

# JobKeeper – What you need to know

## IMPORTANT NOTES

1. The information in this guide is current as at 30 April 2020.
2. Please contact the AMA Queensland Workplace Relations team if you need further information about the JobKeeper Enabling Directions.
3. Please contact your accountant for further information about whether you are eligible for JobKeeper.

## Extension of time to enrol for the JobKeeper scheme

The Commissioner has extended the time to enrol for the initial JobKeeper periods, from 30 April 2020 until **31 May 2020**.

If you enrol by 31 May you will still be able to claim for the fortnights in April and May, provided you meet all the eligibility requirements for each of those fortnights. This includes having paid your employees by the appropriate date for each fortnight.

For the first two fortnights (30 March – 12 April, 13 April – 26 April), the ATO will accept the minimum \$1,500 payment for each fortnight has been paid by you even if it has been paid late, provided it is paid by 8 May 2020. If you do not pay your staff by this date, you will not be able to claim JobKeeper for the first two fortnights.

You can enrol and claim for JobKeeper earlier if you choose. For example, you can enrol by the end of April to claim JobKeeper payments for the two fortnights in April.

## Update to JobKeeper rules

To ensure the integrity and the efficient operation of the JobKeeper Payment scheme, the Government is clarifying the operation of some rules, including the 'one in all in' principle.

On 24 April 2020, the Treasurer issued a [JobKeeper update media release](#), which says:

***'One in, all in' principle:** Once an employer decides to participate in the JobKeeper scheme and their eligible employees have agreed to be nominated by the employer, the employer must ensure that all of these eligible employees are covered by their participation in the scheme. This includes all eligible employees who are undertaking work for the employer or have been stood down. The employer cannot select which eligible employees will participate in the scheme. As noted in the explanatory statement to the existing rules, this 'one in, all in' principle is already a key feature of the scheme and will be made clearer in the rules.*

The ATO is developing information and guidance and will update their [website](#) as soon as possible.

# JobKeeper Enabling Directions

## Overview

On 8 April 2020, the *Fair Work Act 2009* was amended<sup>1</sup> to allow employers participating in the JobKeeper Scheme to:

- Issue various directions to staff to reduce hours/days (with commensurate reductions in salary) or change duties/days/location
- Effectively require staff to take annual leave.

In the legislation, the directions are referred to as “*JobKeeper enabling directions*”.

## JobKeeper Legislation

Part 6-4C of the *Fair Work Act 2009* allows an employer who is entitled to the JobKeeper payment in relation to a particular employee to give a temporary '*JobKeeper enabling direction*' to that employee.

The JobKeeper enabling direction to the employee could be about:

- reducing the employee's ordinary hours of work
- the duties to be performed by the employee, or
- the location of the employee's work.

JobKeeper enabling directions temporarily modify employment terms and conditions in the way that is specified in the direction.

The employer must also still comply with:

- requirements to pay wages
- general protections laws
- unlawful termination laws
- anti-discrimination laws
- laws dealing with health and safety obligations of employers and employees, and
- workers' compensation laws.

### **Unfair dismissal laws still apply.**

### **A JobKeeper enabling direction must be in writing.**

To be entitled to a JobKeeper payment for an eligible employee, an employer must pay amounts totalling at least \$1,500 for the relevant fortnight to or in respect of the employee. This is called the wage condition.

There are safeguards that ensure that an employee's hourly base rate of pay cannot be reduced. The employer must meet the minimum payment guarantee. This means that they must pay the employee for the relevant fortnight the greater of:

- amounts totalling at least \$1,500 (the JobKeeper payment), or
- the amount payable to the employee for the work they performed.

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<sup>1</sup> By the Coronavirus Economic Response Package (Omnibus Measures No. 2) Act 2020 – refer Schedule 1

The total of \$1,500 includes:

- salary, wages, commission, bonus or allowances paid to the employee
- tax withheld
- salary sacrifice superannuation contributions, and
- agreed deductions.

An employer who qualifies must consult with an employee (or the employee's representative) before giving a JobKeeper enabling direction. Also, the direction cannot be unreasonable in all the circumstances. For directions about duties or location of work, a direction must be necessary to continue the employment of one or more employees of the employer.

## Who does the JobKeeper legislation apply to?

The changes to the **Fair Work Act 2009** apply to national system employers who are eligible to and are participating in the JobKeeper Scheme and their eligible employees. For employers with a turnover of less than \$1 billion, this means the employer must have suffered a reduction of at least 30% of turnover when compared to a previous period. Further detail can be found in the Rules.<sup>2</sup>

An eligible employee is one who was employed by the employer on 1 March 2020 (a person remains an employee even if stood down under s.524 of the **Fair Work Act 2009**). Long term casuals are also eligible. Additionally, the eligible employee must be an Australian resident or hold a Subclass 444 Visa.

Employees must agree to be nominated for JobKeeper payments. An employer must notify an individual if the employer has applied for a JobKeeper payment in respect of that employee.

An employee ceases to be eligible for JobKeeper payments in certain circumstances such as if they are totally unfit for work in a particular fortnight and are receiving workers' compensation payments for some or all of that fortnight.

## What are the pre-conditions before issuing directions?

### **Eligibility**

An employer must be entitled to the JobKeeper payment in relation to a particular employee to give directions or enter agreements with that employee under Part 6-4C of the Fair Work Act.

### **Prior Consultation**

Employers are required to consult with staff before issuing a direction under the amendments. Employers are required to keep a written record of the consultation.

If, after consultation, an employer wishes to proceed with the issuing of a direction, the direction must be in writing. **It may be required to be in a particular form.**<sup>3</sup>

Three (3) days must elapse between the start of consultation and the giving of a JobKeeper enabling direction unless the employee agree to a lesser notice period.

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<sup>2</sup> Coronavirus Economic Response Package (Payments and Benefits) Rules 2020

<sup>3</sup> If Regulations require it.

### ***Direction must be reasonable and reasonably necessary to continue employment***

A direction must be reasonable in all the circumstances and necessary to continue employment of one or more employees.

How this will be interpreted in practice is not yet known. A note in the legislation says that the impact of a direction on an employee's caring responsibilities must be taken into account in assessing reasonableness.

It is expected that some latitude will be given to employers, but the power to issue JobKeeper enabling directions is an extraordinary one and employers should be able to explain the rationale for these directions if required to do so.

### ***Direction must be because of Covid-19 and be safe***

A JobKeeper enabling direction can only be given because of changes to the business attributable to the Covid-19 pandemic or government initiatives to slow the transmission of Covid-19.

Additionally, a JobKeeper enabling direction must be safe.

### ***JobKeeper payment must be passed to the employee***

It is also a condition that the JobKeeper payment must be passed on in full to the affected employees.

## **What type of directions can be given?**

### ***Change Ordinary Hours of Work***

A direction reducing an employee's ordinary hours of work is called a '***JobKeeper enabling stand down direction***'.

By giving an employee a JobKeeper enabling stand down direction, an employer that is entitled to the JobKeeper payment in relation to that employee can direct the employee to:

- not work on a day or days that the employee would usually work
- work for a shorter time than the employee would normally work on one or more days, or
- work fewer hours than the employee's ordinary hours of work.

An employer can give a JobKeeper enabling stand down direction if the employee cannot be usefully employed for their normal days or hours because of the COVID-19 pandemic or government initiatives to slow the transmission of COVID-19.

While a JobKeeper enabling stand down direction applies, the employer must ensure the employee's hourly base rate of pay is not less than what would have applied if the direction had not been given. The employer must also meet the wage condition and minimum payment guarantee.

A direction does not apply if it is unreasonable in all of the circumstances. For example, a direction may be unreasonable depending on the impact it will have on the employee's caring responsibilities.

The employer must also have consulted the employee or their representative before giving the direction.

A JobKeeper enabling stand down direction will not apply to periods when the employee is taking paid or unpaid leave authorised by the employer.

### ***Change Location***

A direction can be given to change location of place of work (including to the employee's home) provided the changed location is suitable and does not require the employee to travel a distance that is unreasonable in all the circumstances.

### ***Change Duties***

A direction can be given to require employees to perform any duties within their skill and competency, i.e. the employee can be required to 'act down' or 'act up'.

If 'acting down', there is to be no reduction to the hourly rate of pay.

If 'acting up', and the Award prescribes a higher rate of pay, the employee must receive the higher rate of pay.

## **JobKeeper agreements**

Part 6-4C also allows an employer that is entitled to the JobKeeper payment in relation to a particular employee and that employee to make an agreement about:

- the days or times when the employee is to perform work, or
- the employee taking annual leave, including at half pay.

**JobKeeper agreements must be recorded in writing.**

### ***Change Days or Times***

A request can be made to an employee for them to work on different days or at different times compared to their ordinary days or times of work. Overall, days/hours worked must not be reduced under this request.

The employee cannot unreasonably refuse the request.

This section does not specify whether penalty rates will apply to the changed days/times. For example, if an employer requests an employee to work outside the normal span of hours or on a Saturday or Sunday, it is unclear if penalty rates apply.

### ***Annual leave***

A **request** can be made by the employer for the employee to take paid annual leave.

The employee must consider the request and not unreasonably refuse it.

Note that if the employee agrees to comply with the request, he/she must retain a balance of paid annual leave of not less than 2 weeks.

An employer and employee can also agree in writing to take twice as much annual leave, at half the employee's rate of pay.

## **How does service/benefits accrue?**

During the period of a JobKeeper enabling direction, affected staff continue to accrue service and benefits at the pre-direction rate. In other words, an employee whose hours have been reduced by half because of a JobKeeper enabling direction will continue to accrue leave based on pre-direction hours.

Leave continues to accrue during the period of a JobKeeper enabling direction.

## Employee requests for secondary employment & training

If a JobKeeper enabling direction (to reduce an employee's ordinary hours of work) under section 789GDC of the Fair Work Act applies to an employee, the employee may request:

- to engage in reasonable secondary employment
- formal training, or
- professional development.

The employer must consider the request and must not unreasonably refuse the request.

## What if employers get it wrong?

The Fair Work Commission has been given jurisdiction to arbitrate disputes about JobKeeper enabling directions. It is expected the Fair Work Commission will first attempt to mediate/conciliate the dispute.

Additionally, if the requirements of the **Fair Work Act** are not met when a direction is given, the directions may be unlawful or of no legal effect, entitling employees to commence proceedings in the Court system not only for back pay or re-crediting of annual leave, but also for penalties for breach of the **Fair Work Act**.

## Can an employer still make employees redundant?

The legislation makes it clear that a job enabling direction does not amount to a redundancy.

However, there is no prohibition on termination of employment for redundancy either as an alternative to a JobKeeper enabling direction, or during the period of such a direction if operational conditions change.

**Important Note:** If adverse action is taken against an employee because they assert their workplace rights, for example, by refusing to agree to a request to take annual leave, this may be a breach of the general protections provision of the **Fair Work Act**.

## When do the changes end?

A JobKeeper enabling direction can be withdrawn or revoked by the employer or replaced by a new JobKeeper enabling direction.

This section of the **Fair Work Act** will automatically cease on **28 September 2020**. Any JobKeeper enabling directions will automatically expire on the same date.

The jurisdiction of the Fair Work Commission in relation to disputes about JobKeeper enabling directions will also expire on 28 September 2020 but the legislation is silent as to how disputes lodged prior to that date will be treated.