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## WORK HEALTH & SAFETY LEGAL ARTICLE

### COVID SAFETY PLANS - GETTING BACK TO BUSINESS IN WA, SAFELY

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#### **Introduction**

Western Australia has been successful in limiting the spread of the coronavirus and preventing disease outbreaks in the short period since 15 March when the WA government declared a State of Emergency and shut down or restricted all but essential businesses.

The crisis containment has been assisted by cooperation of the business community. However, the necessary preventative emergency action has had significant business impact. Loss of trade, lack of cash-flow, and difficulty retaining and paying workers are a few of the severe commercial, financial and human consequential impacts.

WA had already commenced easing restrictions when the National Cabinet announced the COVID national recovery strategy on 8 May for implementation in stages by the States. [1] Shortly after, the WA government announced the 4-phase COVID-19 WA Roadmap. [2]

WA is now focussed on getting back to business in a responsible and safe way. Phase 2 commencing on 18 May, involves select previously restricted businesses able to reopen or recommence operations, with public gatherings of up to 20 people subject to social distancing requirements.

The partial 'green light' for the lifting of business restrictions comes with new emergency legislation safety obligations contained within the *Closure and Restriction (Limit the Spread) Directions (No 3)* including mandatory COVID Safety Plans and Certificates for businesses reopening or recommencing previously restricted operations. [3]

Additionally, work health and safety legal obligations continue to apply to COVID occupational hazards and risks, which link with the COVID Safety Plan requirements.

## **Work Health & Safety and COVID**

Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) is the virus that causes the COVID-19 disease. [4] SafeWork Australia and WorkSafe WA recognise the SARS-CoV-2 virus as a health and safety 'hazard' under work health and safety legislation.

As WA has not yet transitioned to the national harmonised WHS laws, [5] the relevant state legislation is the *Occupational Safety and Health Act 1984* (WA) for general workplaces, and the *Mines Safety and Inspection Act 1994* (WA) for mining workplaces.

Under both pieces of legislation, employers and other persons in control of workplaces have a duty to ensure, so far as is reasonably practicable, the health and safety of workers and other persons at the workplace by eliminating and mitigating hazards and risks. [6]

Discharging the duty requires the provision of a safe and healthy workplace, plant and equipment and systems of work, as well as providing information, training and supervision. Also required is consultation with workers about the hazards, risks and means of control.

Specifically there is an obligation to identify, assess and control workplace hazards, including the SARS-CoV-2 virus hazard and the associated risks of the virus spreading, causing the COVID-19 disease at the workplace or through the work arrangements.

This hazard management process for COVID hazards and risks requires the following:

- **identify the hazard of the SARS-Cov-2 virus** in causing the COVID disease at the workplace – consider how, where, when and by whom it can be transmitted;
- **assess the associated risks** – consider the likelihood and consequences of transmission and infection in the context and circumstances of the workplace;
- **determine and implement reasonably practicable hazard controls** – consider whether the risks can be eliminated and if not reasonably practicable to eliminate the risks, consider means of mitigation and minimisation of the risks.

WorkSafe WA [7] and SafeWork Australia [8] have developed a range of information and practical tools, across 25 industry sectors from aged-care to warehousing, to assist businesses in managing COVID related work health and safety hazards and risks.

Failure to comply with the work health and safety legislation, including failure to manage COVID, can result in businesses being exposed to WorkSafe regulatory action, including prosecution. Maximum fines for individuals range from \$50,000 to \$550,000 and for companies from \$450,000 to \$2.7 million, depending on the severity of the breach. [9]

COVID Safety Plans offer a means for employers and other persons in control of workplaces to document and communicate the reasonably practicable ways in which the business will manage COVID related work health and safety hazards and risks.

## **COVID Safety Plans**

COVID Safety Plans are a requirement under COVID State of Emergency directions using powers of the *Emergency Management Act 2005* (WA). Developing and implementing a COVID Safety Plan and displaying a COVID Safety Plan Certificate are specified '*re-opening requirements*' mandatory for all businesses permitted to reopen, or recommence previously restricted operations under the State of Emergency directions.

It is not mandatory that essential businesses that continued to operate without emergency direction restrictions have a COVID Safety Plan. However, these business still need to meet the work health and safety obligations for COVID hazards and risks. A COVID Safety Plan offers a reasonably practicable way of demonstrating compliance for all businesses.

The emergency directions define a COVID Safety Plan as a plan of how the business intends to ensure that certain COVID hazards and risks are addressed including:

- a. implementation of physical distancing guidelines;
- b. maintenance of required hygiene standards;
- c. delivery of appropriately training or education for staff;
- d. collection, maintenance and ensuring availability for inspection of patron attendance records; and
- e. appropriately managing exposure or suspected exposure of a person to COVID-19.

The WA COVID Safety Guidelines [10] indicate that COVID Safety Plans will assist in ensuring re-opening of businesses does not increase the spreading of the coronavirus and that all businesses need to do their part to help mitigate the risks of COVID-19.

Three types of COVID Safety Plan templates with related COVID Safety Guidelines for different industry sectors have been developed and made available:

- Plan & Guidelines: Food Business (including pubs, bars and clubs); [11]
- Plan & Guidelines: Sport and Recreation (including dance classes); [12] and
- Plan & Guidelines: Other Business (all businesses not in above categories). [13]

## **Preparing COVID Safety Plans and Certificates**

The COVID Safety Guidelines provide details about preparing a COVID Safety Plan including, in respect to each of the three industry sectors: physical and social distancing, hygiene, training and education, compliance with existing legislation, response planning, key contacts, further information and additional resources. Checklists are also included to enable monitoring and audit of implemented COVID work health and safety strategies.

Each of the three types of COVID Safety Plan templates provides a partly populated document ready for completion of relevant sections as explained in the Guidelines.

Following preparation of a COVID Safety Plan, the business is also required to complete a COVID Safety Plan Certificate which is defined by the emergency directions to:

1. state the number of patrons who can be accommodated at the place; and

2. record the agreement of the business owner, occupier or manager that the COVID Safety Plan measures will be maintained.

For businesses able to reopen under the emergency direction, generally the number of patrons permitted is up to 20 so long as there is at least 4m<sup>2</sup> of space for each patron.

The Certificate is effectively a written commitment that the business is ensuring COVID health and safety measures are implemented. The displaying of the Certificate openly communicates this to staff and patrons providing a level of confidence in the business.

There is no requirement to submit a COVID Safety Plan to any government authority or to have it approved. However, authorised officers under the emergency legislation and inspectors under the work health and safety legislation can visit workplaces, request to see the COVID Safety Plan and verify the determined COVID hazard and risk control measures.

### ***Maintaining Attendance Records***

Businesses are also required to collect and maintain attendance records of patrons to enable health authorities to conduct COVID contact tracing if required. [14]

Records can be electronic or paper-based and must include as a minimum the name and contact information for each person. Where patrons' visits are very short, including for example ordering a takeaway or collecting goods, and therefore unlikely to present a virus transmission risk, businesses do not need to maintain attendance records.

Business patron attendance records are required to be provided when requested by an authorised officer under the emergency legislation. The emergency direction makes it an offence to use or disclose information in a patron register for any other purpose except as permitted by law.

There is no specific requirement to keep records of attendance of workers under the COVID Safety Plan requirements of the emergency legislation. This is likely due to an expectation that worker attendance can be confirmed through existing employment law and payroll record keeping obligations and processes. Additionally, there is the common sense practical expectation that employers, managers and supervisors will be generally able to confirm the attendance of workers at workplaces by other means.

So while there is no requirement under the emergency legislation for worker attendance records to be kept, there is an expectation that such records are kept. There is power under the emergency legislation for worker attendance records be requested and provided for use in COVID contact tracing where required by authorised officers.

Employers should be aware of this and have worker attendance records readily accessible for provision by the business to authorised government authorities when lawfully requested.

### ***Emergency Legislation Non-compliance***

The failure to comply with obligations to develop COVID Safety Plans, failure to comply with emergency directions, failure to keep patron attendance records, unauthorised use of patron attendance records, failure to provide assistance to authorised officers including providing information where required, are all breaches of the *Emergency Management Act 2005* (WA).

Breaches can result in police issued on-the-spot fines of \$1,000 for an individual and \$5,000 for a business, or the ordering of a business to be shut down. [15] Prosecution can result in fines ranging from \$5,000 to \$50,000. Failure to comply with a direction of an authorised officer, including provision of information such as attendance records, can result in either 12 months imprisonment or a fine up to \$50,000. [16]

### ***COVIDSafe App***

The federal and WA governments have been promoting and encouraging the use of the COVIDSafe app as an important COVID containment tool for use by everyone, including workers returning to work. The app is intended to speed up contact tracing for those who test positive for COVID-19 and stop the spread of the virus at workplaces and in the community.

Naturally, there has been community concern about the privacy issues associated with the app which may impact widespread take up. Legislation designed to protect the privacy of information and prevent misuse finally passed both houses of federal parliament on 14 May and now protects the data as an act of federal parliament. [17].

The legislation appears to have addressed many privacy concerns. However, employers should note that many workers may not be assured by the extent of the legal protections and may remain reluctant or opposed to using the COVIDSafe app.

While the use of the app is strongly encouraged by the WA and federal governments, the legislation makes it unlawful to force or require a person to download or use the app. For this reason, employers and persons in control of workplaces cannot make it mandatory for workers or persons at workplaces to download or use the COVIDSafe app.

### ***Suspected or Confirmed Case of COVID-19 at Work***

One of the critical safety strategies that employers and persons in control of workplaces need to have in place as part of a COVID Safety Plan, is a response plan in the event of a suspected or confirmed case of COVID-19.

The level of detection and response to COVID-19 cases in the workplace will determine whether the workplace will be able to continue operating or may need to be shut down. Diligent response will assist the workplace and the community more broadly in COVID containment should cases occur.

SafeWork Australia recommends the following response plan [18] in the event of a suspected or confirmed COVID case when the person or persons are at the workplace:

1. **Isolate** – isolate the person from others and provide a disposable surgical mask;
2. **Inform** – ring the national COVID-19 hotline and follow advice of health officials;
3. **Transport** – arrange transport to the person's home or a medical facility;
4. **Immediate Clean** – arrange cleaning of the area where the person was working;
5. **Identify** – identify and send home other persons who were in close contact;
6. **Broader Clean** – clean other areas where close contact people worked; and

7. **Review** – review safety and health controls and determine if changes are needed.

Where a suspected or confirmed COVID case is identified during a time a worker is away from the workplace, SafeWork Australia recommends the above steps be modified to only include - Inform, Identify, Broad Clean, and Review (Steps 2, 5, 6 and 7 above).

There is no automatic requirement to close down an entire workplace, and the level of cleaning and shut down will depend on the circumstances, what is reasonably practicable, and advice from health authorities.

### ***Training and Information for Workers***

Providing training and information is required under the work health and safety laws for all workers, including health and safety information about COVID hazards and risks. Employers and other persons in control of workplaces should consider re-inducting workers when they return to work, or provide some other form of training or information provision.

For hospitality venues, under the COVID Safety Plan requirements, it is a condition of reopening or recommencing previously restricted operations (for example going from takeaway service to dine-in) that all workers must have completed approved training. Additionally, each hospitality venue must have a trained Hygiene Officer who has undertaken a higher level approved training course. The Health Department and the Australian Hotels Association (AHA) have developed the approved training courses available free online. [19]

For health care workers, disability support workers and allied health staff, the Health Department has also developed a COVID-19 infection control training course also available free online. [20] For all other businesses, information and training materials are available at the WorkSafe WA and SafeWork Australia websites under industry COVID information.

### ***Practical Tips for Getting Back to Business - Safely***

The following top ten practical tips are provided to assist employers and other persons in control of workplaces in ensuring health and safety and achieving the work health & safety and emergency management legal obligations in getting back to business.

1. Check the WA government COVID emergency directions ([www.wa.gov.au](http://www.wa.gov.au)) to determine if your business has permission to re-open or recommence previously restricted operations.
2. Determine a suitable person to prepare the COVID Safety Plan for your business. Use the relevant industry COVID Safety Guide to assist in developing the plan on the relevant industry template.
3. Review the work health and safety industry information available on WorkSafe WA and SafeWork Australia websites to manage COVID hazards and risks.
4. Consult with your workers to discuss any concerns or ideas they may have to assist in making the workplace COVID safe. Provide support to workers and be aware of mental health needs. Be flexible in workplace arrangements.
5. Display the COVID Safety Plan Certificate in a prominent place at your workplace. Be aware this is a commitment to ensuring COVID health and safety measures.

6. Provide training and information to all workers and ensure they understand the COVID Safety Plan and are competent and confident in return to work.
7. Maintain an Attendance Register of patrons to your business including names and contact details, and have this ready to provide to authorised officers if needed. Do not use or disclose the patron attendance records otherwise, except where permitted by law. Have worker attendance records readily available if legally required to provide these.
8. Consider encouraging workers to download the COVID App, but do not make this mandatory and do not discriminate against workers who do not wish to participate.
9. Stay vigilant and be ready to quickly respond to confirmed or suspected COVID-19 cases in your workplace or workforce. Ensure all managers and workers know the response procedures. Cooperate and coordinate with government health authorities.
10. Monitor and maintain your business COVID Safety Plan. Conduct checks, reviews and audits. Be flexible in changing it as circumstances change, and be ready for it to be inspected or reviewed by work health and safety inspectors or emergency authorised officers if contacted or visited.

### **Conclusion**

The opportunity to get back to business in WA so quickly after the COVID pandemic began is good news and a relief for business owners, workers, the community and the economy.

However, the reopening of closed businesses and recommencement of previously restricted operations in other businesses does not give us a licence to return to normal.

The global pandemic is far from over.

Business owners and leaders need to stay informed, remain vigilant, develop and implement COVID Safety Plans and display a Certificate, consult and engage workers in the process, and be ready to quickly respond to contain COVID-19 cases when they may present thereby limiting any spread.

Businesses operate at the heart of the community and economy. We have both a legal and social responsibility to ensure that the way we operate is safe, healthy and does not harm.

Keeping workers, business patrons, and the community safe and healthy may have always been a business obligation, but it has a new focus in the COVID 'new normal' world.

### **Assistance**

For further information and assistance in developing COVID Safety Plans or for work health and safety advice and assistance on COVID or generally, please contact:

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## References:

- [1] See <https://www.pm.gov.au/media/update-coronavirus-measures-08may20>
- [2] See <https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/covid-19-coronavirus-wa-roadmap>
- [3] See <https://www.wa.gov.au/sites/default/files/2020-05/EMA-Closure-and-Restriction-Limit-the-Spread-Directions-No-3.pdf>
- [4] See [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it)
- [5] See <https://www.kottgunn.com.au/updates/corporate-and-commercial/work-health-safety-bill-2019-introduced-wa-parliament/>
- [6] See Section 19 *Occupational Safety and Health Act 1984* (WA) for general workplaces; Section 9 *Mines Safety and Inspection Act 1994* (WA) for mining workplaces.
- [7] See <https://www.commerce.wa.gov.au/worksafe/covid-19-coronavirus-industry-specific-information>
- [8] See <https://www.safeworkaustralia.gov.au/covid-19-information-workplaces/industry-information-covid-19>
- [9] See Section 3A *Occupational Safety and Health Act 1984* (WA) for general workplaces; Section 4A *Mines Safety and Inspection Act 1994* (WA) for mining workplaces.
- [10] See <https://www.wa.gov.au/sites/default/files/2020-05/COVID-Safety-Guidelines.pdf>
- [11] See <https://www.wa.gov.au/government/document-collections/covid-19-coronavirus-food-businesses>
- [12] See <https://www.wa.gov.au/government/document-collections/covid-19-coronavirus-sport-and-recreation>
- [13] See <https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/covid-19-coronavirus-business-and-industry-advice#covid-safety-plans>
- [14] See Section 72A *Emergency Management Act 2005* (WA)
- [15] See Section 71 *Emergency Management Act 2005* (WA)
- [16] See Section 86 *Emergency Management Act 2005* (WA).
- [17] See *Privacy Amendment (Public Health Contact Information) Act 2020* (Cth).
- [18] See <https://www.safeworkaustralia.gov.au/doc/what-do-if-worker-has-covid-19-infographic?tab=All>
- [19] See <https://hospitalityhygiene.com/>



[20] See <https://www.health.gov.au/resources/apps-and-tools/covid-19-infection-control-training>

*The information in this article is of a general nature and should not be construed as legal advice. Whilst we aim to provide timely, relevant and accurate information, the law may change and circumstances may differ. You should not therefore act in reliance on it without first obtaining specific legal advice.*