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Workplace warning

The national emergency alert system, formerly known as the national emergency warning system, recently introduced by state governments to warn communities of life-threatening bushfires and recommend the most appropriate action, leaves employers and employees in affected areas in the dark.

Some guidelines are needed to establish employers' obligations in a code-red scenario

Property owners are given three or four days warning of possible code-red days and advice about the need to evacuate in advance.

Yet, the emergency alert system contains no information about the rights and obligations of employers and employees working in or travelling to bushfire areas when a code-red day is declared.

There is no specific legal requirement that employers stand down employees or allow them to take days off during code-red days. However, in general terms under occupational health and safety laws, an employer is required as far as is "reasonably practicable" to avoid exposing an employee to the risk of injury or death.

In many cases employers' decisions about whether employees should work or not will be fairly straightforward. Management and staff will do their best to manage risks and, for example, permit employees to take accrued annual leave.

But the unpredictable nature of bushfires, the type of work that needs to be done and the reactions of employers and employees to the local situation could make decision making a nightmare.

A few examples will highlight the problems facing employers and employees.

The manager of a transportation company has scheduled trucks to travel from Melbourne to Wodonga when a code-red day is declared for north-east Victoria including the area traversed by the Hume Highway.

The manager must choose between cancelling the trips and asking the drivers to take a day's holiday or unpaid leave, instructing the drivers to stop and wait before they reach the affected area, or insisting that they keep going to Wodonga.

Can the trucking company direct its drivers to drive through the area of possible catastrophe? And if the drivers are stood down, will they be paid?

The subject of pay and leave entitlements can also raise its head when a code-red day is declared and an employee demands that his or her employer provide work in a bushfire-prone area.

The employer refuses and requires the employee, who has no accrued leave entitlements and will not be paid for the day off, to stay at home. Employees suffer hardship through no fault of their own.

Conversely an employee living in a bushfire-prone area may seek leave to evacuate their family on a code-red day. Can the employee be directed to attend work?

A water authority engages staff to maintain water supplies to a town affected by a code-red warning. To what extent can the water authority require its employees to remain on duty during a period of danger?

An employer may be under considerable financial pressure to remain open for business which conflicts with the need to avoid exposing customers and staff to danger.

Is it reasonable for resort operators on, say, the Surf Coast immediately adjacent to the beach to close down the resort and advise guests and employees to leave every time the government declares a code-red day? Taking this action could cause damage to the reputation of the resort and lead to a loss of revenue.

In the past, employers would have expected employees to show up for work on most days of extreme bushfire danger, especially when there was no immediate risk to the workplace. But in creating a new level of bushfire danger, governments have "moved the goalposts" by which organisations responsible for policing occupational health and safety laws will judge the reasonableness of an employer's actions.

Courts will also be in unfamiliar territory when called upon to determine whether an employer has breached an occupational health and safety law or discharged their duty of care.

There is no single solution to these problems facing employers and employees.

There will be circumstances in which an employer is able to provide a safe place of work even though the employee works within a bushfire prone area on a code-red day. There will be other circumstances in which employers, who are required to provide essential services, will need to take significant steps to neutralise the risks.

And where employees are unable to work on code-red days, employers and employees need to be clear beforehand who will bear the cost of time lost due to an absence on a code-red day.

With a lack of guidance from government agencies about the obligations and rights of employers and employees on code-red days, it is critical that employers develop plans in consultation with their employees that will state clearly what they will and will not do if faced with either catastrophic danger or a fire.