

## ‘JOBKEEPER’ CHANGES TO THE FAIR WORK LAWS OVERVIEW AND FAQ’S

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The Government has now passed legislation that gives effect to its “JobKeeper” wage subsidy package announced a few weeks ago. The package of legislation makes changes to a series of existing laws, including significant changes to the *Fair Work Act 2009*.

Employers should always be conscious of their particular circumstances, legal obligations applicable under the *Fair Work Act 2009*, respective State and Territory WHS legislation and workers compensation legislation, as well as enterprise agreements, awards, contracts and policies and should seek further advice where necessary. Please contact your local State or Territory Master Builders office for more information.

### THE JOBKEEPER SCHEME: GENERAL + PAYMENTS + ELIGIBILITY

#### ***What is JobKeeper scheme?***

The JobKeeper Payment scheme is a wage subsidy to assist businesses that are significantly impacted by COVID-19. The purpose of the scheme is to assist businesses to pay and retain their staff.

Under JobKeeper, eligible businesses that have suffered significantly reduced turnover will be paid \$1500 per fortnight (before tax), per qualifying employee, for up to six months.

The payments will commence from 1 May 2020 and will be backdated to 30 March 2020.

Eligible employers seeking to obtain the payments must enrol in the scheme, and will be able to do so from **20 April 2020**. Enrolment will be through the ATO website.

#### ***When will I receive the first payment?***

The first payments by the ATO will be received by employers from the first week of May.

#### ***How often will these payments be made?***

The payments will be made by the ATO monthly in arrears.

#### ***Which businesses are eligible?***

Employers must meet these conditions to be eligible for the JobKeeper Payment scheme:

- For businesses with annual aggregated turnover less than \$1 billion, the turnover of the business has reduced (or will reduce) by more than 30% (of at least one month).
- For businesses with annual aggregated turnover greater than \$1 billion, the turnover of the business has reduced (or will reduce) by more than 50% (of at least one month).
- For not-for-profits and charitable organisations registered with the Australian Charities and Not-for-profits Commission (ACNC), other than certain educational charities, the annual turnover of the organisation has reduced (or will reduce) by more than 15% (of at least one month).
- All eligible employees must be notified that the business intends to participate in the JobKeeper scheme.
- Employees must ask eligible employees if they agree to be nominated by the employer as the primary employer of the employee (as employees can only attract the payment for one eligible job). Information must be provided to the eligible employees and the ATO through the [approved form](#) (which may be updated from time to time and will be available from the ATO website).

Turnover for the purposes of a business' eligibility is the entity's projected GST turnover for a test period, and this is compared to the entity's GST turnover for a relevant comparison period.

***Do employers have any reporting obligations whilst receiving JobKeeper Payments?***

The ATO requires employers receiving the JobKeeper payment to report monthly to the ATO Commissioner to show payments have been made to employees and to provide information on employer turnover and other matters relevant to the entitlement and the operation of the JobKeeper Payment.

This reporting will be integrated with existing reporting processes such as Single Touch payroll, where this is possible.

In serious cases, payments may be withheld until information provided can be verified.

***Do Employers have any record keeping obligations whilst receiving JobKeeper Payments?***

Employers receiving JobKeeper are required to retain records to allow any information provided to the Tax Commissioner to be verified for five years after it is provided in relation to a payment.

***Can penalties be applied for abuse of the JobKeeper Program?***

The JobKeeper Legislation includes an anti-avoidance regime which entitles the ATO Commissioner to make a subjective determination where he is satisfied of the existence of a scheme.

A scheme will arise if any entity, in effect, enters into an arrangement under which it receives a JobKeeper payment (or a larger JobKeeper payment) which, but for the arrangement, it would not receive.

More generally employers who do not comply with the obligations tied to the JobKeeper payment can be liable for a wide range of significant sanctions.

The below table sets out some of the offences and penalties linked to the misuse of the JobKeeper program.

| <b>Offence</b>   | <b>Penalty</b>   |
|--|--|
| Administrative penalties for making a false and misleading statement             | <ul style="list-style-type: none"> <li>▪ Financial penalty up to 75 per cent of the amount of any overpayment</li> </ul>   |
| Criminal offences for making false or misleading statements to taxation officers | <ul style="list-style-type: none"> <li>▪ Imprisonment for up to 12 months AND</li> <li>▪ A fine of up to 50 penalty units for individual and 250 penalty units for corporate entities.</li> </ul>  |
| Failure to comply with the requirements under taxation law                       | <ul style="list-style-type: none"> <li>▪ Imprisonment for up to 12 months AND</li> <li>▪ A fine of up to 50 penalty units of an individual and 250 penalty units for corporate entities</li> </ul> |
| Obtaining financial advantage  | <ul style="list-style-type: none"> <li>▪ Imprisonment for up to 12 months</li> </ul>   |
| Obtaining financial advantage by deception                                       | <ul style="list-style-type: none"> <li>▪ Imprisonment for up to 10 years</li> </ul>  |
| Conspiracy to defraud  | <ul style="list-style-type: none"> <li>▪ Imprisonment for up to 10 years.</li> </ul>   |

***What are the tax consequences of JobKeeper?***

All JobKeeper payments are assessable income of the business that is eligible to receive the payments. The normal rules for deductibility apply in respect of the amounts your business pays to its employees where those amounts are subsidised by the JobKeeper payment.

JobKeeper payments are not subject to GST.

### ***How is 'turnover' defined?***

Turnover is calculated as it is for GST purposes and is reported on Business Activity Statements (BAS). It includes all taxable supplies and all GST free supplies but not input taxed supplies. Only Australian based sales are included and therefore, only Australian based turnover is relevant for this test. A decline in overseas operations will not be counted in the turnover test.

Projected GST turnover and current GST turnover are defined in the GST Act but have been modified for JobKeeper purposes. The amounts included in calculating projected GST turnover and current GST turnover are the same regardless of whether the business is currently GST registered.

There are four main modifications to the GST turnover calculation:

- Projected GST turnover and current GST turnover calculated for the relevant months or quarter are being tested (rather than for 12 months).
- Where an entity is a party of a GST group, the entity calculates its GST turnover as if it wasn't part of the group. This means that supplies made by one group member to another will be included in the GST turnover for the purposes of the fall in turnover test.
- The calculation includes the receipt of tax deductible donations by a deductible gift recipient. It also includes gifts of money, property (with a market value of more than \$5,000) and listed Australian shares received by an ACNC-registered charity (that is not a deductible gift recipient). However, none of these receipts are included if they are from an associate.
- External Territories (e.g. Norfolk Island) are treated as if they are formed part of the indirect tax zone (i.e. Australia).

### ***Exclusions***

Projected GST turnover and current GST turnover excludes the following:

- GST included in sales to customers (if any)
- Sales that are input taxed sales (e.g. bank interest, sale of shares)
- Sales not connected with an enterprise that the business carries on (e.g. sale of private car)
- Sales that are not made for payment (unless a taxable supply to an associate)
- Payments for no supply (e.g. JobKeeper payments)
- Gifts and donations (except for deductible gift recipients and ACNC-registered charities)
- Sales not connected with Australia, for example sales of goods purchased and sold from a place outside Australia.

### ***Cash or accrual basis***

Businesses may use an accruals basis of accounting to calculate both the current GST turnover and projected GST turnover. However, if the business usually prepares its activity statements on a cash basis, the ATO will allow it to calculate both the current and projected GST turnovers on a cash basis. The basis used must be the same for calculating both the current and the projected GST turnover.

### ***How do I establish a reduction in turnover?***

Most businesses are expected to be able to establish that their turnover has fallen in the relevant month or three months (depending on the natural activity statement reporting period of that business) relative to their turnover a year earlier in 2019. However where a business's turnover a year earlier is not representative of their usual or average turnover, (e.g. because there was a large interim acquisition or their turnover is typically highly variable) the Tax Commissioner will have discretion to consider additional information that the business can provide to establish that they have been significantly affected by the impacts of COVID-19.

The Tax Commissioner will also have discretion to set out alternative tests that would establish eligibility in specific circumstances (e.g. eligibility may be established as soon as a business has ceased or significantly curtailed its operations). There will also be some tolerance where employers, in good faith, estimate a greater than 30 % (or 50%) fall in turnover but actually experience a slightly smaller fall.

### **Example – Turnover test period**

Sally runs a home-maintenance business which employs two full-time staff. She applies for the JobKeeper scheme during the first fortnight the scheme starts operating (fortnight ending 12 April 2020).

The turnover test period for Sally can be:

- The month of March 2020 or April 2020, or
- The quarter from 1 April 2020 to 30 June 2020. The comparison period is the corresponding period in 2019.

### ***How should I estimate projected GST turnover?***

A business needs to identify the sales that it made, or is likely to make, during the turnover test period.

Given that eligibility can be tested part way through a period, the business will need to consider what it expects to happen for the remainder of the period. Relevant considerations include (but are not limited to):

- The period during which the business is not expected to trade because it has been closed due to COVID-19, or its ability to trade has been restricted.
- Recent patterns in trading that are expected to continue.
- Revised business plans or forward-looking workbooks.

The reasons for a fall or expected fall in turnover are not limited only to the direct impacts of COVID-19.

### ***What if I intend to make substantial changes to the structure or operations of my business? Does this impact how I should estimate projected GST turnover?***

A business may intend on making substantial changes to their structure and operations, as part of responding to COVID-19. However, note that projected GST turnover excludes:

- Supplies that are made by transfer of capital assets.
- Supplies that are made as a consequence of substantially and permanently reducing in size or scale of the enterprise.

A 10% reduction is generally accepted as a 'substantial reduction' in size and scale (or less depending on the particular circumstances of the enterprise).

A reduction will be permanent if it is enduring but not if it is reasonable to expect the reduction will end, for example, in one or two years.

This means that, for example, where an entity closes 1 out of its 10 stores in its business, the income from selling the store or the assets used in the store would be excluded when calculating projected GST turnover.

### ***My Business has only just started, or has an inconsistent income. How can I self-assess that my turnover has fallen?***

To establish that a business has faced or is likely to face a downturn in turnover that would make them eligible, businesses are expected to establish that their turnover has fallen in the relevant month or quarter (depending on the Business Activity Statement reporting period) relative to their turnover in a corresponding period a year earlier.

The ATO has established different tests for some businesses who cannot meet the standard test. These tests impact businesses who:

- Were not in operation a year earlier, or
- Believe their turnover a year earlier was not representative of their usual or average turnover because:

- Of a large interim acquisition;
- They were newly established;
- They were scaling up; or
- Their turnover is typically highly variable.

If your business does not meet the standard test, but fits, or may fit into one of these categories, you could still be eligible for JobKeeper. You should speak with a professional who can give advice on making an application to the ATO for payment.

You should also note that the Tax Commissioner has discretion to consider additional information that the business can provide to establish that they have been adversely affected by the impacts of the Coronavirus.

The Tax Commissioner also has discretion to set out alternative tests that would establish eligibility in specific circumstances (for example, eligibility may be established as soon as a business ceases or significantly curtails its operations).

The ATO has also stated that 'there will be some tolerance where employers, in good faith, estimate a 30 per cent or more or 50 per cent or more fall in turnover but actually experience a slightly smaller fall'.

***My turnover has not decreased by 30 per cent this month, but my forecasts tell me it will in the next month. Am I eligible?***

You can apply for the payment if you reasonably expect that your GST turnover will fall by 30 per cent or more (or 50 per cent or more for businesses with an aggregated turnover of \$1 billion or more) relative to your GST turnover in a corresponding period a year earlier. This period does not need to be the first JobKeeper period – you can become eligible any time during the operation of the Scheme.

You should note that you do not need to establish eligibility more than once.

The ATO has guidance about self-assessment of actual and anticipated falls in turnover.

***It is unlikely that my turnover will decrease by 30 per cent in the coming month, but can I apply later if my turnover decreases in a subsequent month?***

If a business does not meet the turnover test as at 30 March 2020, the business can start receiving the JobKeeper Payment at a later time once the turnover test has been met. Payments are not backdated to the commencement of the scheme. Businesses can receive the JobKeeper Payments up to 27 September 2020.

***Which employees are qualified?***

JobKeeper payments will be available for all employees that are employed by an eligible employer and who were employed on 1 March 2020. This includes full-time, part-time and long-standing casual employees.

To be qualified, employees must meet the following criteria:

- Employees must currently be employed by an eligible employer.
  - Note that this includes employees who have been stood-down, or employees who were terminated but have been re-hired by the employer).
- Employees must have been employed by the employer on 1 March 2020.
- Employees must be employed full-time, part-time or as a 'long-term' casual (being a casual employee that had been employed on a regular and systematic basis for longer than 12 months as at 1 March 2020).
- Employees must be at least 16 years old.
- Employees must be an Australian citizen or permanent resident, or hold other specified classes of visa; and
- An employee can only have one employer receive JobKeeper Payments with respect to them (i.e. multiple employers cannot receive JobKeeper payments in respect of one individual, even if the individual is employed by multiple employers).

Employees are not qualified for JobKeeper payments:

- for periods in which they are in receipt of parental leave pay under the *Paid Parental Leave Act 2010* (Cth).
  - Note that employees may receive JobKeeper payments if they are in receipt of paid parental leave from their employer pursuant to an enterprise agreement, contract of employment or similar instrument.
- for periods in which they are totally incapacitated for work and an amount is payable to them under workers' compensation laws.

***I work in my own business – can I claim for myself?***

Businesses in the form of a company, trust or partnership can also qualify for JobKeeper payments where a business owner (a shareholder, adult beneficiary or partner) is actively engaged in the business, or a director is actively engaged in the business.

This is limited to one entitlement for each entity even if there are multiple business owners or participants. It is understood that the ATO will provide further information soon about eligibility of these businesses for the JobKeeper payment.

***Is there an employee 'income cap' or similar?***

There is no income cap on eligibility for employees. Therefore, an eligible employer may receive the subsidy in respect of any eligible employees including its highest paid employees.

***Are apprentices and trainees covered?***

Yes. But only if they meet all of the relevant employee eligibility requirements.

***Are employers eligible to receive both the JobKeeper Payment and the Supporting Apprentices and Trainees wage subsidy?***

No. The JobKeeper Payment is considered 'equivalent' for the purposes of Supporting Apprentices and Trainees wage subsidy, as it is designed to help businesses cover the costs of their employees' wages. Therefore, an employer will not be allowed to claim both payments simultaneously. For any period where the employer elects to claim the JobKeeper Payment they will not be able to claim the Supporting Apprentices and Trainees wage subsidy.

***Can eligible employers claim Supporting Apprentices and Trainees for any period before claiming the JobKeeper Payment?***

Yes. Where an eligible employer claims the JobKeeper Payment, if they also meet the criteria for Supporting Apprentices and Trainees, they will be eligible to claim Supporting Apprentices and Trainees for wages paid up to the date they are eligible for the JobKeeper Payment.

***Where an employer is not eligible for the JobKeeper payments, can they still be assessed as eligible for Supporting Apprentices and Trainees subsidy?***

Yes. Employers should contact their Australian Apprenticeship Support Network Provider for assistance.

***How do employers receive the JobKeeper Payment?***

In order to receive the JobKeeper payment employers must do the following:

- Employers must elect to participate in the scheme.
- Employers can register their interest online now at the ATO website.
- Employers will subsequently need to apply for the JobKeeper Payment through an online application (this is not yet available).
  - In applying for JobKeeper employers will need to provide information to the ATO on the number of eligible employees engaged as at 1 March 2020 and those currently employed by the business (including those stood down or rehired). For most businesses the ATO will use Single Touch Payroll data to pre-populate the employee details for the business.
- The ATO will need to assess whether an employer has experienced the required turnover decline (employers will need to provide supporting information demonstrating the necessary downturn in their business).

- Once approved, ensure that each eligible employee receives at least \$1,500 per fortnight (before tax).
- Notify all eligible employees that you have nominated them as an eligible employee for the purposes of JobKeeper Payments.
- Provide monthly updates to the ATO on the number of eligible employees employed by the business.

***What must be paid to employees who qualify for JobKeeper?***

JobKeeper qualifying employers are required to *meet minimum payment obligations* for those employees who are subject to a *JobKeeper direction or request*. These include ensuring that at least the value of JobKeeper payments an employer receives is passed on to employees each fortnight, or the amount they would receive for the work they have performed, whichever is greater. You still need to withhold tax in the usual way.

You should note that the \$1,500 per fortnight per employee is a before tax amount. Where an employee is paid more than \$1,500 per fortnight, the employer's superannuation obligations will not change. Where an employee is having their wages topped up to \$1,500 per fortnight by the JobKeeper Payment, it will be up to the employer if they want to pay superannuation on any additional wages paid by the JobKeeper Payment.

***What if I usually pay my employees less than \$1,500 per fortnight before tax?***

To be able to claim the JobKeeper Payment for an eligible employee, that employee must be paid a minimum of \$1,500 income per fortnight, before tax is withheld. The employer will be reimbursed \$1,500 per fortnight for each eligible employee.

If you want to claim the subsidy for an eligible employee and they have not been paid \$1,500 per fortnight since 30 March 2020, employers must pay a 'top-up' payment to employees so that they are eligible.

No business can pay their employees less than \$1,500 per fortnight and be entitled to a payment for that employee.

***When do I need to pay my employee's for whom I receive JobKeeper?***

Employers should pay their employees for each JobKeeper fortnight they plan to claim for. The first fortnight is from 30 March – 12 April and each JobKeeper fortnight follows after that.

If an employer's ordinary arrangement is to pay its employees less frequently than fortnightly, the payment can be allocated between fortnights in a reasonable manner. For example, if an employer's ordinary arrangement is to pay an employee every four weeks, it will be reasonable if the employee is paid at least \$3,000 for every four-week period.

*Payment for the first two fortnights (30 March 2020 – 12 April 2020)*

If an employer seeks the JobKeeper payment for the first two fortnight periods, they will need to make sure that each eligible employee has at least received \$1,500 in pay during this period (even if they have been on stand down during this period).

If an employee has not yet received this amount they will need to be paid any remaining difference by the end of April. Any additional payment requirement to meet the \$1,500 per fortnight required can either be made as two separate payments (for each payment fortnight) or a combined payment before the end of April (for the two payment fortnights).

*What happens if an employee has been paid annual leave during some or all of the two payment fortnights (30 March 2020 – 12 April 2020)?*

Annual leave is treated the same as normal pay. An employer will need to ensure the amount paid to the employee including any annual leave payments meet the required \$1,500 per fortnight. If the employee has not been paid the minimum \$1,500 the employer will need to ensure they are paid any outstanding amount before the end of April.

*Payment for fortnights commencing from 13 April 2020*

Employers must pay the minimum \$1,500 before tax to each eligible employee per fortnight to claim the JobKeeper payment for that fortnight.

***Can I require a part-time worker who usually earns less than \$1,500 per fortnight to do additional hours (for example up to the equivalent amount of hours that would see them earn \$1,500 in a fortnight)?***

An employer cannot require or force any such employee to do additional hours because they are receiving an increase to their income as a result of the JobKeeper payment. Employers and employees can of course agree to vary their arrangements by consent however.

**Example – Employer with different types of employees on different wages.**

Sarah owns a residential construction company which largely carries out maintenance and repair works to domestic houses. She employs four people. The business is still operating at this stage but Sarah expects that turnover will decline by significantly more than 30 per cent in the coming months (if it hasn't already). The employees are:

- Steve, who is a permanent full-time employee on a salary of \$2,500 per fortnight before tax who has been working for Sarah for 2 years and who continues working for the business;
- Tasha, who is a permanent part-time employee on a salary of \$1,000 per fortnight before tax who has been working for Sarah for 1 year and who continues working for the business;
- Melanie, who is a permanent part-time employee on a salary of \$1,000 per fortnight before tax who has been working for Sarah since 7 March 2020 and who continues working for the business; and
- Alex, who is a casual employee paid on average \$600 per fortnight before tax who has been working for Sarah since 1 October 2019 and who continues working for the business.

Sarah is eligible to receive the JobKeeper Payment for the following employees:

- Steve, who was in an employment relationship with Sarah on 1 March 2020, is currently still engaged as an employee and works full-time.
- Tasha, who was in an employment relationship with Sarah on 1 March 2020, is currently still engaged as an employee and works part-time.

Sarah is not eligible to receive the JobKeeper Payment for the following employees:

- Melanie, as she wasn't in an employment relationship with Sarah as at 1 March 2020, given that she was employed on 7 March 2020.
- Alex, as she is a casual employee who had not been engaged on a regular basis for longer than 12 months as at 1 March 2020.

The JobKeeper Payment would mean the following for Sarah's two eligible staff's wages:

- Sarah continues to pay Steve his full-time salary of \$2,500 per fortnight before tax but receives \$1,500 per fortnight from the JobKeeper Payment to subsidise the cost of Steve's salary, meaning he only needs to pay the remaining \$1,000 per fortnight before tax towards Steve's wages with the rest covered by the JobKeeper Payment. Sarah will need to continue paying the superannuation guarantee on Steve's \$2,500 income; and
- Sarah will receive \$1,500 per fortnight before tax from the JobKeeper Payment to subsidise Tasha's salary. As this is more than Tasha's current \$1,000 per fortnight salary Tasha will see an increase of \$500 per fortnight before tax being paid whilst Sarah is receiving the JobKeeper Payment. Sarah must continue to pay the superannuation guarantee on the \$1,000 per fortnight of wages that Tasha is earning. Sarah has the option of choosing to pay superannuation on the additional \$500 (before tax) paid to Tasha under the JobKeeper Payment.

Sarah is required to advise her employees that she has nominated them as eligible employees to receive the JobKeeper Payment.

Sarah will be required to register and apply for the JobKeeper payment and to provide information to the ATO on a monthly basis. She will receive the payment monthly in arrears.



***My business employs staff through a ‘special purpose employment vehicle’ or the like. This vehicle hasn’t suffered a downturn in turnover, but the entity that does the work, has – can I claim JobKeeper?***

The first iteration of the JobKeeper Rules doesn’t account for this scenario – but the Government has recently made changes to the JobKeeper Rules to fix this.

The changes to the Rules were established under a new instrument – the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No.2) 2020*, which works in conjunction with the original Rules.

This Amendment establishes a new turnover test for labour hire companies and entities with a special purpose employment vehicle, and focusses on whether the entity suffered a downturn in supply of labour, rather than turnover.

If your business is structured in this way, you should consult an appropriately qualified professional to discuss determination of your eligibility to claim JobKeeper.

***How does the JobKeeper Payment affect an employee who is salary sacrificing wages?***

Salary sacrificing arrangements can continue as is. The JobKeeper Payment may be paid to an employee in cash or as a fringe benefit or an extra superannuation contribution where the employee and employer agree.

***What are the eligible periods for reimbursement?***

Employers will need to satisfy payment requirements in respect of each 14-day period covered by the scheme. The first period starts on Monday, 30 March 2020 and ends on Sunday, 12 April 2020.

Employers must pay their eligible employees a minimum of \$1,500 per fortnight in the scheme payment periods.

***What if I pay my employees monthly?***

Where an employer pays their staff monthly, the ATO will be able to reallocate payments between periods. However, overall an employee must have received the equivalent \$1,500 per fortnight.

***How long will the JobKeeper Payments last?***

For up to six months, running from 30 March 2020 to 27 September 2020. The final period will start on Monday 14 September and end on Sunday 27 September 2020.

***Are employers who have already stood down employees without pay eligible for the JobKeeper Payment?***

Yes, employers who have stood down their employees (in part or full) are still eligible for the JobKeeper Payment. Employees who have been stood down must be paid at a minimum the \$1,500 JobKeeper Payment per fortnight, before tax for the payment periods of the JobKeeper Scheme. It will be up to the employer in this circumstance to decide if they want to pay superannuation on the JobKeeper Payment to their employees.

***What if an employee who was stood down after 1 March 2020 has since applied for income support (JobSeeker)?***

Employers who nominate for JobKeeper must advise their eligible employees. A person receiving the JobKeeper Payment cannot also receive the JobSeeker Payment. Employees who have already applied for JobSeeker can notify Services Australia (formerly Centrelink) to withdraw and shift to the JobKeeper Payment if their employer notifies them that they have nominated for JobKeeper.

***What if my employee who was stood down after 1 March 2020 has since got another job?***

Employees can only receive the JobKeeper payment once.

If an employee was stood down (after 1 March 2020) and has subsequently obtained alternative employment (and have not resigned from their employer who stood them down), they are still eligible for the JobKeeper payment with their employer who has stood them down. This means their employer can apply and can pay them \$1,500 per fortnight before tax.

The employees' new employer will not be eligible for the JobKeeper Payment for them as they have been employed after 1 March 2020 and are therefore not an eligible employee with that employer. If the employer who stood the employee down registers and applies for the JobKeeper Payment they should notify that employee.

***Can I direct my employee to now do work, if they had previously been stood down (under the conventional section of the Fair Work laws) but are now eligible to receive JobKeeper?***

Not while they are still stood down under section 524 of the Fair Work Act. A stand down by its very definition means that an employer's employees cannot be "usefully employed" by the employer because of a stoppage of work for which the employer cannot reasonably be held responsible.

However, if circumstances change and an employer decides that they can now "usefully employ" an employee, an employer can take an employee off stand down. An employer may then seek to utilise the new JobKeeper enabling stand down provisions, which allow more flexibility in terms of a reduction of hours (including a complete reduction to nil). The notice and consultation requirements under these new provisions should be followed.

In these circumstances, employers need to be mindful of and weigh up the risk of a potential claim that the initial stand down was unlawful (e.g. that the employee could have in fact been "usefully employed") as they could be ordered to back pay their employees.

***What happens to any JobKeeper payments if an employee resigns?***

An employee must be currently employed by the eligible employer in order to receive the JobKeeper Payment.

If an employee for whom an employer is receiving the JobKeeper Payment resigns, the employer is no longer entitled to receive the Payment for that employee from the date their resignation takes effect.

The employer must notify the ATO, as they may need to repay some money if the resignation takes effect in the middle of a payment fortnight.

The JobKeeper program does not affect an employer's right to terminate a contract of employment with notice or for cause. Further, the laws relating to unfair dismissal and general protections under the Fair Work Act continue to operate.

Employers should update the ATO where the employment of an eligible employee ends and specify the exact date when the employment relationship will end.

***Can I receive the JobKeeper payment for employees in receipt of WorkCover?***

Employees will not be eligible for the JobKeeper Payment if they are fully incapacitated, unable to work and being supported by a workers compensation scheme.

In other cases, employees would be eligible as they are in an employment relationship with their employer, provided their employer has an obligation to pay some component of their salary or wages.

If your employee is fully compensated under your WorkCover insurance, they will be ineligible for the JobKeeper Payment.

## THE JOBKEEPER SCHEME: FAIR WORK ACT

### ***What flexibilities are provided under the JobKeeper changes?***

The changes made to the FW Act give employers temporary powers to implement flexibility measures in order to save jobs.

These powers allow employers to:

- issue *JobKeeper enabling directions*, including directions requiring to employees to:
  - work reduced hours or days (a *JobKeeper enabling stand down direction*);
  - undertake alternate duties; or
  - work at an alternate location;
- make *JobKeeper requests*, including requests that:
  - employees work on different days or alternate hours of work;
  - employees take accrued annual leave; and
- make *JobKeeper agreements* with employees for annual leave to be taken at half pay.

### ***What is a JobKeeper enabling request?***

Employers can request employees to work reduced days or alternate hours of work, and request that employees take accrued annual leave (provided that their leave balance does not reduce to below 2 weeks).

If an employer makes such a request of an employee, the employee must not unreasonably refuse the request.

### ***What is a JobKeeper enabling stand down direction?***

A *JobKeeper enabling stand down direction* allows an employer to direct an employee to:

- not work on a day or days on which the employee would usually work; or
- work for a lesser period than the period which the employee would ordinarily work on a particular day or days; or
- work a reduced number of hours (compared with the employee's ordinary hours of work), including reducing hours to nil.

During a *JobKeeper enabling stand down*, the employer must:

- pay the employee each fortnight at least the greater of:
  - the \$1500 JobKeeper payment; or
  - the amounts payable to the employee in relation to the performance of work during the fortnight (including all wages, allowances, loadings, penalties, etc.); and
- not reduce the employee's ordinary hourly rate of pay for each hour of work performed.

However, a *JobKeeper enabling stand down direction* can only be given, among other restrictions, if the employee cannot be usefully employed for their normal days or hours of work because of changes to business attributable to:

- the COVID 19 pandemic; or
- Government initiatives to slow the transmission of COVID 19.

When a *JobKeeper enabling stand down direction* is given to an employee, the employer must not unreasonably refuse a request by that employee:

- to engage in reasonable secondary employment; or
- for additional training or professional development.

### ***How does an employer know if an employee cannot be "usefully employed"?***

This situation arises when an employee has no useful work available to perform because of the COVID-19 pandemic or because of the Public Health Orders and Directions (however described in each State and Territory) imposing restrictions on individuals and businesses.

Useful work does not have to be the work that the employee ordinarily performs but needs to be genuine productive work that provides a "net benefit" to the employer. Employers should be able to demonstrate that the impacts of the virus or the Government's measures to deal with it have caused the fact that there is no useful work available for the period the employee is stood down.

### **What are the other types of JobKeeper enabling directions?**

Two other types of *JobKeeper enabling directions* are available to employers, being a direction to

- undertake alternate duties; or
- work at an alternate location.

For all three *JobKeeper Enabling Directions*, an employer must follow the appropriate procedural steps (set out in the question out below). **Annexure B** also contains an employer checklist for giving direction under the new provisions.

### **When can an employer alter an employee on JobKeeper's location of work?**

An employer can direct an employee who qualifies for JobKeeper and is entitled to payments to perform their duties at a place different to their normal workplace including the employee's home provided that:

- The place is suitable for the employee's duties
- The performance of the duties at that place is generally safe and specifically safe having regard to the nature and spread of COVID-19.
- The performance of the duties at that place is reasonably within the scope of the employer's business operations.

AND the employer has information before them that leads them to reasonably believe that this JobKeeper direction with respect to location of work is necessary to maintain the employment of the employee.

(Note: "Necessary" should not be considered as merely desirable or preferred, but actually "necessary" or "but for" directing the employee to a different work location, the employee would be made redundant.)

### **When will changing an employee's duties be considered "necessary" to maintain the employment of the employee?**

The employee needs to have actual factual information before them that leads them to reasonably believe that it is necessary.

#### **EXAMPLE: Direction to change usual duties**

Judy runs a Melbourne warehouse business. Judy's business is affected by COVID-19 and qualifies for the JobKeeper Program. Judy employs Richard as a full-time leading hand.

Given the downturn Judy no longer needs Richard to perform his leading hand duties. Instead, Judy directs Richard to carry out forklift driving duties temporarily. Judy is able to make this direction because:

- Richard has experience driving forklifts and holds the appropriate licenses.
- The driving duties are safe and can be performed with appropriate social distancing measures in place.
- The driving duties are within the scope of the warehouse's business.

Under this change, Richard is doing duties of a lower classification, with a lower base rate of pay under the applicable award. As a result, Richard's rate of pay does not change - the base rate of pay that applied to his previous duties to continue to apply.

Richard's other employment conditions have also not changed (such as hours and days of work).

### **What are the rules employers must follow when issuing JobKeeper enabling directions to employees?**

A *JobKeeper enabling direction* given to an employee to stand down, undertake alternate duties or work at an alternate location, will be of no effect if either:

- if the direction is unreasonable in all of the circumstances; or
- the consultation obligation has not been complied with.

The consultation obligation for *JobKeeper enabling directions* requires an employer:

- to give an employee at least 3 days' written notice of its intention to issue the direction; and
- to consult with the employee (or their representative) prior to giving the direction.

A *JobKeeper enabling direction* given to an employee to undertake alternate duties or work at an alternate location, will also be of no effect unless the employer has information before them that leads them to reasonably believe that the direction is necessary to continue the employment of one or more employees of the employer.

All *JobKeeper enabling directions* will cease to have effect at 12.00 am on 28 September 2020, unless removed prior to that time.

***Do JobKeeper directions need to be in writing?***

A *JobKeeper direction* must be given to an employee in writing (this could include by electronic means) and in a form set out in the regulations (note this is not yet published).

***Does an employee have to follow a JobKeeper direction given by an employer?***

Yes, employees must comply with a *JobKeeper* employer direction unless the direction is unreasonable in all the circumstances (this could for example, depend on its impact on an employee's caring responsibilities). Where a direction is unreasonable it does not apply to an employee.

***Can an employer give a JobKeeper direction which has the effect of making an employee redundant?***

No, a *JobKeeper* direction cannot amount to redundancy.

***What happens if there is a dispute or disagreement?***

Employers, employees and their representatives may raise disputes with the Fair Work Commission (FWC) about *JobKeeper* requests and directions.

The FWC may deal with disputes in whatever way it sees fit, including by arbitration (meaning that it can make decisions that are binding on the parties).

In dealing with a dispute, the FWC must take into account fairness between the parties concerned.

***What protections exist to stop workplaces exploiting or abusing JobKeeper enabling directions?***

An employer will be subject to stiff fines (up to \$63000 per contravention for companies and up to \$12600 per contravention for an individual) if it tries to give a *JobKeeper enabling direction* that the legislation does not allow and the employer knew that this was the case.

## JOBKEEPER AND PAYMENTS TO EMPLOYEES

### ***What conditions must be satisfied regarding JobKeeper payments to employees?***

There are three things to satisfy

- The “*wage condition*” *guarantee*: which requires all employees to be paid at a minimum \$1,500 per fortnight before tax.
- The *minimum payment guarantee*: An employer must ensure that the amount payable to a particular employee each fortnight is the greater of:
  - The \$1,500 JobKeeper amount; or
  - The total amount owed to the employee for the performance of work during the fortnight (in full).
  - Note: The “total amount” includes any of the following that may have become payable during the fortnight:
    - Incentive-based payments and bonuses.
    - Loadings.
    - Monetary allowances.
    - Overtime or penalty rates.
    - Leave payments.
- The *hourly rate of pay guarantee*: this requires that any reduction to the hours/days of an employee cannot reduce an employee’s “hourly base rate of pay” (the hourly rate the employee earned before the reduction in hours/days). An employee must still be paid their “hourly base rate” for any work they perform during the fortnight. An employee’s “hourly base rate” does not include any additional allowances, loadings or penalties added.

#### **EXAMPLE: Employee stood down for 20 hours, JobKeeper payment is less than normal pay.**

Boris runs a painting business. He has qualified for JobKeeper and has been receiving payments of \$1,500 for his employee Dominic, who usually works full-time, 38 hours a week (76 hours a fortnight).

Due to the Government restrictions, work is slower than usual on new residential builds and Boris has a lot less work on. As a result there are now only 18 hours of work for Dominic to perform per week (36 hours per fortnight), Boris cannot usefully employ Dominic for the remaining 20 hours a week (40 hours per fortnight).

Boris therefore decides to use the new JobKeeper stand down provisions to direct Dominic to stand down for the 20 hours per week he cannot be usefully employed. Dominic continues to work 18 hours a week.

Dominic is usually paid \$2,508 (before tax) a fortnight, for 76 hours of work (equating to \$33 per hour). As his hours have been reduced to 36 hours, Boris would normally pay Dominic \$1,118 (before tax) for the fortnight. This amount however is below the \$1,500 JobKeeper amount. So, Boris instead must pay Dominic the full \$1,500 (before tax) for the 36 hours he works a fortnight but doesn’t have to pay any more than that.

Boris is only required to pay superannuation on what he would normally pay Dominic for 36 hours (the \$1,188 (before tax)).

### ***What rate do I pay if an employee is working different duties?***

For an employee performing new duties their hourly base rate is either:

- The employee’s new hourly rate for the new duties being performed if they attract a higher rate of pay; or
- The employee’s old hourly rate if the new hourly rate for the new duties is lower than the old rate (prior to the direction to change duties)

***What happens to employee entitlements and accruals during JobKeeper?***

Employees subject to a JobKeeper enabling direction will continue to accrue and take service-related entitlements as if the direction had not been issued.

This means that employees will continue to accrue annual and personal leave at their usual rate and will be entitled to service related entitlements such as redundancy pay and payments in lieu of notice as if they were working their usual hours of work.

***Can a stand down direction issued by an employer apply when an employee is on leave (annual, personal etc.)?***

No, a stand down direction does not apply to an employee during a period when the employee is taking paid or unpaid leave.

This means that when an employee is stood down (partial or full) and they subsequently go on leave, their rate of pay will return to what it was prior to the direction to stand down.

***If an employee is stood down as a result of JobKeeper direction from an employer what happens to the accrual of their leave entitlements?***

The employee accrues leave entitlements as if the direction to stand down had not been given.

***Does the period when an employee is stood down count towards continuity of service?***

Yes, it counts for the purpose of continuity of service.

***Will tax and superannuation apply to JobKeeper payments?***

JobKeeper payments to employees are taxable like other payments to employees, and PAYG withholding obligations will apply. The \$1500 payment is before tax.

For payments made to cover an employee's usual wages, superannuation is payable according to the ordinary rules for payments to employees for ordinary time earnings.

For payments (or parts of payments) to employees in excess of an employee's usual wages, superannuation is not required to be paid. This situation may arise where:

- an employees' usual wages are less than \$1500 per fortnight (i.e. superannuation would be payable on the part of the \$1500 payment necessary to cover the employee's wages, but not on any windfall balance); or
- employees have been stood down without pay (i.e. superannuation will not be payable on the \$1500 JobKeeper payment paid to employees as it is not paid as ordinary time earnings for work that has been undertaken).

***Where can I register?***

Eligible businesses can apply for the payment online and are able to register their interest via [www.ato.gov.au](http://www.ato.gov.au).

## OTHER RECENT COVID-19 CHANGES TO MODERN AWARDS

### ***I understand that the Fair Work Commission has also made some COVID-19 changes to Modern Awards – what are they?***

The Fair Work Commission has made temporary changes to almost 100 Modern Awards, creating two new types of leave arrangements as a means to help employers and employees respond to COVID-19 challenges. The new leave arrangements involve an 'Unpaid Pandemic Leave' and a flexible approach to annual leave.

- Unpaid pandemic leave will be 2 weeks unpaid leave if an employee is required, by government or medical authorities or acting on the advice of a medical practitioner, to self-isolate and is consequently prevented from working, or is otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic.
- Annual leave changes mean instead of an employee taking paid annual leave on full pay, the employee and their employer may agree to the employee taking twice as much leave on half pay.

### ***Do the COVID-19 changes apply to all awards? Have construction Awards changed?***

The FWC COVID-19 changes do not apply to all awards and the major Construction Awards have not changed at this time as the Fair Work Commission is making the changes in stages and the changes do not yet apply to every Modern Award.

Instead, Master Builders and other employer groups were encouraged to have discussions with building unions to see if we can agree to some industry specific changes.

### ***Where can I find out which awards have had the COVID-19 changes applied?***

A summary of the FWC decision and [changes can be found here](#) including a list of Awards that have been changed. Specific variations for each Modern Award can be [found here](#).

### ***Do the COVID-19 Modern Award changes apply to my business if I am not eligible for JobKeeper?***

The COVID-19 Modern Award changes will apply to all workplaces if they are covered by the Award (and there are no other arrangements in place, such as an EBA) and the Award has been varied.

Note: An EBA may operate to override or vary Modern Award leave provisions, so the COVID-19 Modern Award changes may be impacted by your EBA. Call your local Master Builders for specific advice.

### ***I am eligible for JobKeeper so the Fair Work Act JobKeeper changes apply to me, and I also use a Modern Award which has been varied to include the COVID-19 Modern Award changes – which one applies?***

The Fair Work Act JobKeeper changes operate to the exclusion of any other applicable instrument or arrangement, so they will always override the Modern Award.

### ***Where can I find further information?***

Please contact your local State or Territory Master Builders office with any questions or for further information.



## ANNEXURE A: JOBKEEPER CALENDAR

*Note: Applications open for the JobKeeper payment on April 20. The last day for an employer to nominate for the Jobkeeper Program if an employer wishes to apply for the first two JobKeeper payment fortnights is April 26*

| Monday                                      | Tuesday         | Wednesday       | Thursday        | Friday          | Saturday        | Sunday                                   |
|---|-----------------|-----------------|-----------------|-----------------|-----------------|--|
| <b>March 30</b><br>Start of<br>Fortnight: 1 | <b>March 31</b> | <b>April 1</b>  | <b>April 2</b>  | <b>April 3</b>  | <b>April 4</b>  | <b>April 5</b>                           |
| <b>April 6</b>                              | <b>April 7</b>  | <b>April 8</b>  | <b>April 9</b>  | <b>April 10</b> | <b>April 11</b> | <b>April 12</b><br>End of<br>Fortnight 1 |
| <b>April 13</b><br>Start of<br>Fortnight: 2 | <b>April 14</b> | <b>April 15</b> | <b>April 16</b> | <b>April 17</b> | <b>April 18</b> | <b>April 19</b>                          |
| <b>April 20</b>                             | <b>April 21</b> | <b>April 22</b> | <b>April 23</b> | <b>April 24</b> | <b>April 25</b> | <b>April 26</b><br>End of<br>Fortnight 2 |
| <b>April 27</b><br>Start of<br>Fortnight: 3 | <b>April 28</b> | <b>April 29</b> | <b>April 30</b> | <b>May 1</b>    | <b>May 2</b>    | <b>May 3</b>                             |
| <b>May 4</b><br>ATO<br>payments<br>commence | <b>May 5</b>    | <b>May 6</b>    | <b>May 7</b>    | <b>May 8</b>    | <b>May 9</b>    | <b>May 10</b><br>End of<br>Fortnight 3   |
| <b>May 11</b><br>Start of<br>Fortnight: 4   | <b>May 12</b>   | <b>May 13</b>   | <b>May 14</b>   | <b>May 15</b>   | <b>May 16</b>   | <b>May 17</b>                            |
| <b>May 18</b>                               | <b>May 19</b>   | <b>May 20</b>   | <b>May 21</b>   | <b>May 22</b>   | <b>May 23</b>   | <b>May 24</b><br>End of<br>Fortnight 4   |
| <b>May 25</b><br>Start of<br>Fortnight: 5   | <b>May 26</b>   | <b>May 27</b>   | <b>May 28</b>   | <b>May 29</b>   | <b>May 30</b>   | <b>May 31</b>                            |
| <b>June 1</b>                               | <b>June 2</b>   | <b>June 3</b>   | <b>June 4</b>   | <b>June 5</b>   | <b>June 6</b>   | <b>June 7</b><br>End of<br>Fortnight 5   |
| <b>June 8</b><br>Start of<br>Fortnight: 6   | <b>June 9</b>   | <b>June 10</b>  | <b>June 11</b>  | <b>June 12</b>  | <b>June 13</b>  | <b>June 14</b>                           |
| <b>June 15</b>                              | <b>June 16</b>  | <b>June 17</b>  | <b>June 18</b>  | <b>June 19</b>  | <b>June 20</b>  | <b>June 21</b><br>End of<br>Fortnight 6  |
| <b>June 22</b><br>Start of<br>Fortnight: 7  | <b>June 23</b>  | <b>June 24</b>  | <b>June 25</b>  | <b>June 26</b>  | <b>June 27</b>  | <b>June 28</b>                           |
| <b>June 29</b>                              | <b>June 30</b>  | <b>July 1</b>   | <b>July 2</b>   | <b>July 3</b>   | <b>July 4</b>   | <b>July 5</b><br>End of<br>Fortnight 7   |

| Monday   | Tuesday             | Wednesday           | Thursday            | Friday              | Saturday            | Sunday  |
|--|---------------------|---------------------|---------------------|---------------------|---------------------|---|
| <b>July 6</b><br>Start of<br>Fortnight: 8        | <b>July 7</b>       | <b>July 8</b>       | <b>July 9</b>       | <b>July 10</b>      | <b>July 11</b>      | <b>July 12</b>                                |
| <b>July 13</b>                                   | <b>July 14</b>      | <b>July 15</b>      | <b>July 16</b>      | <b>July 17</b>      | <b>July 18</b>      | <b>July 19</b><br>End of<br>Fortnight 8       |
| <b>July 20</b><br>Start of<br>Fortnight: 9       | <b>July 21</b>      | <b>July 22</b>      | <b>July 23</b>      | <b>July 24</b>      | <b>July 25</b>      | <b>July 26</b>                                |
| <b>July 27</b>                                   | <b>July 28</b>      | <b>July 29</b>      | <b>July 30</b>      | <b>July 31</b>      | <b>August 1</b>     | <b>August 2</b><br>End of<br>Fortnight 9      |
| <b>August 3</b><br>Start of<br>Fortnight: 10     | <b>August 4</b>     | <b>August 5</b>     | <b>August 6</b>     | <b>August 7</b>     | <b>August 8</b>     | <b>August 9</b>                               |
| <b>August 10</b>                                 | <b>August 11</b>    | <b>August 12</b>    | <b>August 13</b>    | <b>August 14</b>    | <b>August 15</b>    | <b>August 16</b><br>End of<br>Fortnight 10    |
| <b>August 17</b><br>Start of<br>Fortnight: 11    | <b>August 18</b>    | <b>August 19</b>    | <b>August 20</b>    | <b>August 21</b>    | <b>August 22</b>    | <b>August 23</b>                              |
| <b>August 24</b>                                 | <b>August 25</b>    | <b>August 26</b>    | <b>August 27</b>    | <b>August 28</b>    | <b>August 29</b>    | <b>August 30</b><br>End of<br>Fortnight 11    |
| <b>August 31</b><br>Start of<br>Fortnight: 12    | <b>September 1</b>  | <b>September 2</b>  | <b>September 3</b>  | <b>September 4</b>  | <b>September 5</b>  | <b>September 6</b>                            |
| <b>September 7</b>                               | <b>September 8</b>  | <b>September 9</b>  | <b>September 10</b> | <b>September 11</b> | <b>September 12</b> | <b>September 13</b><br>End of<br>Fortnight 12 |
| <b>September 14</b><br>Start of<br>Fortnight: 13 | <b>September 15</b> | <b>September 16</b> | <b>September 17</b> | <b>September 18</b> | <b>September 19</b> | <b>September 20</b>                           |
| <b>September 21</b>                              | <b>September 22</b> | <b>September 23</b> | <b>September 24</b> | <b>September 25</b> | <b>September 26</b> | <b>September 27</b><br>End of<br>Fortnight 13 |

## ANNEXURE B – EMPLOYER JOBKEEPER CHECKLIST

This Checklist is for employers who wish to issue a JobKeeper enabling direction to employees to:

- Work reduced hours or days (a JobKeeper enabling stand down direction) for any period they cannot be usefully employed
- Undertake alternative duties, or
- Work at an alternative location.

### **Preliminary Matters:**

- Establish Eligibility:** Are you eligible as an employer (or business participant) and have you qualified for the JobKeeper scheme? Which of your employees are eligible and entitled to JobKeeper payment/s?
- Check pre-requisites:** Have you met all the pre-requisites which allow you to issue a JobKeeper enabling direction?

### **Before issuing a JobKeeper enabling Direction**

- Give written notice:** Give the employee at least 3 days' written notice before giving the JobKeeper enabling direction (or less if the employee agrees)
- Consult:** Consult with the employee/s (or their representative) about the direction
- Keep records:** Keep a written record of the consultation.
- Check whether the direction is 'reasonable':** Consider whether the direction is reasonable, including taking into account the employee's response during consultation

*Where a direction is unreasonable in all the circumstances, it will not apply to the employee. You need to consider anything relevant, including the personal circumstances of the employee (including for example, the impact on an employee's caring responsibilities)*

- Monitor expiry:** Monitor circumstances to ensure the JobKeeper direction still applies.

*For example, a JobKeeper enabling direction no longer operates when there are no further JobKeeper payments, if it is replaced by a new direction, etc.*

**ANNEXURE C – USEFUL RESOURCES****RESOURCES**

- Australian Tax Office – [JobKeeper Payment](#)
- ATO Form - [JobKeeper Employee Nomination Notice](#)
- FWC Form – [Form F13A – Application for the Commission to deal with a JobKeeper dispute](#)
- Business.gov.au – [JobKeeper](#)
- Payment for employers and employees Treasury – [JobKeeper Payment](#)
- [Coronavirus Economic Response Package \(Payments and Benefits\) Bill 2020](#) (incl. the EM and all amendments sought);
- [Coronavirus Economic Response Package Omnibus \(Measures No. 2\) Bill 2020](#);
- [Appropriation Bill \(No. 5\) 2019-2020](#);
- [Appropriation Bill \(No. 6\) 2019-2020](#).
- [Coronavirus Economic Response Package \(Payments and Benefits\) Rules 2020](#)
- [Coronavirus Payments and Rules 2020 – Explanatory Memorandum](#)
- [Coronavirus Economic Response Package Omnibus Act 2020](#) (passed on 23 March 2020)
- [Modern Award COVID-19 Specific Variations](#)
- [FWC COVID-19 Modern Award Variation Decision and Summary](#)
- [FWC COVID-19 related Modern Award major cases](#)