

2 SEPTEMBER 2020

JOBKEEPER UPDATE: EXTENSION OF JOBKEEPER EMPLOYER FLEXIBILITY RULES

The current JobKeeper flexibility rules under the *Fair Work Act 2009* allow eligible employers who qualify for the JobKeeper scheme to issue enabling directions and make enabling requests to eligible employees, including to stand them down, reduce their hours of work, perform other duties, change location of work, take annual leave and work at different times. These flexibility rules are scheduled to expire on 28 September 2020.

On 26 August 2020, the Federal Government introduced the *Coronavirus Economic Response Package (JobKeeper Payments) Amendment Bill 2020* to extend the JobKeeper flexibility rules to 29 March 2021.

On 1 September 2020, the Bill was passed to become the *Coronavirus Economic Response Package (JobKeeper Payments) Amendment Act 2020 (the Act)*.

This update will focus solely on how the Act will extend and modify the existing JobKeeper flexibility rules in the *Fair Work Act 2009* after 28 September 2020.

Extension of JobKeeper Enabling Directions and Requests

From 28 September 2020, access to JobKeeper Enabling Directions and Requests under the *Fair Work Act 2009* (except an annual leave request) will be available to two groups of employers:

- Employers who qualify for the Jobkeeper scheme ("**Qualifying Employers**"); and
- Employers who previously qualified, but no longer qualify, for the Jobkeeper scheme and who holds a valid "10% reduction in turnover certificate" ("**Legacy Employers**").

A "10% decline in turnover certificate" will only be valid if the employer passes the "10% decline in turnover test". The "10% decline in turnover test" is passed if the employer's actual GST turnover for a quarter is 90% or less compared to the same quarter in the previous year.

A properly made "10% decline in turnover certificate":

- For a non-small business employer (with 15 or more employees) must be in the form of a written certificate issued by an independent financial services provider (i.e. a qualified accountant, registered tax agent or BAS agent who cannot be a director, employee or associated entity of the employer).
- For a small business employer (with less than 15 employees) can be in the form of a statutory declaration made by a person authorised by the employer who must have knowledge of the financial affairs of the employer.

JOBKEEPER ENABLING DIRECTIONS

From 28 September 2020, eligible employers will be able to issue the following "JobKeeper enabling directions".

1 Direct an employee to reduce their hours of work for a period ("JobKeeper enabling stand down direction")

The following conditions must be satisfied:

- the employee cannot be usefully employed for their normal days or hours during the period because of changes to business attributable to the COVID-19 pandemic or government initiatives to slow the transmission of COVID-19;
- the implementation of the direction is safe having regard to (without limitation) the nature and spread of COVID-19;
- the employee's hourly base rate of pay cannot be reduced as a consequence of the direction;
- the employee is not taking leave authorised by the employer and not authorised to be absent during the period; and
- the employer must not unreasonably refuse any request by the employee to engage in reasonable secondary employment, undertake training or professional development.

For Qualifying Employers:

- the JobKeeper enabling stand down direction can reduce an employee's hours of work down to nil; and
- an employee who is issued a JobKeeper enabling stand down direction by a Qualifying Employer must be paid their usual wages for work performed or the JobKeeper payment, whichever is greater.

For Legacy Employers:

- the JobKeeper enabling stand down direction can reduce an employee's hours of work to no less than 60% of their ordinary hours of work as at 1 March 2020 (or another date set by regulation);
- the JobKeeper enabling stand down direction cannot require an employee to work less than 2 hours in a day; and
- an employee who is issued a JobKeeper enabling stand down direction by a Legacy Employer must be paid their usual wages for work performed.

2 Direct an employee to perform alternative duties for a period

The following conditions must be satisfied:

- the duties are within the employee's skills and competency to perform;
- the duties are safe to perform;
- the employee has the licence or qualifications necessary to perform the duties; and
- the duties are reasonably within the scope of the employer's business operations.

3

Direct an employee to work at a location other than at their usual workplace (including their home) for a period

The following conditions must be satisfied:

- the different work location is suitable for the employee's duties;
- if the different work location is not the employee's home, the place does not require the employee to travel a distance that is unreasonable in all the circumstances; and
- the performance of the employee's duties at the different work location is:
 - safe having regard to (without limitation) the nature and spread of COVID-19; and
 - reasonably within the scope of the employer's business operations.

When will a JobKeeper enabling direction not be enforceable

A "JobKeeper enabling direction" will not be enforceable if:

- it relates to a period on or after 29 March 2021;
- it reduces the employees' base rate of pay;
- it is not in writing;
- it is unreasonable in all of the circumstances (including e.g. impact on directions on employees' carer responsibilities; unfair effect on employees given the direction when compared to other employees in the same category who are not given the direction);
- the direction is issued by a Qualifying Employer who did not provide 3 days' notice to the employee of the intention to issue the direction;
- the direction is issued by a Legacy Employer who did not provide 7 days' notice to the employee of the intention to issue the direction; or
- the employer did not consult with the employee (or the employee's representative) about the direction.

A "JobKeeper enabling direction" does not affect accrual for the purposes of leave, redundancy pay calculations or notice of termination obligations.

Additional requirements for Legacy Employers

For Legacy Employers, all JobKeeper enabling directions and agreements made pursuant to a JobKeeper enabling request are tested at the start of 28 October 2020 and 28 February 2021 ("**test times**"). If the Legacy Employer does not hold a "10% decline in turnover certificate" during either test time, all JobKeeper enabling directions and agreements made pursuant to any JobKeeper enabling request must cease to operate.

Prior to each test time, Legacy Employers must write to each of its employees who are affected by a JobKeeper enabling direction or request to advise the employee whether the direction or agreement will continue or cease after the test time.

The Act prescribes penalties for Legacy Employers (up to \$13,200 for individual; \$66,600 for body corporate):

- who fail to write to employees about the continuation or cessation of JobKeeper-enabling direction or agreement prior to each test time; and
- who knowingly or recklessly issue a JobKeeper enabling direction or Jobkeeper enabling request while not satisfying the "10% decline in turnover test" for the designated quarter applicable to the relevant time.

JOBKEEPER ENABLING REQUESTS

The Act provides eligible employers the right to make "JobKeeper enabling requests" to an eligible employee that cannot be unreasonably refused by that employee:

1 Request an employee to work on different days and/or times to their usual work time for a period

The following conditions must be satisfied:

- the request does not have the effect of reducing the employee's number of hours of work (compared with the employee's ordinary hours of work);
- the performance of the employee's duties on those requested days / times are both 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
- for Legacy Employers, the agreement cannot require an employee to work less than 2 hours in a day.

2 Request an employee to take a period of annual leave that will not result in the employee having a balance of paid annual leave of fewer than 2 weeks

This type of JobKeeper enabling request can only be made prior to 28 September 2020 and cannot be made with respect to an annual leave period after 28 September 2020.

Where to from here?

All businesses should consider how the latest changes outlined in this update could assist during the COVID-19 pandemic.

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