

Coronavirus Workplace Law Amendments

As part of the urgent response to the impact of COVID-19 on the economy, the Federal Government has passed two important pieces of legislation.



The Federal Government's urgent response to the impact of coronavirus on the economy led to the passing of two Bills by the Commonwealth Parliament on Wednesday, 8 April 2020. The following Acts commenced operation on 9 April 2020:

- a. *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*; and
- b. *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*.

They set out obligations employers must satisfy in order to be eligible for JobKeeper payments. They also provide new powers to employers to give directions to employees (including stand downs) and reach agreement on other issues.

JobKeeper

Turnover requirements

Employers are now eligible for the JobKeeper payment of \$1,500 per fortnight per employee until 27 September 2020 if:

- a. their business has or will likely have a reduction in turnover of 30% or more for the relevant month or quarter (for businesses with an annual turnover of less than \$1 billion);

- b. their business has or will likely have a reduction in turnover of 50% or more for the relevant month or quarter (for businesses with an annual turnover of more than \$1 billion);

The scheme is also available to sole traders or self-employed people.

Employer payment obligations

Three employer payment obligations are mandated, as follows:

1. Satisfy the wage condition

Employers must satisfy the wage condition (as defined in the Rules to be made by the Treasurer) for an employee by the end of the relevant fortnight. This is presumably the requirement that the employer first make the relevant wage payment to the employee, before the ATO will reimburse the employer for that payment via JobKeeper.

2. Minimum payment guarantee

Employers must ensure that the total amount payable to the employee for the fortnight is the greater of:

- a. the JobKeeper payment for the employee; or
- b. the amounts payable to the employee for the fortnight in relation to the performance of work

(including overtime, penalties, loadings, leave payments, etc).

This means that part time or casual employees (who qualify) must be paid the full \$1,500 per fortnight, even if they would normally earn less.

3. Hourly rate of pay guarantee

If a JobKeeper enabling direction (see below) is given to an employee, the employer must ensure that the base rate of pay (worked out on an hourly basis) is not less than the base rate of pay that would have been applied if the direction had not been given. If the employee is not paid by reference to an hourly rate of pay but a workplace instrument applies (e.g. award/enterprise agreement), then the base rate of pay is that outlined in the instrument.

Directions to employees and related measures

Stand down and related options

An employer can give employees directions to:

- a. not work on days they would usually work;
- b. work for a lesser period than they would ordinarily work on any days; or
- c. work a reduced number of hours (compared with their ordinary hours of work). This can include a complete stand down, with no hours worked. Numerous requirements must be satisfied in order for such a direction to be permissible.

Periods during which an employee is under a direction count as service as an employee (i.e. periods of full or partial stand down still count as service).

Also, during a period of stand down, the following apply as if a stand down direction had not been given:

- a. leave accrues;
- b. if the employer makes a request to the employee to take paid annual leave as outlined above, then leave accrues whilst the leave is being taken; and
- c. redundancy pay and pay in lieu of notice calculations are to be based on ordinary hours and rates of pay.

Direction to perform duties

An employee can be directed to perform duties within their skill and competency. This allows employees to be allocated duties that they would not normally perform where there is not the same need for any or all of their duties currently, owing to the pandemic.

Direction to work from different location

An employee can be directed to perform duties at a different location (including at their home).

Before any of the above three directions can be given, there are a number of requirements that must be satisfied. These vary depending on the direction.

Periods during which an employee is under a direction count as service as an employee (i.e. periods of full or partial stand down still count as service).

See the chart below for further detail about JobKeeper enabling directions.

Agreement with employee about days of work/taking paid annual leave

In addition to directing employees on the above issues, employers can also reach agreement with employees to:

- a. perform duties on different days/at different times; and
- b. for employees to take paid annual leave as normal, or take twice the amount of annual leave at half their rate of pay.

Employees must consider and not unreasonably refuse any request from an employer for any such agreement.

The second chart below summarises the types of agreements that can be reached.

Other issues

Employee requests during direction

Employers must consider and not unreasonably refuse requests by an employee to:

- a. engage in reasonable secondary employment; or
- b. undergo training/professional development.

Disputes

The Fair Work Commission may deal with disputes about the operation of these provisions by arbitration.

Paid parental leave

The period during which an employee is in receipt of the JobKeeper allowance is considered to be "qualifying work" for the purposes of the paid parental leave work test.

More detail about these provisions is contained in the charts and table below.

Potential JobKeeper Enabling Directions (JEDs)

A. JobKeeper Enabling Stand Down (JESDD)	Necessary requirements for a JESDD:
<p>Employers can give a JESDD to employee to:</p> <ol style="list-style-type: none"> Not work on day(s) employee would usually work; Work for a lesser period than they would ordinarily work on a day(s); or Work a reduced number of hours (compared with ordinary hours), potentially down to nil hours. <p>JESDD does not apply to an employee during authorised paid/unpaid leave/absence.</p>	<p>Comply with requirements 1 to 9 inclusive in Table 1 below.</p>
B. Direction to perform duties	Necessary requirements for a duties direction:
<p>Can direct employee to perform duties within their skill and competency (i.e. duties other than normal duties).</p>	<p>Comply with requirements 1 to 12 inclusive (except for 7) in Table 1 below.</p>
C. Direction to perform duties at different location	Necessary requirements for a location direction:
<p>Can direct employee to perform duties at a different location (including employee's home).</p>	<p>Comply with requirements 1 to 9 inclusive (except for 7) plus 13 and 14 in Table 1 below.</p>

Agreements with employees about days of work and taking paid annual leave

A. Agreements about days of work	Necessary requirements for a days of work agreement:
<p>Can reach written agreement with employee to perform duties on different days.</p> <p>If employer makes a request for days of work agreement:</p> <ol style="list-style-type: none"> Employee must consider request; and Employee must not unreasonably refuse request. 	<p>Comply with requirements 3, 4, 6, 15 and 16 in Table 1 below.</p>
B. Agreements about taking annual leave	Necessary requirements for agreement:
<p>Employee must consider and not unreasonably refuse request by employer to take paid annual leave if:</p> <ol style="list-style-type: none"> Employer satisfies items 4 and 6 in Table 1; and The balance of annual leave remaining does not drop below 2 weeks. <p>Double leave at half pay - can also agree in writing to take twice as much paid annual leave at half the rate of pay.</p>	<p>Comply with items 4 and 6 in Table 1 below.</p>

Table 1: Requirements for JEDs/Agreements

1. Employer must give written notice of intention to give the direction at least 3 days before the direction (unless employee genuinely agrees to a lesser notice period). *
2. Employer must consult with the employee (or their representative) before giving the direction and keeps written record of consultation. *
 - *Steps 1 and 2 are not necessary if the:
 - i. employer previously took these steps in relation to an earlier direction of the same type;
 - ii. employee/their representative expressed a view; and
 - iii. employer considered views in deciding to give the direction.
3. Direction is in writing.
4. Employer qualified for JobKeeper.
5. The stand down is/duties are safe having regard to (without limitation) the nature and spread of COVID-19.
6. Employer is entitled to one or more JobKeeper payments for the employee for the period.
7. Employee cannot be usefully employed for their normal days/hours because of changes to the business attributable to:
 - i. COVID-19 pandemic; or
 - ii. Government initiatives to slow the transmission of COVID-19.
8. The direction is reasonable (it does not apply if it is unreasonable in all the circumstances).
9. Employer has complied with the 3 new payment obligations as follows:
 - i. Satisfying the wage condition;
 - ii. Ensuring the minimum payment guarantee; and
 - iii. Abiding by the hourly rate of payment guarantee.
10. The duties are reasonably within the scope of the business operations.
11. Employee has appropriate licence/qualifications, where required.
12. Employer reasonably believes direction necessary to continue the employment of one or more employees.
13. The place where the employee is to work is suitable for the duties.
14. If the place is not the employee's home, it does not require unreasonable travel (including with reference to COVID-19 circumstances).
15. Performance of the duties is both safe and reasonably within the scope of the employer's business operations.
16. The agreement does not reduce the employees ordinary hours.



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