

9 April 2020

## UNDERSTANDING THE JOBKEEPER WAGE SUBSIDY

The JobKeeper wage subsidy has now passed into law.

Yesterday, parliament passed the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020* and the *Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 (JobKeeper Legislation)* which introduce a range of new measures, largely given effect through amendments to the *Fair Work Act 2009 (FWA)*.

The measures create, for the first time, a wage subsidy for the employees of eligible employers and also a range of new powers for eligible employers to stand down employees including changing their hours and separate powers to change the location of work or the duties performed to manage their staff and business through this difficult period.

The JobKeeper Legislation will also be supported by the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (JobKeeper Rules)*, which are yet to be finalised. The information set out in this publication is subject to change pending finalisation of the JobKeeper Rules.

This newsletter summarises the key matters from the new legislation to assist you to better understand how the wage subsidy will work for employers and employees.

### The JobKeeper Payment

#### What is the JobKeeper payment?

The JobKeeper payment is a wage subsidy paid by the Commonwealth to eligible employers.

Eligible employers must pass on the full amount of the JobKeeper payment to the employee.

The amount of the JobKeeper payment is currently \$1,500 per fortnight per employee.

The JobKeeper payment secures for employees of eligible employers a minimum gross fortnightly wage of \$1,500.

#### Which employers are eligible for the JobKeeper payment?

Under the JobKeeper Legislation, the Treasurer has been delegated power to prepare the *JobKeeper Rules*, which provide further information in respect of the eligibility criteria. As discussed above, the *JobKeeper Rules* are in presently in draft form and are subject to change.

However, from the information currently available, most employers will qualify for the JobKeeper payment if they can demonstrate that they meet one of the following conditions:

- (a) for businesses with an annual turnover of less than \$1 billion: the business has suffered a reduction in GST turnover of at least 30%;

- (b) for businesses with an annual turnover of greater than \$1 billion: the business has suffered a reduction in GST turnover of 50%; and
- (c) for charities registered with the ACNC: their turnover has or will likely fall by 15% or more.

The major banks (ANZ, Commonwealth, NAB, Macquarie and Westpac) are not eligible nor are Australian Government agencies, State and Territory governments and their agencies, foreign governments and their agencies, local governments and wholly-owned corporations of these bodies.

Non-government schools and private vocational education providers are eligible.

#### How is a decline in turnover assessed for employers?

Employers must select a full calendar month falling between 1 April 2020 and 30 September 2020 for comparison.

The employer must then compare its projected GST turnover for the 2020 calendar month against the same calendar month in 2019 and demonstrate a decline in GST turnover of 50%, 30% or 15%, depending on the type of entity and the entity's turnover in the previous year.

#### Example: Limited liability company with annual turnover less than \$1 billion

Coffee King Pty Limited owns and operates several cafes in the Sydney CBD. Coffee King's annual turnover in the previous income year was \$1.2 million.

Coffee King estimates that between 1 April 2020 and 30 April 2020 it will have a projected GST turnover of \$20,000. For the period of 1 April 2019 to 30 April 2019, Coffee King's GST turnover was \$100,000.

Coffee King's projected GST turnover for April 2020 is 80% lower than its GST turnover for April 2019.

#### Which employees are eligible for the JobKeeper payment?

An employer can only claim the JobKeeper payment for each eligible employee.

In the exposure draft of the JobKeeper Rules, section 9 set out the specific eligibility criteria for employees. An employee will be eligible if the following conditions are met:

- (a) as at 1 March 2020 the employee was:
  - (i) 16 years or older and an Australian citizen or the holder of a permanent visa or a Special Category (Subclass 444) Visa; and
  - (ii) a resident of Australia for tax purposes;
  - (iii) employed by the employer (other than as a casual); or
  - (iv) employed as a long term casual, that is the individual had been employed casually by the employer for at least 12 months as at 1 March 2020.
- (b) the employee continues to be employed by the employer for the relevant fortnight for which the JobKeeper payment is claimed;
- (c) the employee has provided the employer with a 'Nomination Notice' confirming the employee's

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compliance with the conditions set out above;

- (d) the employee is not receiving paid parental leave from Services Australia, dad and partner pay or any amount of compensation under Australian workers' compensation law in respect of total incapacity for work.
- (e) the employee is not receiving a JobKeeper payment from any other entity.

In the exposure draft there is no exclusion for fixed term employees so provided they meet the criteria above, fixed term employees will be eligible

### I own and operate a business. Can I claim the JobKeeper payment?

One 'eligible business participant' may claim the JobKeeper payment. This means that business owners or self-employed individuals may be eligible to receive the JobKeeper payment.

However, section 11(3) of the draft JobKeeper Rules restricts each entity to one JobKeeper Payment for a 'eligible business participant', regardless of how many 'eligible business participants' are associated with the entity.

A person will be an 'eligible business participant' if the individual:

- (a) was not employed by the entity during the fortnight for which the JobKeeper payment is claimed;
- (b) is actively engaged in the business carried on by the entity;
- (c) is either a sole trader, a partner of the partnership entity, an adult beneficiary of a trust entity or a shareholder or director of the company;
- (d) as at 1 March 2020, was 16 years or over, Australian citizen or the holder of a permanent visa or a Special Category (Subclass 444) Visa;
- (e) is an Australian resident for tax purposes;
- (f) has provided the entity with a 'Nomination Notice' confirming the employee's compliance with the conditions set out above;
- (g) is not receiving paid parental leave, dad and partner pay or any amount of compensation under Australian workers' compensation law in respect of total incapacity for work; and
- (h) is not receiving a JobKeeper payment from any other entity.

## Employee Guarantees

### New Temporary Employee Guarantees

The employees of eligible employers will be protected by a range of new temporary guarantees introduced under the JobKeeper Legislation (**Employee Guarantees**).

In their simplest form, the Employee Guarantees ensure that the employees of eligible employers:

- (a) receive a wage of at least \$1,500 per fortnight; and
- (b) do not incur any reduction in their equivalent hourly rate of pay.

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The Employee Guarantees include the following specific guarantees:

- (a) **‘Wage condition’:** Under section 789GD of the FWA and sections 6(1) and 6(10) of the JobKeeper Rules, an employer who is eligible to receive JobKeeper payments in respect of an employee must ensure that the employee is paid a minimum of \$1,500 per fortnight. This is called the ‘wage condition’.
- (b) **Minimum payment guarantee:** Under section 789GDA of the FWA, an eligible employer must ensure that any employee receiving the JobKeeper payment is paid a fortnightly amount of at least the greater of either:
  - (i) the amount of the JobKeeper payment, which is presently \$1,500; or
  - (ii) any amount that would otherwise be payable to the employee in proportion with the amount of work performed by the employee in that fortnight.
- (c) **Hourly rate of pay guarantee:** Section 789GDB of the FWA provides workers with an ‘hourly rate of pay guarantee’. If any employee is given a Stand-Down Direction, the employer must ensure that an employee’s base rate of pay (calculated on an hourly basis) is not reduced below the amount of the employees hourly base rate of pay before the Stand Down, Duties or Location Direction.

#### What happens to employees who were earning more than \$1,500 per fortnight?

The Employee Guarantees prevent an employer from reducing an employee’s rate of pay.

The employee’s equivalent hourly rate of pay must remain the same.

When issuing a Stand Down Direction to an employee, employers need to ensure that the employee’s equivalent hourly rate of pay is not reduced.

However, an employer may direct an employee to reduce their hours (Stand Down Directions are discussed in further detail below).

#### Example: Employee who earns more than \$1500 per fortnight

Lisa as a full-time employee. Lisa’s employment contract provides that she is paid a gross annual salary of \$104,000 and that she must perform a working week of 38 hours, or 76 hours per fortnight.

Ordinarily, Lisa’s gross fortnightly income is \$4,000, or \$52.63 per hour. Lisa had previously been stood down, with her fortnightly hours and pay reduced to zero.

Lisa’s employer learns about the JobKeeper payment and wants to reinstate Lisa and pay her the \$1,500 gross fortnightly payment. Lisa’s employer also wants her to start performing other duties within the business and has directed her to work 30 hours per week.

If Lisa is required to work a 30 hour week and only receives the \$1,500 JobKeeper payment, her hourly rate would be reduced to \$25 per hour, well below her previous equivalent hourly rate of \$52.63.

Lisa’s hourly rate must not fall below \$52.63 per hour.

Unless Lisa’s employer supplements the JobKeeper payment, Lisa can only be required to work approximately 28 hours per fortnight ( $\$52.63 \times 28 = \$1473.64$ ).

If Lisa’s employer decides to supplement Lisa’s wage, she may be required by her employer to work more than 28 hours per fortnight, but her equivalent hourly rate must not fall below \$52.63 per hour.

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## New employers' power to issue directions

### New powers for eligible employers

Under the JobKeeper Legislation eligible employers are conferred with temporary powers to issue certain directions to employees regarding:

- (a) standing down employees;
- (b) the employee's hours of work;
- (c) the employee's location of work; or
- (d) the duties to be performed by the employee

(together **Directions**).

### **Stand Down Directions**

The JobKeeper Legislation extends the right of an employer to stand down its employees.

Traditionally, the stand down provisions under the *Fair Work Act* were not available to employers merely because those employers had suffered a down turn in business (no matter how dramatic that downturn was).

An employer will now be permitted to issue a Stand Down Direction to an employee. The Stand Down Direction may require that the employee:

- (a) not work on particular day;
- (b) work for a lesser period; or
- (c) work for fewer hours
- (d) than the employee would ordinarily work.

A Stand Down Direction can only be issued if:

- (a) the employer is eligible for JobKeeper payments in respect of the employee;
- (b) the employee cannot be usefully employed for their normal days or hours during due to the COVID-19 pandemic or government initiatives to slow the spread of COVID-19 (such as restrictions on gatherings and lockdowns); and
- (c) the Stand Down Direction can be implemented safely.

While a Stand Down Direction remains in place, the employer must continue to comply with the Employee Guarantees. That is, the employee must be paid at least \$1,500 per fortnight and the employee's equivalent hourly rate of pay cannot be reduced as a result of the Stand Down Direction.

### **Duties Directions**

The changes to the Fair Work Act also allow an employer to direct an employee to perform any duties that are within that employee's competency and within the scope of the employer's business even if those duties are not ordinarily performed by the employee (the **Duties Direction**).

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In other words, employers may require an employee to carry out certain duties that the employee would not ordinarily carry out.

This provision ensures that, subject to certain conditions, eligible employers can direct an employee to perform certain duties that might otherwise not be within the scope of their employment contract.

A Duties Direction can only be issued if:

- (a) the employer is eligible for JobKeeper payments in respect of the employee;
- (b) the duties are safe;
- (c) where relevant, the employee is licenced or qualified to perform those duties; and
- (d) the duties are reasonably within the scope of the employer's business operations.

### ***Location Directions***

An eligible employer may also direct an employee to carry out duties at a place that is different to the employee's ordinary place of work (the **Location Direction**). This includes a direction to an employee to work at home.

This provision overcomes any other employment provisions that would otherwise prevent an employer from directing an employee to carry out duties at a different location.

A Location Direction may only be issued where:

- (a) the employer is eligible for JobKeeper payments in respect of the employee;
- (b) the new location is suitable for the employee's duties;
- (c) if the new location is not the employee's home: the Location Direction must not require the employee to travel unreasonably; and
- (d) the employee can perform their duties safely at the new location.

### **Is an employee required to comply with a Direction?**

An employee must comply with a Direction subject to the following:

- (a) **Reasonableness:** An employee is not required to comply with a direction unless the direction is reasonable in all the circumstances.

One of the factors that may be relevant to determining whether a direction is unreasonable is the impact of that direction on any caring responsibilities that the employee may have.

- (b) **Continuation of employment:** In the case of Duties Directions or Location Directions, the employer must also have information available to it that would support a belief that the Duties or Location Direction is necessary to continue the employment of one or more employees.

### **Notice Requirements**

An employer is required to give an employee at least three days written notice of the intention to give a Direction, unless the employer and employee genuinely agree to a lesser notice period. The employer must also consult with the employee about the direction and keep a written record of that consultation.

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## Expiration of Directions

Directions cease to be effective from the earlier of:

- (a) 28 September 2020;
- (b) the date that the Direction is revoked by the employer; or
- (c) the of any order revoking the Direction.

## Can an employer direct an employee to change the days or time when the employee must carry out their duties?

Yes. However, there are some conditions which employers must be aware of:

- (a) the employer must be eligible for JobKeeper payments in respect of the employee;
- (b) the new day or time must not limit the employee's ability to perform their duties safely and within the scope of the employer's business operations; and
- (c) **the employee's total hours of work must not be reduced unless a Stand Down Direction has been issued.**

An employee must not 'unreasonably refuse' a request from an employer to vary days or time of work.

The Explanatory Memorandum to the JobKeeper Legislation suggests that an employee who usually works on weekends could reasonably be required to work on weekdays in a situation where the employer can no longer trade on weekends due to the COVID-19 pandemic.

## Annual leave and other considerations

### Annual Leave

The new legislation provides that employees will continue to accrue leave entitlements as they ordinarily would.

Payments owing to employees in lieu of notice of termination and redundancy payments are not impacted by either:

- (a) a stand down direction under the JobKeeper legislation; or
- (b) an agreement that the employee takes twice the length of annual leave at half the rate of pay.

### ***Can an employer require that an employee take paid annual leave and apply the JobKeeper payment toward payment of the employee's annual leave entitlements?***

The JobKeeper Legislation is less clear on this point and it is hoped that the final version of the *JobKeeper Payment Rules* will provide further clarification.

For now, the answer appears to be yes.

Under section 789GJ(1), an employer can request that an employee take paid annual leave in the following circumstances:

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- (a) the employer is eligible for JobKeeper payments in respect of the employee;
- (b) in complying with the request, the employee will be left with at least 2 weeks of paid annual leave;
- (c) it is not unreasonable for the employee to refuse that request.

Because a Stand Down Direction is not effective when an employee is taking paid or unpaid leave (section 789GDC(3)), the employee must be paid in accordance with that employee's ordinary annual leave entitlements.

If the eligible employer is still receiving JobKeeper payments in respect of that employee, those payments may be applied towards the employee's fortnightly wage.

The Employee Guarantees still apply, so if the employee is ordinarily entitled to more than \$1,500 under a paid annual leave arrangement, the employer must top-up the difference. If the employee would ordinarily be entitled to less than \$1,500, the employer must pay the employee at least \$1,500 per fortnight.

***Can an employer and employee agree that the employee take double the length of annual leave and half the rate of pay?***

Yes. An employer and an employee may agree that the employee take twice the length of paid annual leave at half the rate of pay. The following conditions must be met:

- (a) the employer must be eligible for the JobKeeper payment in respect of that employee; and
- (b) there must be an agreement in writing that the employee will take twice as much paid annual leave at half the rate of pay.

Again, the Employee Guarantees would apply, so the employee must continue to receive fortnightly payments of at least \$1,500 from the employer.

**An employee has made a request to engage in secondary employment, or to undertake training or professional development. Can I refuse this request?**

Only if the refusal is reasonable.

Employees who are subject to a Stand Down Direction may make a request to an employer:

- (a) to engage in reasonable secondary employment;
- (b) for training; or
- (c) for professional development.

Under section 789GU of the FWA, an employer must consider this request and cannot unreasonably refuse the request.

**What are the consequences for employers that fail to comply with their obligations under the JobKeeper Legislation?**

Employers may be liable for civil penalties of up to \$126,000 if they breach their obligations under the JobKeeper Legislation.

A breach may include failure by an employer to pass on the full \$1,500 JobKeeper payment to an employee, or knowingly misusing a direction available under the JobKeeper Legislation.

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The JobKeeper Legislation also strengthens the existing prohibitions against employers making false or misleading statements as to workplace rights.

## Further information

You can read the full text of the *Coronavirus Economic Response Package (Payments and Benefits) Bill 2020* [here](#).

The full text of the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020* [here](#).

If you have any questions regarding the matters raised in this article or the JobKeeper Legislation generally, please contact the author, [Leonie Kyriacou](#).

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