



# Additional COVID-19 Rules in NSW: Construction employers' questions answered

19 JULY 2021

## AT A GLANCE

- As construction shuts down in New South Wales, and tradespeople down tools, there are many questions that remain unanswered.
- Employers may consider stand down provisions given these additional restrictions.
- In this update, we answer some of the key questions employers and their EPL insurers are asking following the Government's weekend announcements.

## BACKGROUND

On 17 July 2021, the NSW Premier and Minister for Health and Medical Research released a statement that announced further changes to the COVID-19 restrictions across Greater Sydney, including the Central Coast, Blue Mountains, Wollongong and Shellharbour (17 July Direction).

Under the 17 July Direction, affected employers must close down all work at a construction site in Greater Sydney from 12:01am on Monday 19 July 2021 until 11:59pm on Friday 30 July 2021.

However, any work at a construction site may continue to be carried out if the work is urgently required for the following eight purposes:

1. to ensure the safety or security of the construction site
2. to deal with environmental risks
3. to maintain critical plant or equipment that would otherwise deteriorate
4. to receive deliveries of supplies that would otherwise deteriorate
5. to maintain public utilities
6. to ensure the safe operation of existing transport infrastructure
7. by or on behalf of NSW Health in response to the COVID-19 pandemic, or
8. because of an emergency.

Businesses performing essential work, or dealing with urgent or emergency works, may not be affected.

## ANSWERING THE KEY QUESTIONS FOR CONSTRUCTION EMPLOYERS

### ***What can I do with my employees?***

Depending on your business and the arrangements you have with your employees, you may be able to:

1. stand down employees
2. invite employees to take paid or unpaid annual leave, or long service leave
3. reduce employees' hours of work by mutual consent, or
4. make employees redundant.

### ***Can I stand down an employee?***

It depends.

The 17 July Direction requires employers to temporarily close down many construction businesses. That means you may be able to stand down your employees.

Before you decide to stand down your employees, you should consider any enterprise agreement, employment contract, workplace policy or an applicable award that contains a stand down provision. This provision will set out the circumstances in which an employer can stand down employees.

If these are not in place between you and your employees, you may be able to stand down employees in line with the stand down provisions in the *Fair Work Act 2009* (Cth).

It is important that you implement any stand down decisions as fairly and reasonably as possible, and in writing.

You should also be aware that employees will continue to accrue annual and personal leave in the usual way during periods of stand down.

### ***Can I direct an employee to take leave during the stand down?***

No.

Generally, you are not allowed to direct an employee to take leave. Directions to take leave are conditional and require notice by the employer.

However, you can invite your employees to access their accrued leave, leave without pay, or long service leave in lieu of being stood down without pay.

If an employee asks to access their annual or long service leave then you may allow them to do so.

### ***Can I allow an employee to take personal (sick) leave during the stand down?***

It depends.

If your employee can be usefully employed, and if that employee becomes unwell (either a physical or mental health condition), that employee may take personal leave. However, if your business is required to shut down, and there is no work available, then personal leave is not available.

If you grant personal leave during a shut down, it is possible that the employee will make a claim for that leave to be reaccredited.

For the current situation, we recommend that you act prudently and discuss any leave requests with employees so that their urgent needs can be met.

### ***Can I reduce an employee's hours?***

No.

However, you may consult with employees to mutually agree to temporarily vary the terms of their employment agreement to reduce working hours. This requires the employee's consent.

### ***Can I make my employees redundant?***

It depends.

Redundancy may be available where changes in the operational requirements of a business mean the employee's role is no longer required and where the employee cannot be reasonably deployed in another role.

## A CAUTIONARY NOTE FOR EMPLOYERS AND EPL INSURERS

This article is written based on the relevant NSW Government announcements at the time. We note the Government may seek to modify employers' obligations or amend its directions.

Things may also change due to union involvement. Many of the Government's provisions are being challenged, particularly by the CFMMEU, which covers highly unionised workplaces in construction, forestry and the maritime industry.

What remains constant is that individual employer circumstances determine whether or not employees can be lawfully stood down. For this reason, and to withstand scrutiny in a rapidly changing environment, it is always prudent to ensure you are making decisions in a reasonable and lawful manner by obtaining legal advice first.

EPL insurers should brace for a possible spike in unfair dismissal claims, not only in the short-term, but in the longer-term as the full effect of this decision is felt in the sector. It is also likely that casual employees will make applications for permanency to recoup entitlements and promote their security.

If you would like to discuss your situation regarding this current lockdown development in NSW, please contact a member of W+K's Workplace & EPL team. Thanks to Ella Lim (Solicitor) who assisted with this update.

## Need to know more?

For more information please contact us.



### Sian Gilbert

Partner, Sydney  
Accredited Specialist, Employment & Industrial Law

T: +61 2 9064 1832

E: [sian.gilbert@wottonkearney.com.au](mailto:sian.gilbert@wottonkearney.com.au)



### Chris Mossman

Partner, Sydney  
Workplace & EPL Practice Leader

T: +61 2 8273 9806

E: [chris.mossman@wottonkearney.com.au](mailto:chris.mossman@wottonkearney.com.au)



### Chris Spain

Partner, Melbourne

T: +61 3 9604 7956

E: [chris.spain@wottonkearney.com.au](mailto:chris.spain@wottonkearney.com.au)

For more Insights from W+K, visit:

<https://www.wottonkearney.com.au/knowledge-hub/>

---

© Wotton + Kearney 2021

This publication is intended to provide commentary and general information. It should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this publication. Persons listed may not be admitted in all states and territories. Wotton + Kearney Pty Ltd ABN 94 632 932 131, is an incorporated legal practice. Registered office at 85 Castlereagh St, Sydney, NSW 2000