



## UPDATED ADVICE - Extension of the Fair Work Act provisions which support the operation of the JobKeeper scheme

### SUMMARY

Legislative amendments have been made to extend the operation of the short-term provisions in Part 6-4C (Coronavirus economic response) of the *Fair Work Act 2009 (FW Act)*. These provisions enable employers to issue certain JobKeeper enabling directions to employees and reach certain agreements with employees, to support the practical operation of the JobKeeper scheme.

Under the *Coronavirus Economic Response Package (Jobkeeper Payments) Amendment Act 2020*, which amends Part 6-4C of the FW Act, different provisions apply to:

1. Employers who qualify for the JobKeeper 2.0 scheme (which operates from 28 September 2020 until 28 March 2021); and
2. Employers who qualified for the original JobKeeper scheme (which operates until 27 September 2020) but do not qualify for the JobKeeper 2.0 scheme, and who have experienced a decline in turnover of 10% or more.

On 17 September 2020, amendments were made to the *Fair Work Regulations 2009* clarifying the relevant hours of work for certain employees of the second category of employers above.

### The JobKeeper scheme

The Australian Government's JobKeeper 2.0 scheme and the eligibility of businesses and employees are discussed in [Advice Nat 073/2020](#).

The JobKeeper scheme is aimed at supporting businesses to keep more Australian workers in jobs during the COVID-19 crisis.

#### 1. Provisions in Part 6-4C of the FW Act that apply up to 27 September 2020

The provisions in Part 6-4C of the FW Act that apply up to 27 September 2020 are explained in [Advice Nat 032/2020](#). Only employers who qualify for the original JobKeeper scheme are eligible to use these provisions and only in respect of eligible employees.

The current provisions in s.789GJ (Taking paid annual leave) of the FW Act, which give employers the right to reach agreement with employees about the taking of annual leave, with employees unable to unreasonably refuse, apply up to 27 September 2020 but are being discontinued from this date.

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The other forms of JobKeeper enabling directions and agreements provided for in Part 6-4C of the FW Act remain available after 27 September 2020, with some amendments as outlined below.

## **2. Provisions in Part 6-C of the FW Act that apply between 28 September 2020 and 28 March 2021**

From 28 September 2020, Part 6-4C of the FW Act applies to the following categories of employers but different provisions apply to each category:

1. Employers who qualify for the JobKeeper 2.0 scheme (which operates from 28 September 2020 until 28 March 2021); and
2. Employers who qualified for the original JobKeeper scheme (which operates until 27 September 2020) but who do not qualify for the JobKeeper 2.0 scheme, and who have experienced a decline in turnover of 10% or more.

The above employers have access to various forms of JobKeeper enabling directions and agreements.

Section 3 below outlines the provisions that apply to the first category of employers above.

Section 4 below outlines the provisions that apply to the second category of employers above.

## **3. Employers who qualify for the JobKeeper 2.0 scheme (which operates from 28 September 2020 until 28 March 2021)**

For employers who qualify for the JobKeeper 2.0 scheme, the following provisions apply from 28 September 2020.

### **JobKeeper enabling stand down directions (s.789GDC of the FW Act)**

An employer who qualifies for the JobKeeper scheme for an eligible employee is able to give a JobKeeper enabling stand down direction to the employee requiring the employee to work for less hours than the employee would ordinarily work (including nil hours).

The direction can only be given if the employee cannot be usefully employed for their normal days or hours during the period because of changes to the business attributable to the COVID-19 pandemic or Government initiatives to slow transmission of the Coronavirus.

The direction must be safe and must not be unreasonable in all the circumstances. In determining what is unreasonable the following notes are included in the Act:

*Note 1: A direction may be unreasonable depending on the impact of the direction on any caring responsibilities the employee may have.*

*Note 2: If directions relating to reduction of hours are given by an employer to the employees in a particular category, the directions may be unreasonable if the directions have an unfair effect on some employees in that category when compared with other employees in that category who are also subject to those directions.*

The employer must comply with the employer payment obligations under the JobKeeper scheme. In addition, the employer must ensure that the employee's base rate of pay (worked out on an hourly basis) is not less than the base rate of pay (worked out on an hourly basis) that would have been applicable to the employee if the direction had not been given to the employee. There is no

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requirement to pay the same weekly pay if the employee works less hours, but the hourly rate needs to be maintained.

A JobKeeper enabling stand down direction has effect despite any inconsistent provisions in an applicable award, enterprise agreement or contract of employment.

The employer must give the employee at least three days written notice of the intention to give a direction (or lesser period by agreement) and must consult the employee or the employee's representative about it and keep a written record of the consultation.

Any direction must be in writing (which can be by electronic means).

During the period when the direction applies:

- The employee accrues leave entitlements as if the direction had not been given;
- If the employment of the employee is terminated, any redundancy pay and payment in lieu of notice are to be calculated as if the direction had not been given;
- The direction does not apply to the employee when the employee is taking paid or unpaid leave that is authorised by the employer (e.g. annual leave), or when the employee is otherwise authorised to be absent (e.g. on a public holiday);
- If the employee gives the employer a request to engage in reasonable secondary employment or a request for training or professional development, the employer must consider the request and must not unreasonably refuse the request; and
- The period counts as 'service' for the purposes of the FW Act.

### **Directions about duties of work (s.789GE of the FW Act)**

An employer who qualifies for the JobKeeper scheme for a particular employee is able to direct the employee during a period to perform any duties within their skill and competency.

The direction can only be given if the duties are safe, if the employee is licensed and qualified to perform the duties (if a licence or qualification is necessary), and if the duties are reasonably within the scope of the employer's business operations.

An employee does not need to comply with the direction if it is unreasonable in all the circumstances.

The employer must ensure that the employee's base rate of pay (worked out on an hourly basis) is not less than the greater of the base rate of pay that would have been applicable to the employee if the direction had not been given and the base rate of pay that is applicable to the duties the employee is performing.

The direction has effect despite any inconsistent provisions in an applicable award, enterprise agreement or contract of employment.

The employer must give the employee at least three days written notice of the intention to give a direction (or lesser period by agreement) and must consult the employee or the employee's representative about it and keep a written record of the consultation.

Any direction must be in writing (which can be by electronic means).

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In addition, the employer must have information to support a reasonable belief the direction for changed work duties is necessary to continue the employment of one or more employees.

### **Directions about the location of work (s.789GF of the FW Act)**

An employer who qualifies for the JobKeeper scheme for a particular employee is able to direct the employee during a period to perform duties at a place (including the employee's home) that is different from the employee's normal workplace.

The direction can only be given if the place is safe and suitable for the employee's duties and if the duties are reasonably within the scope of the employer's business operations. Also, if the place is not the employee's home, the direction must not require the employee to travel a distance that is unreasonable.

An employee does not need to comply with the direction if it is unreasonable in all the circumstances.

The direction has effect despite any inconsistent provisions in an applicable award, enterprise agreement or contract of employment.

The employer must give the employee at least three days written notice of the intention to give a direction (or lesser period by agreement) and must consult the employee or the employee's representative about it and keep a written record of the consultation.

Any direction must be in writing (which can be by electronic means).

In addition, the employer must have information to support a reasonable belief the direction for changed work location is necessary to continue the employment of one or more employees.

### **Days and times of work agreements (s.789GG of the FW Act)**

An employer who qualifies for the JobKeeper scheme for a particular employee is able to reach agreement with that employee for the employee to perform work on different days or at different times during a period than the employee's ordinary days or times of work.

Such an agreement can only be reached if performance of the duties on different days or at different times is safe and reasonably within the scope of the employer's business operations.

The agreement must not reduce the employee's number of hours of work compared with the employee's ordinary hours of work. The number of hours of work for an employee can only be reduced by issuing a JobKeeper enabling stand down direction (see above).

An employee must consider and must not unreasonably refuse an employer's request for agreement to change work days or times. In the absence of agreement, the Fair Work Commission (**FWC**) can settle a dispute about this by arbitration.

The Australian Government's Explanatory Memorandum for the legislation states:

*The circumstances of particular workplaces would inform what is reasonable in this area. For example, an employee who usually works weekends could reasonably be required to work on weekdays in a situation where their employer's business can no longer trade on weekends as a result of the Coronavirus pandemic.*

An agreement under these provisions has effect despite any inconsistent provisions in an applicable award, enterprise agreement or contract of employment.

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#### **4. Employers who qualified for the original JobKeeper scheme (which operates until 27 September 2020) but who do not qualify for the JobKeeper 2.0 scheme, and who have experienced a decline in turnover of 10% or more**

For employers who qualified for the original JobKeeper scheme but do not qualify for the JobKeeper 2.0 scheme (**Legacy Employers**) the following provisions apply from 28 September 2020 if they have experienced a decline in turnover of 10% or more.

##### **10% decline in turnover test (ss.789GCB, 789GCC and 789GCD of the FW Act)**

Legacy Employers have access to various forms of directions and agreements, as outlined below, but only if they have experienced a 10% decline in turnover or more.

The 10% decline in turnover test mirrors the test in the JobKeeper Payment Rules, with a number of necessary modifications; in particular, the relevant percentage decline required is 10%.

In order to access the forms of JobKeeper enabling directions and agreements outlined below, a Legacy Employer is required to hold a 10% Decline in Turnover Certificate, unless the employer has less than 15 employees.

A 10% Decline in Turnover Certificate can be issued by a registered tax agent, BAS agent or qualified accountant (as defined in the *Corporations Act 2001*), except where the agent or accountant is a director, employee or associated entity of the Legacy Employer.

Instead of obtaining a 10% Decline in Turnover Certificate, an employer with less than 15 employees may choose to have a Statutory Declaration completed by an individual who is the employer, or authorised by the employer, and who has knowledge of the financial affairs of the employer.

Heavy maximum penalties apply to employers who give false, misleading or incomplete information to the registered tax agent, BAS agent or accountant, and for making a false statement in a Statutory Declaration.

Legacy Employers with a JobKeeper enabling direction or agreement in place must obtain a further 10% Decline in Turnover Certificate for each relevant quarter, as follows:

- Between 3 September 2020 and 27 October 2020 (inclusive), a Legacy Employer must have a 10% Decline in Turnover Certificate for the June 2020 quarter (April, May and June 2020) compared to the June 2019 quarter;
- Between 28 October 2020 and 27 February 2021 (inclusive), a Legacy Employer must have a 10% Decline in Turnover Certificate for the September 2020 quarter (July, August and September 2020) compared to the September 2019 quarter; and
- Between 28 February 2021 and 28 March 2021 (inclusive), a Legacy Employer must have a 10% Decline in Turnover Certificate for the December 2020 quarter (October, November and December 2020) compared to the December 2019 quarter.

This approach is intended to ensure that JobKeeper enabling directions and agreements are only available to employers who are continuing to experience a 10% decline in turnover or more.

## JobKeeper enabling stand down directions – Legacy Employers (s.789GJA of the FW Act)

A Legacy Employer who holds a 10% Reduction in Turnover Certificate (or a Statutory Declaration for small businesses with less than 15 employees) is able to give a JobKeeper enabling stand down direction to an employee for whom the employer previously received a JobKeeper payment, requiring the employee to work for less hours than the employee would ordinarily work, but:

- not less than 60% of the employee’s ordinary hours of work as at the start of 1 March 2020; and
- not less than 2 hours in a day.

On 17 September 2020, amendments were made to the *Fair Work Regulations 2009* clarifying the relevant hours of work for certain employees of Legacy Employers, for the purposes of calculating the 60% limit on the reduction of hours under a JobKeeper enabling stand down direction. The Regulations specify the method of determining ordinary hours for certain classes of employees for whom it is not possible or not appropriate to assess their ordinary hours as at 1 March 2020, as set out in the following table:

Class of employee	The ordinary hours of work are:
Employees whose ordinary hours of work for the employer have changed on or after 1 March 2020 for reasons (non-COVID reasons) unrelated to the impact of the coronavirus known as COVID-19	The ordinary hours of work of the employee as most recently changed for non-COVID reasons, disregarding the effect of any JobKeeper enabling stand down direction applying to the employee.
Employees not employed by the employer on 1 March 2020	Either: (a) the ordinary hours of work of the employee when the employee started employment with the employer; or (b) if those hours of work have changed for non-COVID reasons—those hours of work as most recently changed for non-COVID reasons; disregarding the effect of any JobKeeper enabling stand down direction applying to the employee.

A JobKeeper enabling stand down direction can only be given if the employee cannot be usefully employed for their normal days or hours during the period because of changes to the business attributable to the COVID-19 pandemic or Government initiatives to slow transmission of the Coronavirus.

The direction must be safe and must not be unreasonable in all the circumstances. In determining what is unreasonable the following notes are included in the Act:

*Note 1: A direction may be unreasonable depending on the impact of the direction on any caring responsibilities the employee may have.*

*Note 2: If directions relating to reduction of hours are given by an employer to the employees in a particular category, the directions may be unreasonable if the directions have an unfair effect on some employees in that category when compared with other employees in that category who are also subject to those directions.*

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The employer must comply with the employer payment obligations under the JobKeeper scheme. In addition, the employer must ensure that the employee's base rate of pay (worked out on an hourly basis) is not less than the base rate of pay (worked out on an hourly basis) that would have been applicable to the employee if the direction had not been given to the employee. There is no requirement to pay the same weekly pay if the employee works less hours, but the hourly rate needs to be maintained.

A JobKeeper enabling stand down direction has effect despite any inconsistent provisions in an applicable award, enterprise agreement or contract of employment.

The employer must give the employee at least seven days written notice of the intention to give a direction (or lesser period by agreement) and must consult the employee or the employee's representative about it and keep a written record of the consultation.

Any direction must be in writing (which can be by electronic means).

During the period when the direction applies:

- The employee accrues leave entitlements as if the direction had not been given;
- If the employment of the employee is terminated, any redundancy pay and payment in lieu of notice are to be calculated as if the direction had not been given;
- The direction does not apply to the employee when the employee is taking paid or unpaid leave that is authorised by the employer (e.g. annual leave), or when the employee is otherwise authorised to be absent (e.g. on a public holiday);
- If the employee gives the employer a request to engage in reasonable secondary employment or a request for training or professional development, the employer must consider the request and must not unreasonably refuse the request; and
- The period counts as 'service' for the purposes of the FW Act.

### **Directions about duties of work – Legacy Employers (s.789GJB of the FW Act)**

A Legacy Employer who holds a 10% Reduction in Turnover Certificate (or a Statutory Declaration for small businesses with less than 15 employees) is able to direct an employee for whom the employer previously received a JobKeeper payment, during a period to perform any duties within their skill and competency.

The direction can only be given if the duties are safe, if the employee is licensed and qualified to perform the duties (if a licence or qualification is necessary), and if the duties are reasonably within the scope of the employer's business operations.

An employee does not need to comply with the direction if it is unreasonable in all the circumstances.

The employer must ensure that the employee's base rate of pay (worked out on an hourly basis) is not less than the greater of the base rate of pay that would have been applicable to the employee if the direction had not been given and the base rate of pay that is applicable to the duties the employee is performing.

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Any direction must be in writing (which can be by electronic means).

In addition, the employer must have information to support a reasonable belief the direction for changed work duties is necessary to continue the employment of one or more employees.

### **Directions about the location of work – Legacy Employers (s.789GJC of the FW Act)**

A Legacy Employer who holds a 10% Reduction in Turnover Certificate (or a Statutory Declaration for small businesses with less than 15 employees) is able to direct an employee for whom the employer previously received a JobKeeper payment, during a period to perform duties at a place (including the employee's home) that is different from the employee's normal workplace.

The direction can only be given if the place is safe and suitable for the employee's duties and if the duties are reasonably within the scope of the employer's business operations. Also, if the place is not the employee's home, the direction must not require the employee to travel a distance that is unreasonable.

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Any direction must be in writing (which can be by electronic means).

In addition, the employer must have information to support a reasonable belief the direction for changed work location is necessary to continue the employment of one or more employees.

### **Days and times of work agreements – Legacy Employers (s.789GJD of the FW Act)**

A Legacy Employer who holds a 10% Reduction in Turnover Certificate (or a Statutory Declaration for small businesses with less than 15 employees) is able to reach agreement with an employee for whom the employer previously received a JobKeeper payment, for the employee to perform work on different days or at different times during a period than the employee's ordinary days or times of work.

Such an agreement can only be reached if performance of the duties on different days or at different times is safe and reasonably within the scope of the employer's business operations.

The agreement must not reduce the employee's number of hours of work compared with the employee's ordinary hours of work. The number of hours of work for an employee can only be reduced by issuing a JobKeeper enabling stand down direction (see above).

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An employee must consider and must not unreasonably refuse an employer's request for agreement to change work days or times. In the absence of agreement, the FWC can settle a dispute about this by arbitration.

An agreement under these provisions has effect despite any inconsistent provisions in an applicable award, enterprise agreement or contract of employment.

### **Disputes**

The FWC is able to deal with disputes about the operation of the provisions discussed above, including by arbitration.

### **Do you require further advice?**

For further information or assistance, please contact Ai Group.

Ai Group has set up a [special section on our website](#) to provide access to Ai Group advice and assistance relating to the COVID-19 pandemic.

A handwritten signature in black ink, appearing to read 'S. Smith'.

**Stephen Smith**

**HEAD OF NATIONAL WORKPLACE RELATIONS POLICY**