

JOBKEEPER: AMENDMENTS TO THE FAIR WORK ACT

On 8 April 2020, Parliament passed the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020* which amends the *Fair Work Act 2009 (FW Act)* to support the JobKeeper scheme

The FW Act has been amended to add new temporary provisions to assist employers who qualify for the JobKeeper scheme to deal with the economic impact of COVID-19. The amendments commenced from 9 April 2020 and will apply until 28 September 2020 (unless extended). Below is a summary of the key changes:

JOBKEEPER ENABLING DIRECTIONS

1. JobKeeper enabling stand down - applies if:

- after 9 April 2020, the employer gave the employee a direction to not work their usual day or days, work for a lesser period on a particular day or days or work for a reduced number of hours during a period;
- the employer qualified for the JobKeeper scheme when the direction was given;
- the employee can't be usefully employed for their normal days or hours because of changes to business attributable to the COVID-19 pandemic, or government initiatives to slow its transmission;
- the implementation of the direction must be safe, having regard to (without limitation) the nature and spread of COVID-19; and
- the employer becomes entitled to the JobKeeper payment for the employee for the period.

During a JobKeeper enabling stand down, employees continue to accrue leave and their service is continuous for the purpose of redundancy and payment in lieu of notice. Further, the employer must pay the higher of the JobKeeper payment or the employee's usual pay (base rate cannot be reduced) for any hours that they work.

This stand down does not apply during a period of paid or unpaid leave or other authorised absence and is separate to the stand down provisions in section 524 of the FW Act.

2. Change usual duties – applies if:

- after 9 April 2020, the employer directed the employee to perform any duties during a period that are within the employee's skill and competency;
- the employer qualified for the JobKeeper scheme when the direction was given;
- the duties are safe, having regard to (without limitation) the nature and spread of COVID-19;
- the employee has the required licence or qualification to perform the duties;
- the duties are reasonably within the scope of the employer's business operations; and
- the employer becomes entitled to the JobKeeper payment for the employee for the period.

The employer must pay the higher of the JobKeeper payment, the employee's hourly base rate of pay had the direction not been given or,

if a higher hourly base rate of pay applies to the duties the employee is performing, the higher hourly base rate of pay.

3. Change location of work – applies if:

- after 9 April 2020, the employer directed the employee to perform duties during a period at a different location from their normal place of work, including the employee's home;
- the employer qualified for the JobKeeper scheme when the direction was given;
- the place is suitable for the employee's duties and does not require the employee to travel an unreasonable distance in the circumstances (including those surrounding COVID-19);
- the performance of the duties at the place are safe, having regard to (without limitation) the nature and spread of COVID-19 and reasonably within the scope of the employer's business operations; and
- the employer becomes entitled to the JobKeeper payment for the employee for the period.

RULES RELATING TO JOBKEEPER ENABLING DIRECTIONS INCLUDE:

- Reasonableness:** must not be unreasonable in all of the circumstances (eg. a direction may be unreasonable depending on the impact of the direction on any caring responsibilities the employee may have).
- Continuing the employment of employees:** directions regarding duties and location of work have no effect unless the employer has information which leads the employer to reasonably believe the direction is necessary to continue the employment of one or more employees of the employer.
- Consultation:** direction does not apply unless the employer gave at least three days written notice (in any prescribed form) of the employer's intention to give the direction (or lesser notice period if genuinely agreed by the employee) and before giving the direction, the employer consulted with the employee (or representative of the employee) about the direction. The employer must keep a written record of the consultation.
- Form of direction:** must be in writing (in any prescribed form).
- Duration:** direction continues in effect until it is withdrawn or revoked by the employer or replaced by a new JobKeeper enabling direction but ceases to have effect at the start of 28 September 2020.
- Compliance:** the employee must comply with the direction.



AGREEMENT TO WORK DIFFERENT DAYS AND TIMES

An employer that qualifies for the JobKeeper scheme and is entitled to receive the JobKeeper payment for the employee can request to make an agreement with the employee to perform their duties on different days, or at different times, compared with the employee's ordinary days or times of work. The employee must consider the request and must not unreasonably refuse it. This new provision applies to agreements made after 9 April 2020 in writing. The agreement cannot have the effect of reducing the employee's number of hours of work (to reduce hours see "JobKeeper enabling stand down" above). It must be safe, having regard to (without limitation) the nature and spread of COVID-19 and reasonably within the scope of the employer's business operations for the employee to perform their duties on those different days or at those different times.

AGREEMENT TO TAKE ANNUAL LEAVE

An employer that qualifies for the JobKeeper payment and is entitled to receive the JobKeeper payment for the employee can give the employee a request to take paid annual leave (provided the employee will have a balance of at least two weeks). The employee must consider the request and not unreasonably refuse it. The employer and employee can agree in writing to the employee taking twice as much paid annual leave at half their rate of pay (note similar temporary amendments to modern awards).

DISPUTES

The Fair Work Commission (FWC) will deal with disputes relating to the above by arbitration. Information on how to apply can be found at www.fwc.gov.au/about-us/coronavirus-covid-19-updates-advice/jobkeeper-disputes

This document is intended for general information purposes only and should not be regarded as legal advice. Please contact Employer Assist by Industry Legal Group if you require legal advice.

AAAA Member Benefits

If you require further advice, please contact Employer Assist on 1300 735 306 or email aaaa@employerassist.com.au