



PROFESSIONAL STANDARDS SCHEME

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## **COVID-19 Pandemic FAQ for Employers**

### ***My business has been badly affected by the pandemic. How do I go about terminating the employment of my visa-holding staff?***

This will be determined by the contract of employment that you have with your staff. There may be stand down provisions you can access as well, however **we are not employment lawyers** so we strongly advise you to get legal advice on this process.

If you make the decision to terminate a TSS visa-holder's employment, you are obliged to notify the Department of Home Affairs ('DHA') of this. The employee will then be obliged to find another employer sponsor, apply for a different, more appropriate visa or depart Australia.

### ***I am an employer whose business has been forced to close. What do I do about my staff who are on TSS visas?***

As a sponsor of TSS visa holders, there are sponsorship obligations in place that must be adhered to. These include obligations in relation to paying your staff appropriately and notifying the DHA of relevant changes to your business and/or employment practices.

If you make the decision to terminate a TSS visa-holder's employment, you are obliged to notify the DHA of this. The employee will then be obliged to find another employer sponsor, apply for a different, more appropriate visa or depart Australia.

### ***I am an employer whose business may have no choice but to close, but I don't want to terminate the employment of my staff on TSS visas just yet. Can I give them leave without pay?***

Yes, you can choose to give a TSS visa-holder leave without pay ('LWOP'). Under DHA policy, however, extended LWOP is not considered to be compatible with the purpose of the programme. Additionally, placing staff on LWOP will generally not meet the obligation an employer has to ensure equivalent earnings and an ongoing market salary rate under other sponsorship obligations. This means that the LWOP **cannot** be indefinite or for an extended period of time.

Generally, LWOP would only be acceptable where there are significant personal reasons (such as a workplace injury) and should not be for more than 3 months, unless you are required to provide the leave under Australian workplace laws. In all cases, the DHA expects that:

- the arrangement is mutually agreed upon by you and your employee
- the process is documented i.e. there is a formal application for LWOP that has been formally approved by the employer

**We have had no clarification from the DHA in relation to whether they are going to take a flexible approach to applying this policy. We therefore strongly advise that any LWOP is for an interim period only, during which time you can make decisions about how you want to operate your business moving forward.**

***I am an employer whose business may have no choice but to close, but I don't want to terminate the employment of my staff on TSS visas just yet. Can I reduce their hours?***

Under current DHA policy, this is generally inappropriate where the reduction is due to a decline or downturn in business. This is because reducing work hours is considered to be inconsistent with the programme, which is intended to allow employers to fill genuine skill shortages in the Australian market.

**We have had no clarification from the DHA in relation to whether they are going to take a flexible approach to applying this policy.** Please contact us to discuss your options if you are in this position.

***I employ international students. Can I give them extra work?***

The DHA has been very clear in their expectation that visa-holders must adhere to the conditions on their visas, regardless of the current pandemic. This includes the work limitation imposed on their visas. As such, you cannot employ them for more than 40 hours a fortnight whilst their course is in session unless you come within one of the specific industries that the DHA has announced is exempt from this:

- supermarkets (existing staff in existing roles who are student visa holders working beyond their usual work limitations, where that work assists to ensure the supply of groceries to and in supermarkets or related online distribution facilities)
- aged care providers

If you are a supermarket, you will [need to seek permission](#) from the DHA to be included in this temporary measure.

If you are an aged care provider registered with the Department of Health, you **do not need to seek permission** from the DHA. You will be sent a letter from the Department of Health that explains this.

***I employ working holiday visa holders. Are they still only allowed to work for me for only 6 months?***

As before, the DHA has been very clear in their expectation that visa-holders must adhere to the conditions on their visas, regardless of the current pandemic. This includes the 6-month work limitation imposed on working holiday visas. As such, you cannot employ them for more than 6 months. There are penalties that apply to employers who do not employ visa-holders appropriately.

***I employ working holiday visa holders. Can they apply for permission to work for me for more than 6 months?***

There are only limited circumstances in which a working holiday visa holder can be given an extension of their employment period. Whilst the government has announced that backpackers working to help bushfire-affected communities can seek an extension of their employment period, we have not yet had any guidance from the DHA on whether a similar policy will be introduced for backpackers working for employers who are affected by the pandemic.

***I employ someone whose visa expires in 2 weeks. Are they allowed to stay in Australia because of the travel restrictions caused by COVID-19?***

It is very important to understand that all visa-holders **must** maintain their lawful status in Australia, regardless of the COVID-19 pandemic. **This requirement has not changed.**

Visa-holders who have an imminent visa expiry are expected to apply for a new visa before their current visa expires. **Please contact us ASAP to discuss any options for people in this position.**

***One of my staff members holds a TSS visa and couldn't get back to Australia before the travel restrictions came into effect. The only reason they couldn't get back was because they couldn't get a commercial flight. What can they do to get back?***

Unfortunately, now that these restrictions are in place, there are only limited circumstances in which a temporary visa holder may return to Australia. This is the case regardless of the reason for their inability to return. We know that this seems particularly unfair to people who had taken steps to book flights that were subsequently cancelled.

As at the date of writing, we have no indication for how long these restrictions will remain in place. Please contact us to discuss options for people in this position.

***One of my staff members holds a Bridging Visa B and couldn't get back to Australia before the travel restrictions came into effect. What can they do to get back?***

There is no provision to apply for or be granted or "extend" a Bridging Visa B if the holder is outside Australia. If someone is offshore and their Bridging Visa B ceases, they will be expected to apply for and be granted another visa (e.g. a short stay visitor visa) to return to Australia once the ban has been lifted. Once back onshore, they may be able to apply for a Bridging Visa A. Contact us to discuss any options for people in this position.

***I have heard of the JobKeeper payment. Am I entitled to claim this for my visa-holding staff?***

To be eligible for the JobKeeper Payment, your employee must be an Australian citizen, the holder of a permanent visa, or a Special Category (Subclass 444) Visa Holder at 1 March 2020. If your employee does not fall within these categories (e.g. if he or she holds a TSS visa, student visa or bridging visa amongst others) then he or she is unfortunately not an eligible employee and you cannot claim the JobKeeper payment in respect of his or her employment.

More information is available [here](#).

Please note, we are **not** accountants nor do we provide advice in respect of social security entitlements. If you require advice in either of these areas, we can refer you to professionals who can assist you.

*The above is a general overview of some of the information available as at 15/04/2020. It is not intended to constitute legal advice nor should it be used as such. If you require advice on your specific position, please contact us to arrange an initial consultation.*

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