

In response to the coronavirus disease 2019 (COVID-19) outbreak, the Australian parliament passed major temporary changes to the Fair Work Act 2009 (Cth) (FW Act) on 8 April 2020 as part of its unprecedented AU\$130 billion “Jobkeeper Scheme”.

On the same day, the Fair Work Commission implemented provisional emergency variations to the majority of modern awards. We highlight the key points employers need to know about these measures, which grant eligible employers a lifeline wage subsidy and provide greater flexibility to manage employees through the crisis.

Due to further changes to the Jobkeeper Scheme and modern award variations since publication, we have updated our alert to reflect current circumstances as at 6 May 2020. As the COVID-19 crisis and the government’s response are constantly evolving, the below may be subject to further change.

Jobkeeper Scheme – Wage Subsidy

The Jobkeeper wage subsidy will provide much-needed financial support for businesses that have experienced significant economic distress because of COVID-19, and incentivise employers to maintain employment with as many employees as possible.

- The Jobkeeper Scheme has been implemented through:
- The Coronavirus Economic Response Package (Payment and Benefits) Act 2020;
- The Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020 (**Measures Act**); and
- Legislative instruments made by the Treasurer or Taxation Commissioner, including the Coronavirus Economic Response Package (Payment and Benefits) Rules 2020, which sets out most of the substantive provisions regarding the Jobkeeper payment (**Rules**).

Payments

Eligible employers are entitled to **AU\$1,500 per fortnight** (before tax) **per eligible employee** from **30 March 2020**, for a maximum period of **six months** (ending **27 September 2020**). Payments are made to employers in arrears, **commencing in May 2020**.

Under the Jobkeeper Scheme employers need to satisfy payment requirements for their eligible employees in respect of each “Jobkeeper fortnight.” In general, this means:

- If an employee usually receives AU\$1,500 or more per fortnight their employer must continue to pay them their regular wage for all hours worked
- If an employee usually receives less than AU\$1,500 per fortnight their employer must “top up” their pay to at least AU\$1,500 per fortnight
- If employees are stood down, their employer must continue to pay them at least AU\$1,500 per fortnight
- An employer is not required to make superannuation payments on any “top up” Jobkeeper payments that exceed an employee’s wage.

Who Is Eligible?

Eligible employers can register for the Jobkeeper Scheme via the ATO. While certain employers (including the major banks and government entities) are excluded from the Jobkeeper Scheme, generally employers are eligible if:

- For employers with an **aggregated turnover of less than AU\$1 billion**, they estimate they have, or will likely experience, at least a **30%** reduction in GST turnover
- For employers with an **aggregated turnover of AU\$1 billion or more**, they estimate they have, or will likely experience, at least a **50%** reduction in GST turnover
- For employers who are a **registered charity or not-for-profit**, they estimate they have, or will likely experience, at least a **15%** reduction in GST turnover

Under the Rules, an employer’s aggregated turnover is as assessed for income tax purposes, and includes the annual turnover of any connected or affiliated businesses. For businesses in a corporate group, this means the turnover of other group members (including foreign entities) may be included in calculating whether the business is above or below the AU\$1 billion threshold. However, a decline in overseas operations will not count towards establishing that an employer’s turnover has fallen by the required 30% or 50%. To establish the requisite fall in turnover, employers must demonstrate a fall or projected fall in their GST turnover in a relevant **month or quarter** compared to their turnover in a **corresponding period in 2019**.

Alternative or modified tests may apply to establish eligibility in specific circumstances, including for recently established or restructured businesses, businesses with irregular turnover, businesses that have been impacted by natural disaster and businesses that use a special purpose entity to employ staff (rather than staff being employed directly through the operating entity).

To receive the wage subsidy, employers must employ **eligible employees**. Employees may be eligible if they are (and were on **1 March 2020**)

- Employed as a permanent **full-time** or **part-time** employee or a **long-term casual** (casuals who have been employed on a **regular and systematic basis** for at least **12 months**), including stood-down employees or employees who have been laid off and rehired since 1 March 2020
- 16 years or older (except full-time students who are 17 years or younger and not financially independent)
- An Australian citizen, permanent resident or New Zealand resident on a special category visa
- Not receiving the Jobkeeper payment from another employer (and, if a long-term casual, are not a permanent employee of another employer)

The government has clarified that a “one in, all in” principle applies to the Jobkeeper Scheme. Participating employers cannot pick and choose which employees they will nominate and must ensure that all eligible employees who agree to be nominated are covered. Eligible employers have until 31 May 2020 to enrol for the Jobkeeper Scheme and nominate eligible employees. However, to claim the Jobkeeper subsidy for April, employers must have paid eligible employees at least AU\$1,500 (before tax) for each “Jobkeeper fortnight” in April by 8 May 2020.

Jobkeeper Scheme – What Else Does It Mean for Employers?

Jobkeeper Enabling Directions

The Measures Act has temporarily amended the FW Act to allow employers covered by the Jobkeeper Scheme to make “**Jobkeeper enabling directions**” to employees receiving the wage subsidy. Under these amendments, which expire on **28 September 2020**, if employees **cannot be usefully employed for their normal hours or days** because of the COVID-19 outbreak, an employer can direct an employee to:

- Not work on days they usually would
- Work for shorter periods on days they normally work
- Work for a reduced number of hours

Eligible employers can also direct employees covered by the Jobkeeper Scheme to perform **alternative duties** and **change the location of their work**, where reasonable and necessary to continue the employment of one or more employees.

All Jobkeeper enabling directions must be reasonable. This includes that modified duties must be safe, within an employee’s skills and qualifications, and reasonably within the scope of the employer’s operations.

Employers must also consult with, and give notice to, employees before implementing a direction. Employers cannot reduce employees’ hourly pay rate under a Jobkeeper enabling direction – they must pay employees either the Jobkeeper payment (AU\$1,500 per fortnight) or their usual wage for all hours worked (whichever is more). In response to a Jobkeeper enabling stand-down direction, an employee can request to take on secondary employment or access training and professional development. Employers cannot unreasonably refuse such a request.

Agreements Between the Employer and Employees to Change Working Arrangements or Take Annual Leave

Under the temporary amendments, eligible employers and employees can agree:

- To **change employees’ normal working days or times**, as long as the change is safe, reasonable and employees’ working hours are not reduced
- That an employee will **take paid annual leave**, including taking **twice as much leave at half pay** (however, employees are entitled to retain an annual leave balance of at least **two weeks**)

The Fair Work Commission (FWC) has the power to arbitrate disputes arising over Jobkeeper enabling directions. Employers who breach the Jobkeeper requirements, such as by failing to pass on the entire AU\$1,500 payment to employees or pay employees for all hours worked, or by misusing a Jobkeeper enabling direction, could face significant penalties of up to AU\$126,000 per contravention.

Temporary Amendments to Modern Awards

Further to the government’s legislative amendments, the FWC has made **temporary variations to 99 modern awards**, to allow for greater flexibility during the COVID-19 pandemic. These changes will apply until **30 June 2020**, with the possibility for extension if required, and cover employers and employees where a relevant award applies, including those not participating in the Jobkeeper Scheme. The FWC initially made emergency variations in March to three modern awards (the Clerks – Private Sector Award 2010, Hospitality Industry (General) Award 2010 and Restaurant Industry Award 2010) to grant employers greater flexibility to change employees’ duties and hours, and direct employees to take annual leave.

Under its further variations implemented on 8 April 2020, if a relevant award applies:

- By written agreement between the employer and the employee, employees can **access their annual leave at half pay**
- Employees can access **two weeks of unpaid pandemic leave** if they are unable to work due to:
 - Being required to self-isolate by the government, medical authorities or the advice of a medical petitioner
 - Measures taken by the government or medical authorities in response to the pandemic, such as an enforceable government direction to close “non-essential” services

Unpaid pandemic leave is available to employees **in full, immediately**, and can be taken even if an employee has other paid leave entitlements available.

The FWC has since made further temporary variations to the Educational Services (Schools) General Staff Award 2010, allowing employers to direct employees to reduce their work hours and/or perform alternative duties. The variations, which will expire on 1 August 2020 unless extended, are expressly intended to facilitate keeping employees in work through the COVID-19 crisis, and indicate the FWC may make further emergency variations to other modern awards.

If you would like further guidance as to what these changes could mean for your business, please do not hesitate to contact a member of our Labour & Employment team.

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