

Insights

Getting back to business after JobKeeper – the legal, insurance and talent implications

Panellists and facilitator:

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Live poll responses

Delegates were asked to respond to a live poll, with figures compared to the **WTW June 2020 Asia Pacific Restoring Stability Survey – Pay, Benefits, Wellbeing**.

In response to the pandemic, what workforce changes you have made?	WTW study	Event poll results
Hiring freeze	50%	56%
Redeployed talent	63%	11%
Reduced work hours/weeks	20%	44%
Reduced pay	NA	22%
Redundancy/furloughs	16%	33%
Lending/borrowing talent from other organisations	20%	0%

Table 1. Live poll results compared to results from 2020 Asia Pacific Restoring Stability Survey - Pay, Benefits, Wellbeing (results from this survey reflect responses from 746 employers in APAC, representing 1.6 million employees from 15 markets).



Has your business experienced employment claims/complaints that are linked to COVID-related changes?

24% yes

67% no



Talent implications

- There are limited models out there for how to handle the pandemic and to transform effectively. WTW has looked to high performing organisations and those who excel during turbulent times to understand what sets these organisations apart.
- WTW's High Performance Employee Experience (HPEX) framework is a blueprint for success and identifies aspects that organisations need to focus on in order to minimise people risks, particularly during turbulent times. For example:
 - using digital technology for personalised communication to build agency and collaboration (continue to listen, provide opportunities to connect and for employees to have a 'voice')
 - focus on employee wellbeing
 - enable leaders and managers
- Prevention is the best cure. As organisations make changes to the workforce, they need to consider from the outset, how can we change in a way that will not negatively impact on the Employee Experience?
- We are asking – and needing – employees to exist in new environments, think in new ways and act differently which has a big impact on the Employee Experience. How organisations balance business sustainability with decisions that impact on the Employee Experience will be key.
- Restoring stability is not about going back to old ways but resetting, reimagining the workplace under new assumptions.
- This presents an opportunity for organisations and for employees – redeployment, redesign of jobs (breaking down into tasks), skills, development. Optimising how work gets done in an organisation but doing so with one (or both) eyes on the Employee Experience.



Insurance implications

- There is a rise in retaliation claims in the US – perhaps a precursor to what we may see here, where an employer has taken adverse action when an employee has exercised a right and highlighting the inadequacy of policies and procedures. There are discrimination claims where employees have the inability to attend work due to quarantine, illness and take sick leave.
- The bulk of notifications in Australia are around genuineness of redundancies. The underlying sentiment is employers are using the COVID downturn to rid themselves of underproductive employees.
- Policies where EPL (Employment Practices Liability) is covered & key call outs – exclusions:
 - Cover will be typically found in Management Liability or D&O policies - with cover for individual insured persons, or the company if there is a specific endorsement. There are also some specific products available in the market.
 - Cover for claims extends to past, present and prospective employees for both compensatory and defence costs. The policy will respond to wrongful unlawful termination and breach of discrimination laws but not to failure to pay contractual, statutory entitlements, such as sick leave, maternity leave or things such as back pay owed.
- If insurance is in place, it is essential to have early engagement and maintain transparency. We see better outcomes if a claim is notified early and insurers are provided information throughout the course of the matter. If you become aware of circumstances that may give rise to a claim, if they're notified within the period of insurance, that policy will respond.
- Increased due diligence in underwriting – looking closely at the number of employees, the approach to COVID-19, any changes implemented, procedures and protocols.
- Known matters won't be covered for companies seeking EPL cover (i.e. it could be too late to purchase insurance).
- We're not seeing general insurers apply COVID-19 exclusions as a rule. However, what wouldn't be covered under a new policy period is if an employee has already made a complaint, or the complaint was made in the previous policy period that has expired.



Legal implications

- Fair Work Commission (FWC) has requested more resources, reporting a 70% increase in unfair dismissal claims, an overall caseload increase of 40%, with stand down disputes quadrupled, and General Protections cases up by 20% (Commissioner report to the Senate).
- The Village Roadshow, Qantas and Auscript disputes highlighted a number of major brands who have had to defend their processes around stand downs, whether sick leave should be paid during stand down and interpretation around some of the more hastily put together JobKeeper direction legislation in the Fair Work Act.
- Rise during COVID-19 in unfair dismissal claims disputing the occurrence of a genuine redundancy as shown in McClelland v Lone Pine Koala Sanctuary. That was decided in favour of the employer.
- General protections case of Tran v Macquarie University highlighted the Federal Court's view on COVID-19's long-term effect on the economy and individuals – substantial future economic loss was awarded on account of the pandemic with the court finding the employee would struggle to get another job at similar level during this period. The decision has very wide ramifications for dismissal of higher wage earners especially in the context of the difficulty in obtaining similar employment during this pandemic.
- A rise in the difficulties of performance managing remotely, dealing with bullying and mental illness issues arising from remote working. How this is handled by people managers (and to some extent the policies in place or lack of policies and processes) may dictate what types of matters we will see in the future.
- There are major pitfalls for employers around the lack of policies, or policies probably not drafted that could lead to problems around grievance disputes.
- Employers can't just think about unfair dismissal when it comes to termination of employment. There are also other avenues – breach of contract, unreasonable notice, discrimination, Human Rights Commission applications but in particular General Protections. In General Protections claims there is a reverse onus of proof. An employer cannot take adverse action against an employee for exercising a workplace right. It is up to the employer to disprove points which can be quite difficult and there are significant penalties not just for the company but also for individuals involved in the breach.
- As businesses navigate out of the pandemic we're likely to see:
 - A rise in general protections claims and unfair dismissal influx as organisations look at how they'll restructure when JobKeeper reduces. Employees less likely to settle, and willing to take it further, especially in light of compensation for future economic loss due to the pandemic.
 - Testing the "genuineness" of any redundancies with employee complaints for other reasons such as harassment or lack of performance management. Issues around reducing salary, noting that prior to COVID-19 one of the biggest problems around IR was wage underpayment.
 - Working from home disputes – health and safety, lack of or difficulty in performance management, bullying and harassment claims, complaints about lack of support or being victimised, refusal to return to the office, people being sick or taking care of those who are sick.
- Organisations can mitigate the risk and liability with policies and procedures, written communication and by being strategic, not jumping the gun especially around summary dismissal or not having investigations.

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