COVID-19

Work health and safety issues for employers as Australia returns to work

June 2020

As government restrictions ease and more people return to work, employers enter a new phase of operating in a world forever changed by COVID-19, whilst continuing to ensure both the safety of their employees and their operations. It is not all happening at once. Across Australia organisations are returning at different speeds, creating a dynamic environment for employers to manage their safety risks.

At the same time that government is looking to employers to help lead the way out of the current health and economic crisis, more than ever employees are looking to their employers to keep them safe. Trust is critical, and it is this trust that is an essential element to transforming operations so as to be able to operate successfully in the new COVID-19 environment.

What are the rules for returning to work?

We know that considerable planning and ongoing vigilance will be required by businesses to protect their people and achieve compliance with work health and safety laws. It is likely that safety assessments will identify a range of controls that need to be in place and many employers may already be familiar with the need to implement a number of measures – hygiene, screening, physical distancing, masks, etc – with no one measure likely to be sufficient on its own.

In this publication, we examine the new and evolving work health and safety issues that businesses must navigate, with a view to assisting them meet the challenges that are unfolding. These insights are informed by our experience to date and the experiences we have shared working with our clients. The issues we have seen are extensive but by no means exhaustive – and nor can they be.

The uncertainty that has characterised this crisis and the associated anxiety will remain for some period yet. New issues will evolve, and others will be specific to different workplaces. However, we are seeing a cooperative effort to meet the challenges of the new normal, with maintaining health and safety in the workplace as the common binding thread.

This publication refers to commentary provided in Corrs' previous COVID-19 publications:

* COVID-19: Implications for Employers; and
* COVID-19: The Next Critical Phase.

Contents

Current state-of-play

As of today, most State and Territory governments have directed people to continue working from home (or remotely), if possible. Currently, the only exception is Western Australia where the government has encouraged people to return to work, unless they are unwell or vulnerable.

We expect that over the coming weeks and months, there will be a significant increase in people returning to work as restrictions ease and guidance from State and Territory governments is updated.

Meanwhile, to assist businesses with the myriad of issues that will arise as we move to this next phase, the National

COVID-19 Coordination Commission has established the National Industrial Relations Working Group. The development of any guidance material will be informed by the 'National COVID-19 Safe Workplace Principles'.

National COVID-19 Safe Workplace Principles

Recognising that the COVID-19 pandemic is a public health emergency, that all actions in respect of COVID-19 should be founded in expert health advice and that the following principles operate subject to the measures agreed and implemented by governments through the National Cabinet process.

1 All workers, regardless of their occupation or how they are engaged, have the right to a healthy and safe working environment.

2 The COVID-19 pandemic requires a uniquely focused approach to work health and safety (WHS) as it applies to businesses, workers and others in the workplace.

3 To keep our workplaces healthy and safe, businesses must, in consultation with workers, and their representatives, assess the way they work to identify, understand and quantify risks and to implement and review control measures to address those risks.

4 As COVID-19 restrictions are gradually relaxed, businesses, workers and other duty holders must work together to adapt and promote safe work practices, consistent with advice from health authorities, to ensure their workplaces are ready for the social distancing and exemplary hygiene measures that will be an important part of the transition.

5 Businesses and workers must actively control against the transmission of COVID-19 while at work, consistent with the latest advice from the Australian Health Protection Principal Committee (AHPPC), including considering the application of a hierarchy of appropriate controls where relevant.

6 Businesses and workers must prepare for the possibility that there will be cases of COVID-19 in the workplace and be ready to respond immediately, appropriately, effectively and efficiently, and consistent with advice from health authorities.

7 Existing State and Territory jurisdiction of WHS compliance and enforcement remains critical. While acknowledging that individual variations across WHS laws mean approaches in different parts of the country may vary, to ensure business and worker confidence, a commitment to a consistent national approach is key. This includes a commitment to communicating what constitutes best practice in prevention, mitigation and response to the risks presented by COVID-19.

8 Safe Work Australia (SWA), through its tripartite membership, will provide a central hub of WHS guidance and tools that Australian workplaces can use to successfully form the basis of their management of health and safety risks posed by COVID-19.

9 States and Territories ultimately have the role of providing advice, education, compliance and enforcement of WHS and will leverage the use of the SWA central hub in fulfilling their statutory functions.

10 The work of the National COVID-19 Coordination Commission will complement the work of SWA, jurisdictions and health authorities to support industries more broadly to respond to the COVID-19 pandemic appropriately, effectively and safely.

Risk Management

Employers understand the need to identify hazards and manage risks associated with the workplace (which can include a person's home). Employers must do what is reasonably practicable to eliminate those risks or, where this is not reasonably practicable, minimise those risks. This includes providing a safe working environment for employees and other persons who visit the workplace.

Exposure to COVID-19 by employees and others affected by a business' operations is a foreseeable risk that must be assessed and managed in the context of the business' operating environment. The impact of the

COVID-19 pandemic on an employee's mental health is another foreseeable risk that needs to be carefully managed in the context of what the 'new normal' may look like.

For all the uncertainty and disruption, it is important to remember the following basic principles in relation to risk management:

Safe Work Australia has released helpful resources on the risk management process in the context of COVID-19.

Resources

As always, when making decisions about work health and safety, up-to-date and accurate information is powerful. We encourage businesses to consider the wealth of resources available from State, Territory and Commonwealth regulators together with Safe Work Australia, including industry specific material which can assist in the planning process for returning to work, and maintaining a safe workplace.

It is also useful for businesses to consider what their local and overseas counterparts in the same industry are doing to mitigate risk, including what has worked effectively and what has not.

However, these resources are not to take the place, or be used in lieu, of a business' risk management process.

Consultation

Underpinning the basic principles of risk management is consultation with employees, workers (including any health and safety representatives) and other duty holders.

Businesses have a general duty to consult, cooperate and coordinate activities with all other persons who have a work health and safety duty in relation to the same matters, so far as is reasonably practicable. For example, this might be particularly relevant when employees are returning to workplaces where there are multiple tenants in a building. Each duty holder should exchange information to find out who is doing what and work together in a cooperative and coordinated way so risks are eliminated or otherwise minimised for all those accessing the building, so far as is reasonably practicable.

Record keeping

Keeping records of the risk management process is key to demonstrating what a business has done to comply with its work health and safety obligations, as well as allowing it to demonstrate to various stakeholders and regulators how decisions were made.

As a general rule, records should include information about:

- The identified hazards, assessed risks and control measures, including any hazard checklists, worksheets, assessment tools and resources used during the risk management process;
- How and when the control measures were implemented, monitored and reviewed;
- Who the business consulted with through the process and when this occurred;
- Information, instruction and training provided to employees and others; and
- Changes made, if any.

Practical considerations when planning for a return to work

01

Use of the COVIDSafe app

It is unlawful for businesses to direct their employees to use the COVIDSafe app .

The COVIDSafe app was released on 26 April 2020 and traces people who have been in close contact with each other. If a person has been in close contact with another person who is confirmed as having contracted COVID-19, they will be contacted by State or Territory health officials to advise them of that fact. The app will not work to its full, intended effect though if it is not downloaded by the vast majority of the population.

Whilst downloading the app is voluntary, it is being strongly encouraged by government and can be encouraged by businesses.

Consistent with use of the app being voluntary, the Privacy Policy for the app has been developed and expressly states that "*no user should feel pressured to install or continue to use COVIDSafe, or to agree to upload contact data to the data store*".

A person cannot require another person to download the app to a communication device, to have the app in operation on a communication device or to consent to uploading the app's data from a communication device to the National COVIDSafe Data Store.[1]

A person must also not refuse to enter into a contract with another person (including an employment contract), take adverse action as defined under the *Fair Work Act 2009* (Cth) or refuse to allow a person entry to a premises which is otherwise accessible to the public or to which that person has a right to enter, among other things, on the basis that the person has not downloaded the app, does not have the app in operation or has not consented to uploading the app's data to the National COVIDSafe Data Store.[2]

1   Section 94H of the *Privacy Act 1988* (Cth).
2   Ibid.

02

Travel to and from work

Public transport

For most, public transport will remain the principal mode of travel for attending work. Whilst public transport providers have implemented control measures in response to the COVID-19 pandemic, and updated those control measures in anticipation of a gradual return to work, there remain unresolved issues associated with travelling on public transport, in particular the enforcement of physical distancing.

With the knowledge of this risk in mind, businesses must factor travel to and from work into their risk assessments when planning for their employees' return to work, particularly focusing on those considered to be at higher risk of contracting COVID-19. Fundamentally, businesses should be open to allowing their employees to continue to work from home if reasonable to do so in order to eliminate the risk of infection.

In addition to this, businesses should generally be prepared to allow for greater flexibility with their employees who intend to travel to and from work on public transport in the current environment. For example, in the Commonwealth Government's 3 Step Framework for a COVIDSafe Australia, all three steps include avoiding public transport during peak hour. This will require consideration of a business' ability to introduce flexibility around start and finish times.

Not all workplaces can introduce such a change unilaterally. Many employers will need to reflect on the award or enterprise agreement provisions when considering the merit of such a change. However, permitting flexibility around start times, where possible, also facilitates staggered entry and exit from the workplace, which will help to minimise crowding at entrances and exits. Some businesses have established staggered start times for each day whereby employees arrive in waves every 10 or 20 minutes. Similarly, businesses are limiting the number of people inside their facilities by seeing customers only by appointment and limiting walk-ins.

Private transport

Businesses will need to consider the cost implications for employees who are being directed (or encouraged) to travel to work differently, whether they are changing the way they travel privately or are moving from public transport to private travel.

An inevitable query will be whether it is reasonable to reimburse the costs associated with private travel (including fuel and parking, for example). This will need to be carefully considered and where it is thought not to be practicable, then that decision should be recorded.

Car-pooling

It is not uncommon for employees to travel together. In fact, car-pooling is a method used in some industries (such as mining) to assist with managing the risk of fatigue and is encouraged. In the current environment however, physical distancing makes this practice problematic. The Commonwealth Department of Health is discouraging car-pooling between employees to and from work and we are aware of employers directing employees to cease car-pooling. At the very least, businesses should discourage car-pooling and consider alternatives in consultation with employees.

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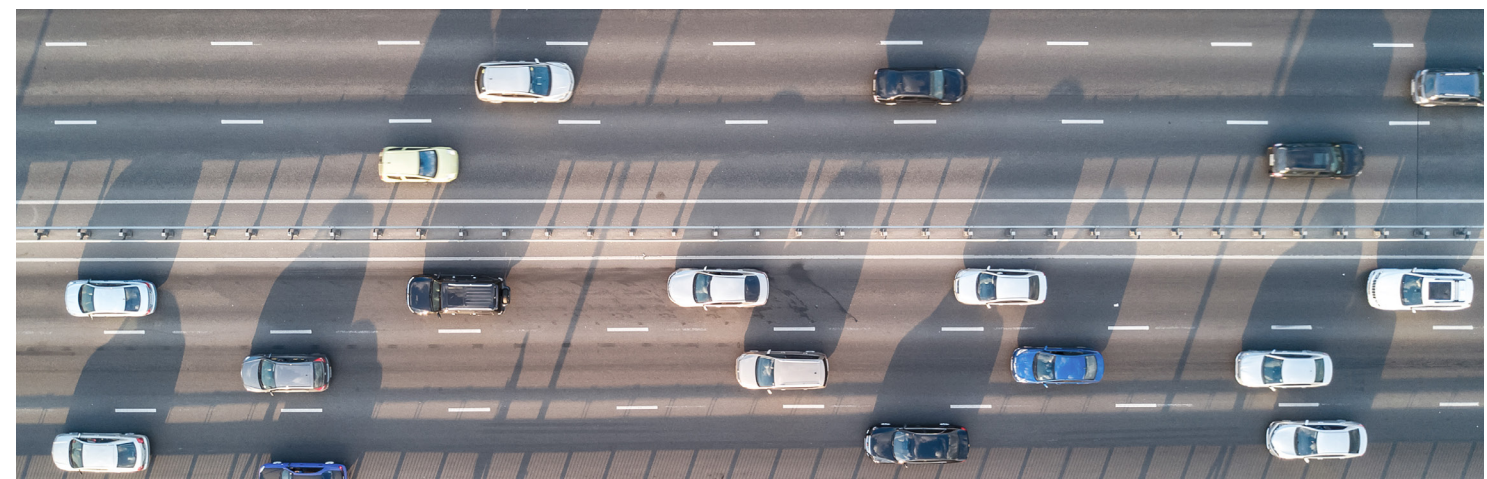
The workplace

Health screening

Since the release of Corrs' previous publications, health screening at the workplace has become more prevalent. As people start to return to work, the prevalence of this control measure is likely to increase.

Temperature testing remains the preferred, less intrusive method for health screening at a workplace (if it is to occur at all). There are also other methods of testing, such as blood ('point of care' or 'pin prick') testing and swab testing. The Therapeutic Goods Administration (TGA) advises that blood testing cannot detect if a person is infectious, nor detect if a person has recently been infected. In fact, the use of blood testing as a tool to detect or diagnose

COVID-19 has been generally prohibited in some jurisdictions.[3]

When people are being tested for COVID-19, swab testing is the preferred method. However according to the TGA, this can take several hours to generate results and requires complex laboratory equipment and trained technicians. Notably, such testing is being introduced in the construction industry in Victoria. The initiative, which is supported by the State government, involves a bus visiting some construction sites offering voluntary swab testing and generating results in 48 hours.

Given that blood testing and swab testing do not provide immediate results, and the ability to safely carry out such testing may be problematic, the utility in introducing blood testing and swab testing for at least the purpose of day-to-day workplace entry is low. Furthermore, Safe Work Australia advises that businesses are not expected, and should not try, to diagnose people.

Encouraging employees to self-report symptoms is still strongly recommended. Further information on how to monitor symptoms is set out below.

Temperature testing

A fever is one of the common symptoms of COVID-19. The position from a regulatory perspective since Corrs' previous publications has not changed. Currently, there is not a direction for temperature testing to take place before an employee or other person enters a workplace.

A person's temperature is inconclusive as to whether they have contracted COVID-19. So much so that Safe Work Australia is of the view that 'there may be little benefit' in conducting such testing and instead recommends implementing other well-known control measures. This position is consistent with views expressed by the World Health Organisation. Temperature testing is, however, being introduced in some workplaces, largely reflective of the risk associated with the industry in which the business operates. We also understand that sometimes more than one temperature test is taken, in case the first temperature test was influenced by other, temporary factors.

Safe Work Australia recommends considering temperature testing for employees who 'fly in, fly out' (FIFO), 'drive in, drive out' (DIDO), who work in the agriculture industry and/or are also provided accommodation. For high risk industries, including aged care, health care, education and mining, Safe Work Australia is deferring to other government bodies.

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3   For example, in Queensland (Point of Care Serology Tests Direction (23 April 2020)), South Australia (Emergency Management (Prohibition of Point of Care Serology Tests) (COVID-19) Direction 2020 (2 April 2020) and Western Australia (Prohibition on the Use of Point of Care Serology Tests Directions (1 April 2020)). The directions in Queensland and South Australia do not apply to persons employed or engaged in providing pathology services or public health services. The direction in Western Australia prohibits the use of blood testing as an acute illness diagnostic tool.

Is consent required to obtain temperatures of employees?

Generally speaking, taking an employee's temperature involves the collection of personal information, including sensitive information such as health information. The collection of sensitive information triggers obligations regarding the collection, storage and use of such information pursuant to the *Privacy Act 1988* (Cth) (Privacy Act),[4] and the requirement to obtain each employee's consent prior to temperature testing.

The requirement to obtain consent is subject to some exceptions, including where the collection of the information is required or authorised by law. Whilst it is arguable that an employer's primary duty to ensure, so far as is reasonably practicable, the health and safety of its employees implicitly requires or authorises temperature testing in the COVID-19 climate, Australia's Privacy Commissioner has issued guidance to the effect that to rely upon this exception the relevant law needs to expressly contemplate the collection of the information.

The ability to rely upon an employer's primary duty as an exception to the requirement to obtain an employee's consent would be strengthened if Safe Work Australia and/or relevant work health and safety regulators or health departments released guidance directing all employers to implement this control measure.

However, to date, there has only be guidance to suggest there may be some instances where temperature testing is reasonable or required. For example, where employees live together, where there is regular turnover of employees, or in workplaces where vulnerable persons are present.

Assuming an employee's temperature is validly collected (that is, with the employee's consent), it will likely form part of the employee's record (although this would need to be confirmed).

Under the Privacy Act, employers are exempt from complying with the requirements of the Privacy Act – including the Australian Privacy Principles (APP) – when handling employee records, to the extent that what is done with the employee record is directly related to the employment relationship. The exemption applies only in respect of an employment relationship; it does not apply to independent contractors or other third parties including unsuccessful job applicants.

Where the employee records exemption applies, organisations are not required to comply with the requirements of the Privacy Act in respect of an act or practice regarding the information. The consequences of information collected being an 'employee record' is that the organisation would be exempt from complying with the obligations contained in the APP, such that there will be no privacy implications under the Privacy Act as a result of it collecting, using and disclosing the personal information for purposes associated with the organisation's COVID-19 response. Obligations may still apply under State and Territory legislation.

Notwithstanding this exemption, it is recommended that employers treat such information carefully, including by adopting reasonable steps to protect the information from unlawful access or use, only disclosing it to those with a legitimate need within the organisation, and not using it for a purpose other than the employment relationship without the employee's consent.

In addition to the Privacy Act, as temperature readings would be considered health information, State and Territory health legislation may apply. In such instances, an employer may be required to comply with local Health Privacy Principles which impose obligations on limiting the use of the information and requiring employers to take reasonable steps to protect the information from misuse, interference, loss and unauthorised access, modification and disclosure.

Some employers may wish to avoid the requirement to obtain an employee's consent by recording temperatures taken in an anonymised form (that is, where the employer is entirely unable to re-identify the information or trace it to any individual employee). In such circumstances, obligations imposed by privacy and health legislation may be avoided as the information may not satisfy relevant definitions of personal or health information.

However, this may cause issues for an employer's compliance with other obligations, for example in the event an employee returns a temperature reading indicative of a fever, a common symptom of COVID-19, an employer will be obliged to take steps to discharge its health and safety duties owed to all employees and others within its workplace. Where temperature information has been collected on an anonymous basis, an employer must not be able to re-identify the information in order to take these further steps.

Accordingly, best practice suggests against anonymising temperature information but rather seeking an employee's consent at the time of testing, with the purpose of testing being clearly communicated to them. In this context the purpose for collecting an individual's personal information is to manage an appropriate response to the risk of COVID-19 exposure within the employer's workplace so that the use and/or disclosure of the information for that purpose would be a 'primary purpose' of collection and therefore permitted. Further, an employer will not be able to use or disclose the personal information for another purpose unless the individual has consented to the use or disclosure and would reasonably expect this further disclosure as it is related to the primary purpose.

Finally, the Office of the Australian Information Commissioner (OAIC) has developed privacy guidelines intended to assist employers understand their privacy obligations to employees during the pandemic. These guidelines reiterate that personal information should only be used or disclosed on a 'need-to-know' basis and that only the minimum amount of personal information reasonably necessary to prevent or manage COVID-19 should be collected, used or disclosed.

One important point made by the OAIC is that employers should take steps to notify employees of how their personal information will be handled in responding to any potential or confirmed case of COVID-19 in the workplace.

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4   The *Privacy Act 1988* (Cth) will apply where an employer entity has a link to Australia, being an entity that carries on business in Australia and collects personal information in Australia. Additionally, there is scope for State and Territory based privacy legislation to also apply in certain circumstances, for example, where an employer entity is a contracted service provider to a government entity, and/or is contractually obliged to comply with local Privacy Principles.

Office set-ups

Safe Work Australia has made a number of recommendations relating to workplace redesign addressing physical distancing, general hygiene and cleaning in the workplace.

With respect to physical distancing, it is recommended that businesses do the following:

- Put up posters around the workplace on keeping at least 1.5 metres distance between everyone at the workplace, where possible.

- Erect signs at the entrances to lifts and meeting rooms to ensure the maximum safe capacity is not exceeded. The vexing issue of using lifts has settled, for the time being, with Safe Work Australia relaxing its requirement to provide four square metres per person per lift.

- Move work stations, desks and tables in staffrooms further apart to comply with physical distancing.

- If possible, bring in shift arrangements so less staff are in the workplace at once.

- Instruct employees to have meetings by phone or online instead of in person. If not possible, require they meet in a large space and keep meetings short.

- Review regular deliveries and request contactless delivery. Check systems for e-invoicing are in place.

- Provide physical distancing markers on the floor in areas where customers line up or where workers perform tasks.

- Nominate a person on the work floor to be responsible for monitoring compliance with physical distancing in accordance with the latest government requirements.

With respect to **hygiene**, it is recommended that businesses do the following:

- Have hand sanitiser stations at entry and exit points and around the workplace.

- Ensure bathrooms are well stocked with hand wash and paper towel.

- Put up posters with instructions on how to hand wash/ hand rub.

- Instruct workers on other ways to limit the spread of germs, including by not touching their face, sneezing into their elbow and staying home if feeling sick.

- Have automatic alerts set up on computer systems to remind workers about washing hands and not touching their eyes, nose and face.

- Instruct your employees to limit contact with others – no shaking hands or touching objects unless necessary.

- If possible, accept only cashless transactions (where relevant).

- Increase access to closed bins in your workplace.

- Put up signs to request customers only touch objects they are going to buy.

With respect to cleaning, it is recommended that businesses do the following:

- Ensure any areas frequented by employees or others (e.g. visitors to business premises) are cleaned at least daily with detergent or disinfectant.

- Instruct workers to wear gloves when cleaning and wash their hands thoroughly with soap or use an alcohol-based hand sanitiser before and after wearing gloves.

- Clean frequently touched areas and surfaces several times a day with a detergent or disinfectant solution or wipe. This includes Eftpos equipment, elevator buttons, handrails, tables, counter tops, door knobs, sinks and keyboards.

- Instruct employees to clean personal property that comes to work, such as sunglasses, mobile phones and iPads with disinfectant, such as disinfectant wipes.

A number of the recommendations are consistent with those made in the immediate response to the COVID-19 pandemic, so some may have been introduced at workplaces already and should continue. As with any control measures implemented at the workplace for health and safety purposes, their effectiveness will depend on how they are implemented. Businesses will necessarily need to monitor compliance to understand their effectiveness.

In the office environment consultation remains key, with the expectation that landlords, property managers and tenants will work co-operatively to implement the arrangements put in place. For further information about the office environment, please see the Corrs' Insight Space, re-imagined: real estate in an era of social distancing.

Supporting mental health and wellbeing

The physical measures are one thing. The impact of this crisis, however, runs much deeper. So many aspects of this crisis can increase the stress and anxiety felt by employees. For example, the unprecedented Government enforced isolation; anxiety about an individual's health and that of family and friends; the precarious economic environment and, overall, a fear of the unknown. The very prospect of attending the office for some may also be a matter of anguish and, in some cases, resistance. Protecting an employee's mental health has emerged as an area of priority for many organisations.

These concerns underscore the need for an employer to provide a safe and secure environment. It is a trust issue. Notably, mental ill-health had already been increasing in prevalence before the pandemic. In its draft report released at the end of last year, the Productivity Commission found that at least three million working Australians either had mental ill-health or were caring for someone with mental ill-health.

The requirement on businesses to manage psychological risks is the same as the requirement to manage physical risks under work health and safety laws. When risks cannot be eliminated, the risks must be minimised through managing exposure to hazards, so far as is reasonably practicable. In Safe Work Australia's 'National Guidance Material – Work-Related Psychological Health and Safety', it set out a systematic approach to the management of work-related psychological health and safety. The systematic approach focuses on preventing harm, intervening early and supporting recovery.

Of course, people can respond to hazards in different ways and this is partly why Safe Work Australia considers consultation with workers to be a key part of providing a psychologically healthy and safe working environment. One measure we have seen businesses take is making counselling services available to workers returning to the office.

Vulnerable workers

Vulnerable workers, in this context, are those who are or are likely to be, at increased risk of a serious illness if they contract COVID-19. The risks posed to the health and safety of vulnerable workers will therefore be different compared to other workers and the control measures selected may not be (as) effective for vulnerable workers.

The presence of vulnerable workers at the workplace will need to be considered by businesses upon the return to work and risk assessed accordingly.

Who are 'vulnerable workers'?

The Australian Health Protection Principal Committee (AHPPC) has identified the following people as 'vulnerable' in the context of COVID-19:

- People with compromised immune systems;
- People 65 years and older with chronic medical conditions;[5]
- Aboriginal and Torres Strait Islander people 50 years and older with chronic medical conditions; and
- People 70 years or older.

There is limited evidence of the risk to pregnant women and therefore they are not currently identified as vulnerable.

The AHPPC is recommending that businesses conduct risk assessments for vulnerable workers, taking into account the worker, the workplace and the nature of work being carried out. Consistent with this recommendation, Safe Work Australia also recommends seeking a medical opinion if it is needed. Consultation with individual employees who fall into this category is therefore key in establishing what control measures are suitable for them.

Given the degree of harm that could result for vulnerable workers, including serious illness (or death), this will necessarily inform how businesses decide what is reasonably practicable for managing the risk of vulnerable workers returning to the workplace, including whether they should continue to work from home if reasonable to do so

Discrimination

The control measures implemented by businesses in respect of vulnerable workers will need to be considered in the context of anti-discrimination laws. Relevantly, it is unlawful to discriminate against a person on the basis of a protected attribute, which includes age, pregnancy and disability. In some circumstances, however, discrimination will not be unlawful including when the conduct is for compliance with other laws (e.g. work health and safety laws).

Responding to a suspected case of COVID-19 in the workplace

Corrs' previous publications have covered the need for businesses to know how it will respond when there is a suspected (or confirmed) case of COVID-19 in the workplace.

Safe Work Australia has also released an infographic which depicts the steps that should be followed, including when the person suspected has left but was recently at the workplace. If businesses did not have a plan before on how to respond, they should now.

Monitoring symptoms

Safe Work Australia recommends that businesses do the following:

- Display signs about the symptoms of COVID-19 in the workplace.
- Direct employees to stay home if they are sick, and if they are displaying symptoms of COVID-19 ask them to call the National Coronavirus Helpline (1800 020 080).
- Instruct employees to notify the business if they are displaying symptoms of COVID-19, have been in close contact with a person who has COVID-19 or have been tested for COVID-19.
- Remind staff of their leave entitlements if they are sick or required to self-quarantine.
- Treat personal information about an employee's health carefully, in line with privacy laws.
- Facilitate working from home, if possible, for staff who are required to self-quarantine but are not displaying symptoms of COVID-19.

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5   This will include people with coronary heart disease, chronic lung disease (for example, severe asthma), poorly controlled diabetes and poorly controlled hypertension (that is, high blood pressure).

Leave arrangements

As noted above, if an employee is at the workplace displaying symptoms of COVID-19, then an employer can require that employee to not attend the workplace as they are not fit for work. The employee remaining at the workplace can put others at risk of infection.

The employee may be able to work from home or if they are unable to work from home, they can access any personal leave (which may extend to when an employee is unable to work from home because the role cannot be performed other than at the workplace). If an employee does not have any personal leave, they can agree with the employer to take another form of leave or they can take unpaid leave.

Similarly, if an employee is fit for work yet is required to self-isolate, an employer can agree to an employee taking another form of leave or they can take unpaid leave.

Recent variations to modern awards

An employee may have additional choices if they are covered by an award recently varied by the Fair Work Commission.

The affected awards now provide two weeks unpaid pandemic leave if an employee is required to self-isolate or is otherwise prevented from working by measures taken by government or medical authorities in response the pandemic. Unpaid pandemic leave will be available immediately and does not need to be accrued. It will be an option even if the employee has other leave available and the employer can agree to extend the leave beyond two weeks.

The variations will operate from 8 April until 30 June 2020.

During this time, it will also be possible for an employer to agree to an employee taking annual leave at half pay (and, in effect, doubling their time off work). Any agreement would need to be in writing and kept as an employee record.

Continued working from home

Most employees will now have settled into their new 'working from home' environments, and some employees may continue to work from home as the restrictions are eased.

The timeframes associated with the pandemic will necessarily inform how risks to the health and safety of employees whilst working from home are to be managed.

Some businesses have already announced that regardless of what happens next, employees will be encouraged to continue working from home. It is also likely that some employees will request to continue working from home, particularly if they now have set-up a safe working environment at home.

Ahead of returning to work, businesses should review their flexible working and remote working policies to ensure they reflect the business' expectations in the current environment and that they will be applicable for long term working from home arrangements.

Safe working environment

As people continue to work from home, businesses should ensure that they continue to monitor the effectiveness of their controls for remote working.

Safe Work Australia recommends that businesses implement the following measures for employees who work from home:

- Provide guidance to employees on how to set up a safe home work environment (examples are available on Safe Work Australia's website, including working from home information and diagrams).
- Ensure employees have completed a self-assessment checklist so they are complying with good ergonomic practices.
- Appoint a contact person in your business that employees can talk to about any concerns.
- Set up ways to communicate with employees online (e.g. through Skype or Zoom) and communicate with them daily.
- Provide information to employees about the support available to them, for example through an employee assistance program.

Supporting mental health and wellbeing at home

Managing the risk of mental health for those working from home has been recognised for some time as a significant work health and safety issue. Working from home can be isolating. Working from home in isolation can be simply unnerving.

When working from home, hazards which can lead to mental ill-health (or psychological harm) include:

- Isolation.
- Poor working environments (for example, exposure to high noise levels or extreme temperatures).

- Low job support.
- Poor organisational change management (for example, inadequate consultation with employees about major changes or lack of information being provided to workers if businesses are restructuring).

Domestic and family violence

In addition to mental health, domestic and family violence has also been recognised as a secondary effect of the COVID-19 pandemic and associated economic impact.

If a person is working from home, their working environment may have other people present including spouses, partners, children, siblings and other relatives. Domestic and family violence is not limited to physical or verbal abuse. It extends to psychological abuse, sexual assault, financial abuse and technology-facilitated abuse.

Safe Work Australia recognises that such violence can be a work-related hazard if the perpetrator is, or threatens to be, violent whilst the other person is working from home. It also recognises that workplaces can be a place of refuge for employees who are experiencing such violence and if they are now working from home, the risk of harm may be heightened.

What can businesses do?

To support employees who may be exposed to family or domestic violence, businesses can:

- Provide information to employees about family and domestic violence to raise awareness and communicate what support is available, including paid (and any unpaid) leave entitlements.
- Consult with employees about their work from home arrangements.
- Encourage employees to discuss any individual concerns they may have in respect of health and safety at home. The way in which this discussion takes place may be influenced by the employee's situation.
- Assure employees of their right to confidentiality (to the extent possible) if they choose to disclose.
- Provide a secure reporting mechanism, including with appropriately trained people.
- Consider alternative work locations if a person is not able to work from home safely.

Many workplaces have a policy or procedure for domestic and family violence to support their employees. Procedures can set out how to identify signs of violence, how to respectfully raise suspicions of violence and what control measures can be implemented to ensure a safe working environment. Businesses should review their documents to ensure that they can be effective during the pandemic.

04

Complaints about workplace control measures

Unlike a number of health and safety risks that can be present at a workplace, those associated with COVID-19 have been well-publicised across the country. Therefore, when employees attend the workplace they can come with a degree of apprehension and also firm expectations about how risks should be managed.

Employees will trust their organisations to put in place the necessary controls to keep them safe. Some are likely to become agitated if the controls are not being adhered to by their colleagues. Maintaining confidence in the measures being taken will have the important benefit of building trust that can then be relied upon to focus on your operations during what is a challenging period for many employers. For employers looking to transform their operations for the new normal they will need to have the trust of their employees to succeed.

However, this trust and associated expectations can develop into questions, queries or complaints being raised with the business. Complaints may not be raised with the business directly. Instead, complaints may be raised through health and safety representatives, unions or regulators. Each of whom may have their own matters to raise.

The complaints can be that the business is doing 'too little', or that the business is doing 'too much' to manage the risks. Our experience is that these complaints are not unusual. Whilst finding control measures that are 'just right' is ideal, compliance with work health and safety laws is the immediate priority.

If such complaints are raised, businesses may be compelled to respond as health and safety representatives, unions and regulators all have powers and functions (of different kinds) under work health and safety laws. In anticipation, businesses should ensure that the reasons for its decisions on how it is managing the risks, including what control measures will (and will not be) implemented, are recorded.

As the risks associated with the pandemic constantly evolve, so does the guidance material available. This is why it is imperative that any guidance material relied upon to make decisions should be recorded as at the date of reliance. It is also important that when that guidance material changes, any decisions which have been informed by that guidance material are revisited.

Health and safety representatives

Health and safety representatives are elected by employees to represent the employees.

Under work health and safety laws, health and safety representatives can monitor control measures implemented at the workplace, inquire into anything that appears to be a risk to the health and safety of members in their work group and investigate complaints from members in their work group. In exercising these functions, health and safety representatives can conduct inspections, receive information concerning the work health and safety of members in their work group and issue Provisional Improvement Notices, among other things.

There are obligations on a business relating to health and safety representatives, including that businesses must allow representatives access to information that relates to the work health and safety of members in their work group and hazards at the workplace affecting members in their work group.

Whilst the exchange of information between a health and safety representative and a business in respect of COVID-19 is to be expected, the representative is not entitled to personal (or medical) information about an employee unless that employee has provided consent to the release.

However, such information can be provided if it is in a form which does not identify the worker and could not lead to the identification of the worker.

Direction to cease work

In addition to an employee's right to cease (or refuse to carry out) unsafe work, a health and safety representative can direct an employee in their work group to cease work on the basis that the representative has a reasonable concern that carrying out the work would expose the employee to a serious risk to their health and safety, emanating from an immediate or imminent exposure to a hazard. Such a direction is only possible though after the representative has consulted with the business and an attempt has been made to resolve the matter via the issue resolution provisions (unless taking these steps first would be unreasonable given the seriousness of the risk to health and safety).

Discriminatory conduct

Businesses cannot engage in discriminatory conduct for a prohibited reason, which includes a health and safety representative exercising their powers or performing their functions. Generally, discriminatory conduct covers dismissal, terminating a contract for services with a worker, putting a worker to their detriment in their engagement as a worker or altering the position of a worker to their detriment, although it can depend on the jurisdiction. For it to be an offence, the prohibited reason needs to be the dominant reason for the discriminatory conduct.

Other prohibited reasons include:

- A worker raises, has raised or proposes to raise an issue or concern about work health and safety with a health and safety representative, a member of a health and safety committee, an inspector or a union official who has appropriate permits to exercise right of entry, among others; and

- A worker taking action, has taken action or proposes to take action to seek compliance by a person (including a business) with any duty or obligation under work health and safety laws.

Unions

Some businesses have been subject to complaints by unions, focused mainly on 'essential services'. If complaints are raised by union officials, it will be important to crystallise the issue(s) so that any engagement is constructive. If the complaints are based on a business' compliance with work health and safety laws, the issue(s) will necessarily need to be about work health and safety and not other (industrial) issues.

Right of entry

Under work health and safety laws, union officials with the appropriate permits can exercise rights of entry to the workplace. These rights of entry can be used to:

- Inquire into suspected contraventions;
- Inspect employee records or information; and
- Consult and advise employees.

Upon entry, the union official will need to comply with any work health and safety requirements that apply to the workplace (particularly those which have been introduced by the business to manage the risks associated with COVID-19) and any other legislated requirements that apply to the certain workplace.

If a dispute arises about the exercise or purported exercise of these rights of entry, the regulator can be asked to appoint an inspector to attend the workplace to assist in resolving the dispute. Alternatively, the dispute can be heard by an authorising authority.

Regulators

Complaints, as well as disputes, can be raised with work health and safety regulators. Safe Work Australia has published a 'Statement of Regulatory Intent' applicable to all work health and safety regulators in jurisdictions that have adopted the model work health and safety laws. Currently, the statement extends to WorkSafe WA but not WorkSafe Victoria.

The statement sets out the enforcement approach that regulators will take to ensure compliance with work health and safety laws during the pandemic. Safe Work Australia acknowledges that the pandemic has created an *"exceptional set of circumstances"* and will have significant impacts for Australian workplaces.

According to the statement, and while public health orders are in place, regulators will adopt a *"common sense and practical approach to interactions with workplaces"*. Regulators are continuing with compliance and enforcement activities, however focusing on serious risk to health and safety and advisory support.

The statement further provides that regulators will adopt a *"supportive and educative approach to compliance during this time provided duty holders have made genuine attempts to comply with requirements, but compliance is affected due to factors outside their direct control"*.

As with all compliance and enforcement activities by regulators, the principles of constructiveness, accountability and proportionality (among others) continue to apply consistent with the National Compliance and Enforcement Policy. The use of enforcement measures, such as Prohibition Notices and Improvement Notices, should not be ruled out.

Transitioning to the new normal

Work health and safety has always been a key priority for the workplace. In the swirling uncertainty that we face, more than ever it is a business critical issue.

Assessing risk and acting to control it is not unfamiliar territory for employers. It is critical, however, that employers invest in getting their safety systems right because the stakes are high. As the return to work may be a slow, long term process, the control measures implemented for this period need to be clear, sustainable and effectively communicated. They also need to be adaptable.

Employees need to have confidence and trust in the organisation and that they will be protected at work. It is crucial not just for the health and safety of employees and others, but also to your operations. Reputations, and potentially the future viability and success of businesses, are on the line.

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