

Industrial Relations Update

AEN Mid-Year Conference

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- JobKeeper changes to the Fair Work Act and extension of provisions
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JobKeeper changes to the Fair Work Act

Apply to employers who meet the eligibility criteria for JobKeeper payments

Provide for **directions** and **requests** to be made to employees

JobKeeper changes to the Fair Work Act

Enable employer to make JobKeeper enabling **directions** to employees receiving JobKeeper payments:

- Reduction in hours/days of work (including to nil)
- Alternative duties
- Alternative location

JobKeeper changes to the Fair Work Act

Enable employer and employee to **agree** to:

- Variations to the days of work – i.e. work on different days and at different times to their usual days/hours of work (as opposed to directions to reduce days/hours of work)
- Annual leave at half pay

Variation to work arrangements

Apply when

- an employee cannot be usefully employed for their normal days or hours because of changes to business attributable to Coronavirus (and associated government initiatives)

Variation to work arrangements (reductions)

Employee can be directed to:

- not work on particular days they would ordinarily work; or
- work for a lesser period than they would ordinarily work on particular days; or
- work a reduced number of hours (including nil hours)

Variation to work arrangements

- Employees do not have to comply with a direction if it is unreasonable in all the circumstances.
- Employees subject to a direction may ask to engage in reasonable secondary employment, training or professional development. Employers must consider and must not unreasonably refuse these requests.

Other JobKeeper enabling directions

- If an employer reasonably believes it is necessary to continue the employment of one or more employees, the employer can also give the following JobKeeper Enabling Directions

Alternative duties

- To perform any duties within their skill and competency
(provided that the duties are safe, reasonably within the scope of the employer's business operations and the employee is competent and licenced to perform those duties)

Alternative location

- To work somewhere other than their usual place of work (including their home)
(provided the location is suitable for the employee's duties, does not require the employee to travel an unreasonable distance and performance of the employees' duties at the place is safe and reasonably within the scope of the employer's business operations)

Agreements to vary days of work

Employers receiving the JobKeeper Payment can also **request** an eligible employee:

- to work on different days and times to their ordinary days or hours of work

(provided performance of the employees' duties on those days or at those times is safe and reasonably within the scope of the employer's business operations)

Agreements re annual leave

Employers receiving the JobKeeper Payment can also **request** an eligible employee to:

- take annual leave at full pay (provided the employee will have at least 2 weeks of annual leave remaining).

Employers and employees may also agree to the employee taking annual leave at half pay for twice the time

Agreements to vary days of work and annual leave

An employee must consider such requests from their employer, and must not unreasonably refuse the request. This means that an employee **cannot be directed** to take annual leave or work on different days or at different times.

Affect on service and entitlements

- A period to which a direction applies counts as service for all purposes, including where a JobKeeper Stand Down direction has reduced an employee's hours to zero – so leave continues to accrue
- Public Holidays occurring during a stand down have to be paid (for days usually worked prior to stand down)
- Stood-down employees cannot use personal leave but can elect to take annual leave

Rates of pay

If an employee has been given a direction changing their duties of work, and the new duties would ordinarily attract a higher rate of pay, the employee must be paid that higher rate of pay. Employees must also continue to be paid any applicable penalty rate or other allowance that applies to the hours they work

Rates of pay

Employers receiving the JobKeeper Payment must ensure that employees receive a minimum of \$1,500 per fortnight (before tax). An employee's hourly rate of pay for hours worked cannot be reduced by a JobKeeper Enabling Direction.

Rates of pay

If an employee worked so many hours so that they are entitled to more than \$1,500 per fortnight (before tax), including any applicable penalty rates, allowances, loadings or leave payments, the employer must pay them the full amount for the hours worked.

Superannuation

Superannuation is payable on all ordinary hours worked

Consultation requirements

An employer must:

- not misuse a JobKeeper direction
- consult employees at least 3 days' prior to the direction being given (unless a shorter period is genuinely agreed to by the employees); and
- provide the direction in **writing**

Disputes

The Fair Work Commission may mediate, conciliate or arbitrate a dispute referred to it, and can make any order it considers appropriate, including upholding, setting aside, or varying a JobKeeper Enabling Direction, or making any other order it considers appropriate

FWC can hear disputes about:

- temporary and partial stand downs
- temporary changes to an employee's usual duties and locations of work
- agreements about altering an employee's days and times of work
- agreements about use of annual leave
- employee requests for secondary employment and training

FWC cannot hear disputes about:

JobKeeper eligibility (ATO)

JobKeeper payments

Dispute decisions so far....

- Unreasonable to only reduce one employee's hours to zero and not share the reduction in hours amongst a team
- Failure to consult unreasonable
- Recommendation that employee take annual leave (non-appearance by employee)
- Employee with 10 weeks annual leave and 9 weeks LSL refusal to take annual leave 1 day per week unreasonable

Dispute decisions so far

- Direction for casual employee to work additional hours reasonable but decision overturned by full bench because the direction *"disproportionately and unfairly affects one category of employee over another"*.
- Another case found direction to work additional hours unreasonable because of employee's other commitments and treating one employee differently

Employee Protections

While a direction or agreement under the changes to the FWA can temporarily override an award, enterprise agreement or contract of employment, it is limited to the content of the JED or agreement, and all other requirements under awards, agreements or contracts continue to apply unaffected

Employee Protections

When a JED or agreement ceases, the employee's terms of employment revert back to being entirely set by the relevant award, agreement or contract in the same way it was before the direction was given or agreement made.

Timing

- An authorised direction will remain in effect until revoked or replaced by the employer, or until the JobKeeper provisions cease completely on 28 September 2020
- Federal Government is introducing amendments to the legislation to extend the changes to the Fair Work Act consistent with the extension of JobKeeper

JobKeeper 2.0 – Proposals contained in the bill amending the Fair Work Act

- Bill proposing amendments to the existing provisions of the Fair Work Act
- Existing flexibilities for eligible employees (except annual leave) will remain in force until March 2021 to reflect the extension of JobKeeper to qualifying employers.

JobKeeper 2.0 – Directions to continue

- The legislation allowing **eligible** employers to issue JobKeeper Enabling Directions to eligible employees will continue including to stand employees down, perform other duties, change location of work and reduce employee hours (including to zero)

JobKeeper 2.0 – Legacy employers

Businesses that previously received JobKeeper but do not re-qualify under new eligibility rules will be known as "legacy employers" and subject to a new turnover test.

Legacy employers will have continued access to some flexibilities if they can demonstrate their turnover has declined by 10% or more in relevant quarters this year compared to last year.

JobKeeper 2.0 – Legacy employers

- Job enabling directions for legacy employers which reduce an employee's hours are authorised if the direction does not reduce the hours to less than 60% of their hours as at March 2020, and cannot direct them to work less than two hours in a day;
- Job enabling directions to perform different duties or work at a different location (including home) continue to be authorised

JobKeeper 2.0 – Legacy employers

- Employer directions which reduce hours for a category of employees may be unreasonable if they have an unfair effect on some of those employees compared to other employees who are subject to those directions.

JobKeeper 2.0 – Legacy employers

- Employers and employees continue to be able to agree to the employee working on different days and at different times
- Employers will have to give employees seven days' notice of a direction
- Agreement to take annual leave will not continue for legacy employers

JobKeeper 2.0 – Legacy employers

- Directions cease immediately if at the two test times of 28 October 2020 or 28 February 2021 the employer no longer meets the turnover test
- Written notice if the termination of the direction is required to be given to the employee before the test time if the turnover test will not be met at the test time

JobKeeper 2.0 – New pay rates

- Under the changes, the current JobKeeper rate of \$1500 a fortnight will drop to \$1200 a fortnight from late September and to \$1000 a fortnight from early January, with a lower payment introduced for employees who worked less than 20 hours a week before the pandemic.

JobKeeper 2.0 – process

- The new provisions will implement a 7-day consultation provision to replace the 3 day consultation period.
- The employer has to keep a written record of the consultation
- Eligible financial service provider (e.g. registered auditor, tax agent or accountant) can issue a 10% decline in turnover certificate

Other issues related to JobKeeper

- All provisions of the Fair Work Act and awards (other than the changes referred to above) remain in place including:
 - award obligations to consult with employees prior to redundancy
 - pay all award terms and conditions for all hours of work performed

Other issues related to JobKeeper

- Stand down provisions of the Fair Work Act (other than JobKeeper related stand downs) continue to be available where employee cannot be usefully employed for reasons out of the employer's control

JobKeeper changes to Awards

- Most awards (99) have had a new schedule X inserted
- unpaid pandemic leave
- annual leave at half pay

JobKeeper changes to Awards – paid and unpaid pandemic leave

- In addition to unpaid pandemic leave:
- 2 weeks paid pandemic leave has been inserted into the Aged Care, Nurses and Health professionals awards for full-time and part-time employees and casual employees employed on a regular and systematic basis covered by those awards working in the Aged care sector

JobKeeper changes to Awards - Hospitality

The above award was varied to provide flexibility in relation to:

- the range of duties employees can be required to perform;
- reduction of ordinary hours for full-time and part-time employees to between 60% and 100%;
- employees being directed to take annual leave
- employees by agreement taking twice the amount of annual leave at half pay.

JobKeeper changes to Awards - Clerks

The above award was varied to provide flexibility during the COVID-19 pandemic in relation to:

- the range of duties employees can be required to perform;
- the minimum engagement for part-time and casual employees working from home;
- the spread of ordinary hours of day workers working from home;
- temporary reduction of ordinary hours by agreement;
- employees being directed to take annual leave, and employees by agreement taking up to twice the amount of annual leave at a proportionately reduced pay rate; and
- a reduced notice period for close-down.

JobKeeper changes to Awards – Restaurant Award

The above award was varied to provide during the COVID-19 pandemic in relation to:

- the range of duties employees can be required to perform;
- the reduction of ordinary hours of work for full-time and part-time employees;
- employees being directed to take accrued annual leave with 24 hours' notice, subject to considering an employees' personal circumstances;
- employees, by agreement, taking up to twice the amount of the accrued annual leave at half pay; and
- a reduction in the notice period for a close-down.

JobKeeper changes to Awards – Vehicle Award

The above award was varied to provide during the COVID-19 pandemic in relation to:

- Capacity to temporarily reduce hours of full-time and part-time employees (requests for secondary employment to be considered)
- Request for employees to take annual leave, and capacity to take annual leave at half pay (annual leave to commence prior to 31 August 2020)

Annual wage decision 2020

1.75% increase to award wages and federal minimum wage

New C10 rate \$862.50 per week
 \$22.70 per week

Federal Minimum wage \$753.80 per week (↑ \$13.00)
 \$19.84 per hour (↑ 0.35c)

Wage Increase is effective in three tranches

Annual wage decision 2020

Group 1 Awards - from 1 July 2020

- Frontline Health Care & Social Assistance Workers
- Teachers and Child Care
- Other Essential Services

Group 2 Awards - from 1 November 2020

- Construction
- Manufacturing
- A range of other industries

Group 3 Awards - from 1 February 2021

- Accommodation and Food Services
- Arts and Recreation Services
- Aviation
- Retail and Tourism

Casual Loadings on overtime – labour hire

FWC Full bench has issued a decision dealing with how casual loadings interact with overtime penalties.

Three approaches have been identified:

- Casual loading not payable on overtime
- Casual loading payable on overtime on a cumulative basis
- Casual loading payable on a compounding basis

The Commission is in the process of issuing draft orders which seek to remove the ambiguity in the operation of the casual loading in many awards and removing ambiguity.

New 2020 awards

The FWC has issued revised 2020 versions of 2 tranches of modern awards.

A number of awards are still in the process of being reviewed and updated and should be finalized during the remainder of 2020.

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