



Australian Government JobKeeper scheme: Amendments to the Fair Work Act

SUMMARY

Legislation has been passed by Parliament temporarily amending the *Fair Work Act 2009* (FW Act) to support the practical operation of the Australian Government's JobKeeper scheme in Australian workplaces.

Ai Group was involved in the development of the legislation and we worked hard to achieve a successful outcome for Members. In addition, many of the provisions in the legislation are based on concepts included in the COVID-19 schedule recently inserted into the Clerks – Private Sector Award by agreement between Ai Group, ACCI, the ACTU and the Australian Services Union.

The amendments to the FW Act allow employers who are eligible to access the JobKeeper scheme to:

- Issue directions to employees about their work duties, work location and the number of hours of work; and
- Make agreements with employees about the days and times of work, and annual leave arrangements. An employee must consider and must not unreasonably refuse the employer's request for agreement to proposed arrangements.

Various safeguards apply.

The Fair Work Commission (FWC) has been given the power to resolve disputes about the rights and entitlements of employers and employees under the new provisions, including by arbitration

The JobKeeper scheme

The Australian Government's JobKeeper scheme and the eligibility of businesses and employees are discussed in the Member Advice: [Australian Government JobKeeper scheme: Eligibility and structure](#).

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

Amendments to the FW Act

Schedule 1 of the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020* amends the FW Act to support the operation of the JobKeeper scheme. The Bill was passed by Parliament on 8 April 2020 and will come into operation shortly.

The amendments temporarily insert a new Part 6-4C (Coronavirus economic response) into the FW Act which will be automatically repealed on 28 September 2020.

Only employers that qualify for the JobKeeper scheme are eligible to use the new provisions in the FW Act.

The provisions are summarised below.

JKPs and employer payment obligations

Employers that qualify for the JobKeeper scheme must meet certain minimum payment obligations to employees, including:

- Ensuring that at least the value of JobKeeper payments (JKPs) they receive from the Australian Government (i.e. \$1,500 per fortnight) is passed on to the employees by the end of each fortnight; or
- If an employee is entitled to receive a higher amount for the work that the employee carries out for the employer in the fortnight (e.g. under an award, enterprise agreement or contract of employment), ensuring that the employees are paid the amount that they are entitled to receive.

Heavy penalties apply for breaches of these requirements.

Under the JobKeeper scheme, an employer pays its employees directly through its normal payroll system. The JKPs are made by the Government to the employer to cover a maximum of \$1,500 per fortnight of the payments made by the employer to each employee.

Superannuation contributions are only required to be paid on amounts paid to an employee for work actually performed by the employee.

Example 1

Joe is stood down and does not carry out any work for his employer during the fortnight. The employer is required to pass on the \$1,500 JKP to Joe. The employer is not required to make superannuation contributions on the \$1,500 per fortnight paid to Joe.

Example 2

Mary is a full-time employee who earns \$30 per hour for a 76-hour fortnight (i.e. \$2,280 per fortnight) under the terms of her employment contract. Due to a significant drop in demand from customers as a result of the COVID-19 crisis, Mary's employer decides to give her a *JobKeeper enabling stand down direction* (see below) reducing her ordinary hours from 76 hours to 64 hours per fortnight. Mary is entitled to receive \$30 per hour for the 64 hours that she now works each fortnight (i.e. \$1,920 per fortnight). Mary's employer can apply the \$1,500 JKP towards Mary's fortnightly pay. The employer must make superannuation contributions on the \$1,920 per fortnight paid to Mary.

Example 3

David is a full-time employee who earns \$30 per hour for a 76-hour fortnight (i.e. \$2,280 per fortnight) under the terms of his employment contract. David continues to work on a full-time basis and his employer is required to continue to pay him \$30 per hour. However, his employer can apply the \$1,500 per fortnight JKP towards David's fortnightly pay. The employer must make superannuation contributions on the \$2,280 per fortnight paid to David.

Example 4

Ayesha is a part-time employee who earns \$30 per hour for a 15-hour week (i.e. \$900 per fortnight) under the terms of her employment contract. Ayesha continues to work on the same part-time basis and her employer is required to continue to pay her \$30 per hour. Her employer is required to pay Ayesha the \$1,500 per fortnight that it receives under the JobKeeper scheme for her. The employer must make superannuation contributions on the \$900 per fortnight paid to Ayesha for the 15 hours of work that she carries out for the employer each fortnight but is not required to make superannuation contributions on the other \$600 that is paid to her each fortnight.

JobKeeper enabling stand down directions

An employer who qualifies for the JobKeeper scheme for a particular 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.

The employer must comply with the employer payment obligations (see above). 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 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

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 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).

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

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 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

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. Also, 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 workdays or times. In the absence of agreement, the 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.

Employer requests for employees to take paid annual leave

An employer who qualifies for the JobKeeper scheme for a particular employee is able to request that the employee take paid annual leave.

The employee must consider (and must not unreasonably refuse) their employer's request to take annual leave, provided that the leave arrangement would not result in reducing the employee's leave balance to fewer than two weeks. If the employee does not agree to the request, the FWC can settle a dispute about this by arbitration.

In addition, an employer and an employee are able to agree upon the employee taking twice as much annual leave at half the rate of pay.

These provisions have 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?

The information on the JobKeeper Scheme and the eligibility of businesses and employees please see the Member Advice: [Australian Government JobKeeper scheme: Eligibility and structure](#).

For further information or assistance about the changes to the FW Act and other workplace relations issues, please contact the Ai Group Workplace Advice Line on 1300 55 66 77. The Advice Line is experiencing a very high volume of calls at the present time. Members can email workplaceadvice@aigroup.com.au to receive a call back. Thank you for your patience and understanding.

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.

Also, Ai Group encourages members to email jobkeeper@aigroup.com.au with inquiries relating to the eligibility and structure of the JKP.

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

Stephen Smith
Head of National Workplace Relations Policy

FURTHER INFORMATION

For further information or assistance, please contact the Ai Group Workplace Advice Line on 1300 55 66 77