

Determination of the Commissioner for Public Sector Employment

3.1: Employment Conditions – Hours of Work,
Overtime and Leave: Supplementary
Provisions for COVID-19

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**Government
of South Australia**

Office of the Commissioner
for Public Sector Employment

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Determination 3.1:

Employment Conditions – Hours of Work, Overtime and Leave: Supplementary Provisions for COVID-19

Date of Operation: 14 December 2021

Review Date: This document will be subject to revision as circumstances develop.

This determination is issued in accordance with the Commissioner for Public Sector Employment's powers under section 14(1)(b) of the *Public Sector Act 2009*. It has immediate effect and will remain in place until such time as it is revoked. This determination has been issued in response to the situation presented by COVID-19. It supports continued efforts to respond to the possible spread of COVID-19 while still delivering essential services to the community.

For the purposes of managing and minimising the impact of COVID-19, this determination over-rides existing leave and travel provisions contained within any current Commissioner's Determinations.

Unless explicitly stated, any reference to special leave with pay within this Determination is Special Leave with Pay for COVID-19 (SLWP).

APPLICATION OF THIS DETERMINATION

Casual Workers

Casual workers remain ineligible for special leave with pay but may access any other applicable entitlements at the discretion of the delegate (e.g. long service leave).

Workers with reduced flexibility

It is recognised that distinct categories of workers operate in complex settings within the sector. Different levels of workplace flexibility will consequently apply to different worker groups, depending on the nature of the service being carried out. Flexible working options are limited for front-line workers continuing to provide critical services to ensure South Australia thrives while also effectively responding to COVID-19. Such critical services include but are not limited to:

- Health services
- Emergency services
- Human and child protection services
- Education services
- Correctional services

While it is preferable to support flexible working arrangements where practicable and appropriate, this will not always be possible. If agencies have not yet done so, they should identify and communicate to relevant staff operating in a setting of reduced flexibility the options that are available to them, and those that are unable to be accommodated due to the need to continue critical service delivery.

CE DISCRETION

This Determination identifies the minimum provisions available to support public sector employees during COVID-19. It is however noted that, unless otherwise stated, chief executives and agency heads maintain discretionary authority to approve or not approve arrangements on a case-by-case basis, provided appropriate justification can be provided to the employee.

Leave Arrangements

SPECIAL LEAVE WITH PAY FOR COVID-19 ABSENCES

In recognition of the continued public health situation relating to COVID-19, special leave with pay of up to 15 days is available to support absences from the workplace for COVID-19 situations. This special leave with pay is separate and in addition to existing special leave with pay provisions in *Commissioner's Determination 3.1: Employment Conditions – Hours of Work, Overtime and Leave* (CD3.1).

Special leave with pay for COVID-19 may be accessed more than once, but the aggregate is to be limited to 15 days per service year.

Special leave with pay is applied for, taken, and recorded in hours. Special leave with pay applies to part time employees on a pro rata basis in that the number of days available would be proportionate to the full-time equivalent (FTE) of that employee.

Special leave with pay is only paid at an employee's ordinary rate of pay for the relevant day/hours.

This special leave with pay is not considered to be part of the 15 days' special leave with pay as detailed in the *Commissioner's Determination 3.1: Employment Conditions – Hours of Work, Overtime and Leave* (CD3.1).

ADJUSTED LEAVE ARRANGEMENTS

In recognition of the new situation presented by the general opening of South Australia’s borders, previous COVID-19 leave provisions are no longer in effect and are replaced with the below.

SCENARIO	EXAMPLE APPLICATION	PROVISION (in order or priority)
Well, but unable to attend the workplace	Absent for testing required by health authorities, required to quarantine, worksite closure	<ol style="list-style-type: none"> 1. Flexible working arrangements if possible; or otherwise 2. Special Leave With Pay (SLWP) will be available
Unwell (COVID-related)	Symptomatic and requiring testing*, COVID positive	<ol style="list-style-type: none"> 1. Employee’s sick leave entitlement (accessed in line with existing agency processes)
Exposure to COVID-19 occurred during employee’s leave period** and requires quarantine or isolation.	Personal travel (intrastate, interstate or overseas), visit to an exposure site while on annual leave.	<ol style="list-style-type: none"> 1. Flexible working arrangements if possible; or otherwise 2. Employee’s personal leave entitlements (annual, LSL, retention), or leave without pay

*Working from home may be permitted if the employee is mildly symptomatic but otherwise remains well, and appropriate duties are available. This should be considered on a case-by-case basis depending on the individual circumstances.

** For the purposes of this Determination, the employee’s leave period is to be considered as from the time the employee stops duties until they recommence duties. This is inclusive of any unpaid days prior to returning to work (e.g. a weekend).

Other arrangements

REQUIREMENT FOR EMPLOYEES TO SELF-REPORT

An employee must self-report to their manager as soon as possible if they:

- Are unwell and exhibiting symptoms that may be associated with COVID-19.
- Have had close contact with a confirmed or probable case of COVID-19.
- Have had casual contact with a confirmed case of COVID-19.
- Have been advised or directed by health authorities to isolate, quarantine or be tested for COVID-19.
- Have been tested for COVID-19 and are awaiting test results.
- Have tested positive for COVID-19.
- Have tested negative for COVID-19 but otherwise remain unwell; or
- Are being treated for COVID-19.

Agencies must ensure employees understand their self-reporting obligations, including the process required by the agency for them to report, and any obligation to provide evidence as necessary upon request.

Employees who report any of the above must abide by any direction given by a health authority, which may include remaining absent from the workplace. Working from home may be permitted if the employee otherwise remains well and duties are available.

VULNERABLE EMPLOYEES

Health advice on vulnerable members of our community remains the same.

Those at higher risk continue to be:

- People aged over 70; or
- People with one or more specific pre-existing medical conditions.

Agencies should refer to the Australian Department of Health website for the most current list of pre-existing medical conditions which may increase risk.

Aboriginal and Torres Strait Islander people may also be at increased risk of severe disease in any public health emergency and should be considered a priority population when assessing potential risk related to COVID-19.

Anyone considered vulnerable should seek advice from their medical practitioner on their presence in the workplace. Agencies should develop individual workplace COVID-19 management plans for those staff who may be at higher risk of more severe illness.

If a vulnerable employee can return to the workplace but wishes to remain at home, and flexible working arrangements are not practicable or appropriate, the employee may seek to access their personal annual, LSL or retention leave entitlements or leave without pay.

The chief executive may provide access to SLWP on a case-by-case basis if they deem it appropriate in the individual circumstances.

CARER'S LEAVE

Employees may access an uncapped amount of their accrued sick/carer's leave for COVID-19 caring purposes each year.

Access should also be provided for the purpose of caring for school aged or pre-school aged children who are well but unable to attend childcare or school due to a site closure, or because of a requirement for the child to quarantine.

Carer's leave may also be utilised to accompany a child or dependent to a COVID-19 vaccination appointment.

Living with/caring for a vulnerable or dependent person

An employee living with or caring for a vulnerable person may request flexible working arrangements to support their personal requirements, but such a request must be negotiated and agreed to between the manager and employee before implementation and should identify a date of review. The practicality of any arrangement must be considered in the context of the work required of the employee, and the level of risk to the vulnerable or dependent person if the employee was to remain in the workplace.

Where flexible working arrangements cannot be accommodated, the employee may seek to access their personal annual, LSL or retention leave entitlements or leave without pay.

ACCESS TO LEAVE ACCRUALS

Given the extended duration of the COVID-19 pandemic, it is important to plan and enable employees to access leave accruals in a timely fashion to allow them time to refresh and recharge. Ideally, annual/recreation leave should be taken within 12 months of accrual. Continued rollover of leave accruals should be closely monitored to ensure impact on employee mental health is managed.

Payment of annual/recreation leave entitlements at half salary

In recognition of the current need for additional flexibility in taking leave, and in accordance with Schedule 1, Part 4, clause 5(3) of the PS Act, employees may apply to take annual/recreation leave on half salary. In this event, the period of leave is to be twice the period to which the employee would otherwise have been entitled.

Payment in lieu of annual leave

Where employees are critical to the COVID-19 response, and to assist with staffing the response, employees may request to receive payment in lieu of annual leave subject to the following conditions:

- The employer cannot require an employee to take payment in lieu of annual leave. Any request must be at the initiative of the employee.
- Requests are considered on a case-by-case basis, taking into consideration the possible impact on the employee's wellbeing if they do not take time away from the workplace.
- Employees must have at least two weeks' annual leave remaining after payment.
- The agreement to receive payment in lieu of leave must be recorded in writing for each payment
- The payment must be equivalent to the amount the employee would have received (including leave loading) had the leave been taken

REGULAR TESTING REQUIRED IN LINE WITH EMERGENCY MANAGEMENT DIRECTION

Where the duties carried out by an employee require regular COVID-19 testing under an *Emergency Management Act 2004* (EM Act) direction, any period waiting in line to be tested will be treated as paid work time, including reasonable travel time from their home or workplace to the testing facility.

If required testing falls on a non-workday the employee will be paid the appropriate rate for the minimum hours of engagement under the relevant industrial instrument.

If required testing falls during a period of leave the employee will be re-credited one full day of the applicable leave for each day they are required to undergo testing.

Evidence of testing may be required by the agency prior to the recrediting of leave.

Vaccination provisions

Public sector employees will be encouraged and supported to receive their vaccination where possible to help protect the community against COVID-19.

VACCINE MANDATES ISSUED UNDER THE EMERGENCY MANAGEMENT ACT

Some workgroups are currently subject to a legally binding direction issued under the EM Act requiring COVID-19 vaccination in order to carry out their work duties (with limited medical exemptions).

Directions issued under the EM Act are lawfully binding. It is the responsibility of any employee covered by such a direction to ensure they can comply. Failure to do so is an offence. Agencies must abide by all requirements of an applicable direction issued under the EM Act.

Staff who are subject to a mandate under the EM Act and remain unvaccinated without a valid medical exemption will be managed in accordance with internal agency processes. Such staff will not be eligible for special leave with pay for COVID-19.

UNVACCINATED EMPLOYEES – MEDICAL EXEMPTIONS

There will be instances where an employee has a valid medical reason to remain unvaccinated for COVID-19, even if vaccination is required to continue their duties. Such staff must seek an appropriately endorsed medical exemption in accordance with any applicable requirements. On providing an endorsed valid medical exemption the employee may be risk-assessed to identify all appropriate mitigation treatments such as Personal Protective Equipment and hygiene standards in order for the employee to remain in the workplace.

Valid medical reasons are those stipulated by the [Australian Technical Advisory Group on Immunisation \(ATAGI\)](#).

ADVERSE REACTION TO VACCINE

In instances where an employee receives a COVID-19 vaccine and experiences an adverse reaction, normal sick leave provisions will apply.

DISCLOSURE OF VACCINATION STATUS

To assist with the planning and management of a sector emergency response to increased COVID-19 community transmission it is critical to understand the level of vaccination across the workforce. Consequently, all employees are strongly encouraged to disclose their vaccination status and should be reassured that any information provided will be used for appropriate purposes.

Chief Executives may also elect to issue a management direction to disclose vaccination status based on the risk profile for their employees and/or clients but should seek advice from the Crown Solicitor's Office before doing so.

REQUESTING AND RECORDING VACCINATION STATUS

Agencies are encouraged to implement a process which allows managers to sight evidence of an employee's vaccination. Copies of evidence will not generally be required to be retained unless there is a clear lawful reason or requirement to do so.

A principles-based approach to gathering personal information should be adopted and should include:

- **Data minimisation** to ensure only critical information is collected
- **Purpose of use** to ensure clarity on why the information is required, and how it will be used.
- **Security** to ensure any information collection is safe and secure, and storage of information is appropriate in line with the [Information Privacy Principles Instruction PC012](#).
- **Access and correction** to ensure only appropriate people have access to information, and that employees can apply to access and correct any personal information about them.

Agencies should review further information on the [State Records SA website](#).

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