you have fewer than 15 employees) and you terminate an employee because of redundancy, you are not required to pay any redundancy pay. If you are not a small business (that is, you have 15 or more employees) and you terminate an employee because of redundancy, you are required to pay redundancy pay under the National Employment Standards.

We appreciate the strain that the COVID-19 outbreak has on small business and individual circumstances, and every situation is different. If you have met your legal obligations but wish you could do more, you could consider:

- paying redundancy pay over and above your legal obligations;
- making a discretionary ex gratia termination payment over and above your legal obligations;
- providing a statement of service;

HOW CAN AMA (NSW) HELP?

Please contact us if you need any assistance with consultation and redundancies. We would be happy to discuss your consultation obligations with you, provide you with template letters for consultation and redundancies or provide guidance in relation to an employee's final pay.



If you have any questions in relation to this document or the issues raised, please contact our Workplace Relations team on **02 9439 8822** or email workplace@amansw.com.au

The information in this document is of a general nature only and does not constitute legal advice. The application and impact of laws can vary widely based on the specific facts involved. Given the changing nature of the situation, laws, rules and regulations, and the inherent hazards of electronic communication, there may be delays, omissions or inaccuracies with the information in this document.

We have made every attempt to ensure that the information and links contained in this document are accurate as at the date of drafting. The examples given are illustrative and not exhaustive. The links provided connect to third party websites over which AMA (NSW) has no control.

AMA (NSW) will not be liable for any decision made or action taken in reliance on the information in this document. It is for general guidance only and should not be used as a substitute for obtaining specific assistance or advice.



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