

## Transitioning back to the office: Rights and responsibilities



By [Kevin Yee](#) and [Katrina Emmerick](#) - Jun 01, 2021 7:40 am AEST

### Snapshot

- The last year has shown us that many employees are just as capable of working from home as they are from the office.
- As stand-down directions are lifted and the public health situation improves, the hybrid system is becoming the new normal.
- Consultation and communication are the keys to a smooth transition back to the office.
- WHS and mental health will be important considerations when negotiating flexible work arrangements.

Twenty twenty has shown us that employees are just as capable of working from home ('WFH') as they are from the office, though there are of course some exceptions. What began as compliance with temporary public safety measures has resulted in many people wanting to WFH on a permanent basis.

Based on our experience as employment lawyers, there are good reasons why everyone (employers included) can appreciate WFH arrangements. WFH has reduced the corporate impact on the environment and the impact of time-consuming commutes which, in some cases, has resulted in increased productivity levels. It has also assisted many people to find a better balance between their personal and professional lives.

The situation continues to develop. JobKeeper ended on 29 March 2021 and many employers have now lifted their JobKeeper-directed stand downs. Many businesses have already made a direction to employees to return to work ('RTW') or are considering alternative long-term arrangements. While the employer retains a right to lawfully and reasonably direct their employees, COVID-19 considerations and their interaction with flexibility provisions in the *Fair Work Act 2009* (Cth) ('FWA') mean it is not as simple as merely directing an employee to come back to work.

### When can an employee refuse to return to work?

Many employees may not be enthusiastic about returning to the office, but employees may only refuse to RTW if they have a reasonable concern about their health and safety, or another legitimate reason, e.g. carer's responsibilities. An employee should raise any concerns with their employer as soon as possible. To be clear, an employee's preference to WFH is not sufficient and will not constitute a legitimate reason for refusing to RTW.

If an employee refuses to RTW and the reason for their refusal is not considered reasonable or legitimate, this could justify disciplinary action against the employee. The employer should apply a best practice approach to carrying out any disciplinary action, including issuing formal directions, warnings and, if necessary, considering whether termination is appropriate.

### What if an employee wants flexible working arrangements?

An employee's right to request flexible work arrangements arises under the National Employment Standards ('NES') and potentially an industrial instrument, where applicable. The NES set out a list of who can request

flexible work, e.g. individuals with carers responsibilities, and those over 55. Notwithstanding this, in the current climate it is best practice to treat everyone equally, regardless of whether they are covered by one of the listed reasons. Requests for flexibility can be made in relation to:

- change in working hours (changes in hours/shifts);
- change in pattern of work (split shifts or job-sharing); or
- change in location of work (working from home or elsewhere).

#### ***What is the process for making a request for flexible work?***

- The request must be in writing, and must set out the change sought and reasons;
- Employers must give the employee a written response within 21 days of receipt, stating whether the request has been accepted or rejected;
- Requests for flexibility must be genuinely considered and can only be refused on 'reasonable business grounds'; and
- If a request has been rejected, the response must set out the reasons.

There is no requirement for an employer to agree to a request made by an employee, however they must genuinely consider the request. The *FWA* gives power to the Fair Work Commission ('**FWC**') to deal with disputes that may arise in this regard.

#### ***What are reasonable business grounds to refuse a request?***

- Costs of accommodating the change;
- Capacity to make the requested change;
- Practicality of changing work arrangements of other employees to accommodate the change;
- The change would cause loss of efficiency or productivity; or
- The change would negatively impact customer service.

The *FWA* also allows state and territory laws to continue to apply to employees where they provide more beneficial entitlements than the *NES* in relation to flexible work arrangements.

It is important for employers to treat all employees fairly when assessing a requested flexible work arrangement. Employees may have access to discrimination protections under the *FWA* and/or the relevant discrimination act, if they can establish that the refusal was *because of* a protected characteristic or the exercise of a workplace right.

#### **Work Health and Safety considerations**

An employer must also keep in mind the work health and safety ('**WHS**') of employees when requesting employees RTW, including under contract and any other applicable legislation. There are several practical steps to consider to ensure compliance with *WHS* provisions and government directives, including:

- sanitation stations;
- distancing between employees, including floor markings;
- managing the flow of people returning to the office, e.g. a roster system; and
- an emergency plan, in the event of further outbreaks.

#### ***Mental health and the return to work***

While the stigma around mental health remains, now more than ever we are aware of how our mental health can impact our engagement at work. Some things to keep in mind when deciding to consider requests for flexible working arrangements, or RTW directions are:

- While many employees enjoyed the flexibility and benefited from WFH, there are also many people who had a very different experience. WFH over the past year led to an increase in anxiety and depression rates, largely due to the sense of isolation people felt, moving from a bustling social environment to their homes 24 hours per day.
- Many found it difficult to separate their work and personal lives, given their homes became their office environment.

- Studies showed that ‘WFH fatigue and burnout’ occurred towards the end of 2020, with employees experiencing an increase in anxiety due to a longer work day. This in turn led to a drop in productivity. The length of the pandemic has raised questions about the viability of WFH long term, especially in relation to employees’ mental health. The hybrid approach seems to be most manageable in a long-term scenario (Tim Lawson, Brian Scheid, [‘Work-from-home productivity gains seen evaporating as pandemic grinds on’](#), *S&P Global Market Intelligence*, 10.9.20).
- The change back to working in an office environment will naturally also have a significant impact on people. The whiplash of such significant changes at rapid speed has undoubtedly impacted people, the effects of which will remain as people adjust to the new normal.

Employers should acknowledge the mental health impact of COVID-19 and implement measures to mitigate the impact of any changes. There may be employees who are anxious about returning to work, either due to social anxieties or health and safety concerns.

Dialogues with employees about mental health and the challenges we have all faced should be a key part in the process of RTW. Employers are encouraged to refresh their Employee Assistance Program (‘EAP’) services (or similar). Some employers may consider increasing leave allowances to add additional days of ‘mental health leave’.

While we have all been through the same pandemic, each of our experiences has been different and the impacts that naturally follow will also be different. Being conscious and sensitive of this and allowing open discussion is a step towards breaking down the stigma surrounding mental health in professional contexts.

### ***Incentivising the return to work***

In our experience, having employees on board with the RTW rather than simply issuing a directive is likely to result in a happier and more productive workforce. Highlighting the benefits of RTW will help encourage employees to return. Whether the benefits are the social aspects, or work-related, there are plenty, and at least one of them is bound to hold some appeal for employees. Some companies are introducing new initiatives to incentivise people to RTW, e.g. gradual or staggered return to work; the ‘hybrid system’ for employees who want to work some days in the office and still enjoy the flexibility of WFH part time; offering greater flexibility to WFH where requested; free meals; reimbursing commuting costs; regular social activities; on-site child-care; and RTW bonuses.

Supportive workplaces are becoming more attractive to employees when looking at the market. Companies will need to adapt to the new priorities of employee, as pay will not necessarily be enough of a competitive edge to keep good people.

### **A caution about overcaution**

There are many dimensions when considering the health and safety and mental health of employees, which were exacerbated by COVID-19 and WFH. One key theme for employers to remember is that it is important to return to basics – if an employee is underperforming, or engaging in inappropriate conduct, you still need to address these issues. WFH or COVID-19 is not a shield to legitimate performance management.

Employers can turn this crisis into an opportunity to improve company culture, increase productivity and update all company policies and procedures to incorporate the new normal.

Finding the balance between keeping track of employees and their deliverables, without micromanaging, will be vital for businesses implementing new hybrid structures. If 2020 has taught us anything, it is to maintain open communication with employees, on both a professional and personal level.

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