

EMPLOYERS' GUIDE

JobKeeper Payment & the Fair Work Act



WORKPLACE PARTNERS

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Introduction

There is no doubt that the spread of the Coronavirus (COVID-19) is continuing to escalate across the globe and most recently here in Australia. Our team of Workplace Relations specialist have been busy advising clients and responding to their concerns, with that in mind, we have created this guide for small to medium businesses in Australia.

The latest financial support by the Federal Government to support employers and employees through a \$1,500 per fortnight JobKeeper payment has been established to keep businesses in operation and more people in jobs. The JobKeeper payment will be paid directly to employers to help keep people employed.

This guide has been developed by Workplace Partners to provide information and guidance to employers' in understanding the new JobKeeper Payment and associated changes to the *Fair Work Act 2009*. This information serves as a guide only and is not to be taken as an expression of the law, it is designed to provide basic information to help employers.

By using this guide, you agree that Workplace Partners accepts no responsibility or liability for any damage, loss or expense incurred from you using or relying on this guide.

1. JobKeeper Eligibility

JobKeeper is part of the Australian Federal Government financial stimulus package to assist businesses that are significantly affected by COVID-19. The primary purpose of JobKeeper is to assist businesses to retain their employees.

JobKeeper is a \$1,500 per fortnight payment to businesses to help subsidise the wages of eligible employees.

The JobKeeper payments commence on 1 May 2020 (will be backdated to 30 March 2020) and at this stage cease on 28 September 2020.

JobKeeper eligibility – employers

To be eligible, Employers will need to meet the eligibility criteria below:

- business has a turnover of less than \$1 billion and turnover has fallen by more than 30% (of at least a month); or
- business has a turnover of \$1 billion or more and turnover has fallen by more than 50% (of at least a month); and
- business is not subject to the Major Bank Levy.

Eligible employers include companies, partnerships, trusts, sole traders and not-for-profits.

Registered charities registered with the Australian Charities and Not-for-Profit Commission (ACNC) will be eligible if the estimated turnover has fallen or will likely fall by more than 15% (of at least one month).

Business will need to establish that their turnover has fallen in the relevant month or quarter (depending on the Business Activity Statement reporting period for that business) relative to their turnover in a year earlier.

The business must have been in an employment relationship with eligible employees as at 1 March 2020, and confirm that each eligible employee is currently engaged in order to receive the JobKeeper payments.

JobKeeper eligibility – employees

Eligible employees must meet the following criteria:

- are currently employed by the eligible employer (including those stood down or re-hired);
- were employed by the employer at 1 March 2020 (can be re-employed);
- are full-time, part-time, or long-term casuals (a casual employed on a regular and systemic basis for longer than 12 months as at 1 March 2020);
- are at least 16 years of age;
- are an Australian citizen, the holder of a permanent visa, or a Special Category (Subclass 444) Visa Holder at 1 March 2020;
- are not in receipt of a JobKeeper Payment from another employer.

Employees receiving Parental Leave Pay from Services Australia are not eligible for the JobKeeper Payment.

If your employees receive the JobKeeper Payment, this may affect their eligibility for income support payments and they must report their change in circumstances to Services Australia.

2. Fair Work Act Changes

JobKeeper directions

An employer can only give a JobKeeper direction or make an agreement under the new Fair Work Act JobKeeper provisions if the employer:

- is a national system employer in the Fair Work system
- qualifies for and has registered for the JobKeeper scheme
- is entitled to JobKeeper payments for the employee to whom the direction or agreement applies.

An employer that meets the above criteria is considered a 'qualifying employer' and can engage in using the Fair Work Act JobKeeper provisions for each employee that is entitled to a JobKeeper payment ('eligible employee').

Any directions or agreements under the new provisions can only be applied during periods for which a qualifying employer claims the JobKeeper payment for an eligible employee.

In addition to existing rights available to employers under the Fair Work Act 2009, the new temporary provisions of the Fair Work Act 2009 allow qualifying employers to:

- Issue JobKeeper enabling directions, which require an employee to:
 - work reduced hours or days (JobKeeper enabling stand down direction);
 - undertake alternative duties; or
 - work at an alternative location.
- Make the following request to an eligible employee (the employee cannot unreasonably refuse):
 - request employees to work reduced days or alternate hours of work;
 - request employees to take accrued annual leave.
- Agree with employees for annual leave to be taken at half pay.

Note: Employers should ensure and confirm that they are entitled to JobKeeper payments for their employees before issuing any direction or making an agreement under the new provisions.

JobKeeper stand down (without pay)

Any stand down direction under JobKeeper (referred to as JobKeeper enabling stand down direction) is separate to any rights under s524 of *the Fair Work Act 2009*, enterprise agreement, or employment contract.

The new stand down provisions allow a qualifying employer to direct an eligible employee to:

- not work on a day or days which the employee would usually work
- work fewer hours (including no hours), compared to the employee's ordinary hours of work

- work for a lesser period than what the employee would ordinarily work on a regular day or days,
and not be paid for the period that work is not performed.

Qualifying employers can only give an eligible employee a JobKeeper enabling stand down direction:

- If 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 because of government initiatives to slow the transmission of the coronavirus (for example, because of an enforceable government direction).
- The direction is implemented safely, having regard to the nature and spread of COVID-19.
- The "wage condition" is satisfied (this means that the eligible employee is paid a minimum of \$1,500 per fortnight before tax).
- The "minimum payment guarantee" is met. An employer must ensure that the amount payable to the 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).
- The "hourly rate of pay guarantee" is met (cannot reduce an employee's usual hourly rate). An employee must continue to be paid their usual hourly base rate for any work performed in the fortnight.

***Total amount** includes, Incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, and leave payments, that may have been payable in the fortnight.

Consultation

Employers must:

- **notify the employee and consult with the employee (or their representatives) at least 3 days before issuing the direction (or a lesser period if the employee genuinely agrees)**
- **keep a written record of the consultation.**

When consulting with an eligible employee, an employer needs to make sure that the direction isn't unreasonable, taking into account all of the circumstances, including the employee's caring responsibilities.

Any JobKeeper enabling stand down direction **must be in writing**.

If an employee is taking paid or unpaid leave or is otherwise entitled to be absent from work (e.g. public holiday), the direction doesn't apply.

Leave accruals

Eligible employees who are subject to a JobKeeper enabling stand down direction will continue to accrue their usual leave entitlements for the period the direction applies (as if the direction hadn't been given to them).

Secondary employment / training / professional development

Eligible employees who are subject to a JobKeeper enabling stand down direction can request to take on secondary employment, training, or professional development.

Qualifying employers must consider these requests and must not unreasonably refuse them.

Direction to perform alternate duties

Qualifying employers can direct an eligible employee to perform any duties that are within the employee's skill and competency provided that:

- the duties to be undertaken are safe (including having regard to the nature and spread of COVID-19).
- the employee has any required licenses or qualifications to perform the duties.
- the duties are reasonably within the scope of the employer's business operations.

Direction to work at alternate location

Qualifying employers can direct an eligible employee to perform duties at a place different from the employee's normal place of work, including at the employee's home. In giving such a direction, Employers must ensure that:

- the location is suitable for the employee's duties.
- it is safe for the employee to perform their duties at the new location (including having regard to the nature and spread of COVID-19)
- the duties are reasonably within scope of the employer's business operations.

Test that must be satisfied (alternate duties/location)

In giving a direction to perform alternate duties or to work from a different location, the employer must ensure that the direction isn't unreasonable taking into account all of the circumstances, including the employee's caring responsibilities.

The employer must also reasonably believe that the direction about duties or location is necessary to maintain the employment of the eligible employee.

Request employees to work reduced days or alternate hours of work

A qualifying employer can make a request for an eligible employee to work reduced days or alternate hours of work.

If a qualifying employer makes such a request to an eligible employee, the employee has to consider the request, and cannot unreasonably refuse such a request. Any agreement must be recorded in writing.

Request employees to take annual leave

A qualifying employer can request an eligible employee to take paid annual leave (as long as the employee will maintain a balance of at least 2 weeks).

If a qualifying employer makes such a request to an eligible employee, the employee has to consider the request, and cannot unreasonably refuse such a request. Any agreement must be recorded in writing.

A qualifying employer and eligible employee can agree in writing for the employee to take annual leave at half their usual pay for twice the length of time.

Employees who make an agreement to take annual leave still accrue their usual leave entitlements for the period the agreement applies.

Disputes

The Fair Work Commission has power to hear disputes and make orders about JobKeeper directions and request under the Fair Work Act.



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