

## Article Information

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## NSW hard business lockdown - New rules apply

**You will no doubt be aware that the NSW Premier announced additional lock down measures that will have broader reaching effects from 19 to 31 July 2021, at least (New Lock Down Measures). These new measures will significantly affect a range of businesses.**

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The New Lock Down Measures will cover the Greater Sydney Region and will include the Central Coast, the City of Wollongong, the City of Shellharbour and the Blue Mountains. There are also specific additional measures impacting people residing in the local government areas of Fairfield, Liverpool or Canterbury-Bankstown, who (except for Authorised Workers) will be unable to leave these local government areas until at least 31 July 2021.

The New Lock Down Measures have been implemented by way of amendment to the *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021* under the *Public Health Act 2010* (NSW) which is accessible here: <https://legislation.nsw.gov.au/information/covid19-legislation/temporary-movement-gathering-restrictions>.

In brief, all non-essential retail businesses, non-urgent maintenance and construction sites are required to shut down till 31 July 2021. Please see our article on [Construction Activity Pause and EOTs](#) for details on the scope.

### Standing Down Staff Without Pay

If your business is affected by the New Lock Down Measures, you may be able to 'stand down' your employees without pay. However, it is important that you carefully consider the process of doing so before implementing any stand down.

While we have broadly set out below the process for standing down staff, we recommend you obtain advice to guide you through the process given the complex considerations and risks involved.

The COVID-19 changes that were implemented last year, enabling businesses to stand down and other working arrangements under the Fair Work Act ceased to operate some time ago and **are currently not available** to businesses.

The pre-existing stand down provisions in the Fair Work Act **are available** but are not as broad as the COVID-19 changes were and require careful consideration of the following if your business is affected by the New Lock Down Measures:

- You may only stand down staff without pay where there is:
  - a '**stoppage of work**'; and
  - the employees cannot be '**usefully employed**'.

The New Lock Down Measures are likely to qualify as causing a 'stoppage of work' for many businesses but this is not necessarily so in all circumstances. This will usually mean the whole, or distinct parts of your business have come to a complete halt as a result of the New Lock Down Measures.

Likewise, the process for assessing whether an employee can be 'usefully employed' involves careful consideration as to whether there is work that the employee might perform other than their normal duties, but would need to be work that is beneficial and falls within the scope of their capacity and skills.

As part of the stand down process, consider alternatives such as the availability of paid leave, such as annual and long service leave.

### Stand Down Process

There is no set form but an employee must be notified of the stand down and the basis for doing so. This should be done in writing.

The legal source permitting a business to stand down its employees will usually be in section 524 of the Fair Work Act unless the business has an enterprise agreement that deals with stand down, or specific stand down provisions have been included in the employees' contracts of employment.

Finally, be careful to consider and deploy any consultation obligations that apply before implementing any stand down. Consultation would be recommended where possible, even if no obvious obligation to do so, and should be in advance of any stand down period commencing.

### **Employees Living but not Working in Fairfield, Liverpool or Canterbury-Bankstown**

For employees who live in the local government areas of Fairfield, Liverpool or Canterbury-Bankstown and:

- are not able to be stood down; and
- are unable to travel to work,
- they are not entitled to be paid.

Considerations for businesses with employees affected in these specified local government areas, please give careful consideration as to whether:

- working from home arrangements really cannot be implemented/accommodated; and
- the employees have accrued paid annual, long service leave or other accrued entitlements such as accrued time off in lieu, and unused but accrued rostered days off.

### **Exempt Employees & Businesses**

The following classes of employees and businesses, affected by the restrictions on the local government areas of Fairfield, Liverpool or Canterbury-Bankstown, will be able to continue to operate and attend for work as normal:

- retail;
- public administration and safety;
- health care and social assistance;
- education;
- agriculture and manufacturing;
- transport, postal, warehouse;
- electricity, gas, water and waste services;
- information, media and telecommunications; and
- emergency services.

you will find the link to the specific list here: [Authorised Work/Workers](#)

### **Key Takeaways**

- The New Lock Down Measures are likely to have significant impacts upon a range of businesses.
- Businesses and their employees will need to be extra careful to ensure compliance given the increased police and compliance activity and the large fines at risk.
- Standing Down employees without the correct legal basis for doing so can expose the business of penalties of up to \$66,600 per breach and business owners and officers of personal penalties of up to \$13,320 per breach.

If you have any queries about how the New Lock Down Measures will impact your business, please don't hesitate to contact a member of Piper Alderman's [Employment Relations Team](#).