

Frequently Asked Questions

JobKeeper changes to fair work laws

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The Government has now passed legislation that gives effect to its JobKeeper wage subsidy package announced a few weeks ago. The package of legislation makes changes to a series of existing laws, including significant changes to the Fair Work Act 2009.

Employers should always be conscious of their particular circumstances, legal obligations applicable under the Fair Work Act 2009, respective State and Territory WHS legislation and workers compensation legislation, as well as enterprise agreements, awards, contracts and policies and should seek further advice from our MBAV IR team on 03 9411 4555.

The JobKeeper scheme: general, payments and eligibility

What is the JobKeeper Payment scheme?

The JobKeeper Payment scheme is a wage subsidy to assist businesses that are significantly impacted by COVID-19. The purpose of the scheme is to assist businesses to pay and retain their staff. Under JobKeeper, eligible businesses that have suffered significantly reduced turnover will be paid \$1500 per fortnight (before tax), per qualifying employee, for up to six months. The payments will commence from 1 May 2020 and will be backdated to 30 March 2020.

Which businesses are eligible?

Employers must meet these conditions to be eligible for the JobKeeper Payment scheme:

- For businesses with annual aggregated turnover less than \$1 billion, the turnover of the business has reduced (or will reduce) by more than 30% (of at least one month).
- For businesses with annual aggregated turnover greater than \$1 billion, the turnover of the business has reduced (or will reduce) by more than 50% (of at least one month).
- For not-for-profits and charitable organisations registered with the Australian Charities and Not-for-profits Commission (ACNC), other than certain educational charities, the annual turnover of the organisation has reduced (or will reduce) by more than 15% (of at least one month).

Turnover for the purposes of a business' eligibility is the entity's projected GST turnover for a test period, and this is compared to the entity's GST turnover for a relevant comparison period. Eligible employers will be able to apply for the JobKeeper Payment through the ATO.

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How is 'turnover' defined?

Turnover is calculated as it is for GST purposes and is reported on Business Activity Statements (BAS). It includes all taxable supplies and all GST free supplies but not input taxed supplies. Only Australian based sales are included and therefore, only Australian based turnover is relevant for this test. A decline in overseas operations will not be counted in the turnover test.

How do I establish a reduction in turnover?

Most businesses are expected to be able to establish that their turnover has fallen in the relevant month or three months (depending on the natural activity statement reporting period of that business) relative to their turnover a year earlier in 2019. However where a business's turnover a year earlier is not representative of their usual or average turnover, (e.g. because there was a large interim acquisition or their turnover is typically highly variable) the Tax Commissioner will have discretion to consider additional information that the business can provide to establish that they have been significantly affected by the impacts of COVID-19.

The Tax Commissioner will also have discretion to set out alternative tests that would establish eligibility in specific circumstances (e.g. eligibility may be established as soon as a business has ceased or significantly curtailed its operations). There will also be some tolerance where employers, in good faith, estimate a greater than 30 % (or 50%) fall in turnover but actually experience a slightly smaller fall.

What if I've been trading for less than 12 months?

Where a business has not been in operation for a year and therefore will have an issue showing that turnover has fallen relative to a year earlier, the Tax Commissioner will have discretion to consider additional information that the business can provide to establish that they have been significantly affected by the impacts of COVID-19.

What if my turnover has not yet decreased, but I believe it will in the coming month?

Employers can apply for the JobKeeper Payment if they reasonably believe their turnover will fall by 30% (or 50%) relative to turnover in a corresponding period a year earlier.

My turnover is likely to decrease later this year – can I apply then?

Businesses can apply for the JobKeeper Payment at a later time once the turnover test has been met. In this scenario, the JobKeeper Payment is paid from the date an employer becomes eligible (not backdated to the commencement of the scheme).

JobKeeper Payments can be received up to 27 September 2020.

Which employees are eligible?

JobKeeper payments will be available for all employees that are employed by an eligible employer and who were employed on 1 March 2020. This includes full-time, part-time and long-standing casual employees.

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To be eligible, employees must meet the following criteria:

- Employees must currently be employed by an eligible employer.
 - Note that this includes employees who have been stood-down, or employees who were terminated but have been re-hired by the employer).
- Employees must have been employed by the employer on 1 March 2020.
- Employees must be employed full-time, part-time or as a 'long-term' casual (being a casual employee that had been employed on a regular and systematic basis for longer than 12 months as at 1 March 2020).
- Employees must be at least 16 years old.
- Employees must be an Australian citizen or permanent resident, or hold other specified classes of visa; and
- An employee can only have one employer receive JobKeeper Payments with respect to them (ie multiple employers cannot receive JobKeeper payments in respect of one individual, even if the individual is employed by multiple employers).

Employees are not eligible for JobKeeper payments:

- for periods in which they are in receipt of parental leave pay under the Paid Parental Leave Act 2010 (Cth).
 - Note that employees may receive JobKeeper payments if they are in receipt of paid parental leave from their employer pursuant to an enterprise agreement, contract of employment or similar instrument.
- for periods in which they are totally incapacitated for work and an amount is payable to them under workers' compensation laws.

Is there an employee 'income cap' or similar?

There is no income cap on eligibility for employees. Therefore, an eligible employer may receive the subsidy in respect of any eligible employees including its highest paid employees.

Are apprentices and trainees covered?

Yes. But only if they meet all of the relevant employee eligibility requirements.

Are employers eligible to receive both the JobKeeper Payment and the Supporting Apprentices and Trainees wage subsidy?

No. The JobKeeper Payment is considered 'equivalent' for the purposes of Supporting Apprentices and Trainees wage subsidy, as it is designed to help businesses cover the costs of their employees' wages. Therefore, an employer will not be allowed to claim both payments simultaneously. For any period where the employer elects to claim the JobKeeper Payment they will not be able to claim the Supporting Apprentices and Trainees wage subsidy.

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Where an employer is not eligible for the JobKeeper payments, can they still be assessed as eligible for Supporting Apprentices and Trainees subsidy?

Yes. Employers should contact their Australian Apprenticeship Support Network Provider for assistance.

How do employers receive the JobKeeper Payment?

In order to receive the JobKeeper payment employers must do the following:

- Employers must elect to participate in the scheme.
- Employers can register their interest online now at the ATO website.
- Employers will subsequently need to apply for the JobKeeper Payment through an online application (this is not yet available).
 - In applying for JobKeeper employers will need to provide information to the ATO on the number of eligible employees engaged as at 1 March 2020 and those currently employed by the business (including those stood down or rehired). For most businesses the ATO will use Single Touch Payroll data to pre-populate the employee details for the business.
- The ATO will need to assess whether an employer has experienced the required turnover decline (employers will need to provide supporting information demonstrating the necessary downturn in their business).
- Once approved, ensure that each eligible employee receives at least \$1,500 per fortnight (before tax).
- Notify all eligible employees that you have nominated them as an eligible employee for the purposes of JobKeeper Payments.
- Provide monthly updates to the ATO on the number of eligible employees employed by the business.

What must be paid to employees who are eligible for JobKeeper?

JobKeeper qualifying employers are required to meet minimum payment obligations for those employees who are subject to a JobKeeper direction or request.

These include ensuring that at least the value of JobKeeper payments an employer receives is passed on to employees each fortnight, or the amount they would receive for the work they have performed, whichever is greater.

Employees who are usually paid less than \$1500 per fortnight will be entitled to the full \$1500 payment, so may actually receive more under JobKeeper than they might ordinarily earn.

Employees usually paid more than \$1500 per fortnight and who are required to work for hours that would result in earnings higher than \$1500 per fortnight should be paid the balance of their wages by the employer.

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What are the eligible periods for reimbursement?

Employers will need to satisfy payment requirements in respect of each 14-day period covered by the scheme. The first period starts on Monday, 30 March 2020 and ends on Sunday, 12 April 2020.

Employers must pay their eligible employees a minimum of \$1,500 per fortnight in the scheme payment periods.

What if I pay my employees monthly?

Where an employer pays their staff monthly, the ATO will be able to reallocate payments between periods. However, overall an employee must have received the equivalent \$1,500 per fortnight.

How long will the JobKeeper Payments last?

For up to six months, running from 30 March 2020 to 27 September 2020. The final period will start on Monday 14 September and end on Sunday 27 September 2020.

Are employers who have already stood down employees without pay eligible for the JobKeeper Payment?

Yes, employers who have stood down their employees (in part or full) are still eligible for the JobKeeper Payment. Employees who have been stood down must be paid at a minimum the \$1,500 JobKeeper Payment per fortnight, before tax for the payment periods of the JobKeeper Scheme. It will be up to the employer in this circumstance to decide if they want to pay superannuation on the JobKeeper Payment to their employees.

What if an employee who was stood down after 1 March has since applied for income support (JobSeeker)?

Employers who nominate for JobKeeper must advise their eligible employees. A person receiving the JobKeeper Payment cannot also receive the JobSeeker Payment. Employees who have already applied for JobSeeker can notify Services Australia (formerly Centrelink) to withdraw and shift to the JobKeeper Payment if their employer notifies them that they have nominated for JobKeeper.

What if my employee who was stood down after 1 March 2020 has since got another job?

Employees can only receive the JobKeeper payment once.

If an employee was stood down (after 1 March 2020) and has subsequently obtained alternative employment (and have not resigned from their employer who stood them down), they are still eligible for the JobKeeper payment with their employer who has stood them down. This means their employer can apply and can pay them \$1,500 per fortnight before tax.

The employees' new employer will not be eligible for the JobKeeper Payment for them as they have

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been employed after 1 March 2020 and are therefore not an eligible employee with that employer. If the employer who stood the employee down registers and applies for the JobKeeper Payment they should notify that employee.

Can I direct my employee to now do work, if they had previously been stood down (under the conventional section of the Fair Work laws) but are now eligible to receive JobKeeper?

Not while they are still stood down under section 524 of the Fair Work Act. A stand down by its very definition means that an employer's employees cannot be "usefully employed" by the employer because of a stoppage of work for which the employer cannot reasonably be held responsible.

However, if circumstances change and an employer decides that they can now "usefully employ" an employee, an employer can take an employee off stand down. An employer may then seek to utilise the new JobKeeper enabling stand down provisions, which allow more flexibility in terms of a reduction of hours (including a complete reduction to nil). The notice and consultation requirements under these new provisions should be followed.

In these circumstances, employers need to be mindful of and weigh up the risk of a potential claim that the initial stand down was unlawful (e.g. that the employee could have in fact been "usefully employed") as they could be ordered to back pay their employees.

The JobKeeper scheme: fair work act

What flexibilities are provided under the JobKeeper changes?

The changes made to the FW Act give employers temporary powers to implement flexibility measures in order to save jobs.

These powers allow employers to:

- issue JobKeeper enabling directions, including directions requiring to employees to:
 - o work reduced hours or days (a JobKeeper enabling stand down direction);
 - o undertake alternate duties; or
 - o work at an alternate location;
- make JobKeeper requests, including requests that:
 - o employees work on different days or alternate hours of work;
 - o employees take accrued annual leave; and
 - o make JobKeeper agreements with employees for annual leave to be taken at half pay.

What is a JobKeeper enabling request?

Employers can request employees to work reduced days or alternate hours of work, and request that employees take accrued annual leave (provided that their leave balance does not reduce to below 2 weeks).

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If an employer makes such a request of an employee, the employee must not unreasonably refuse the request.

What is a JobKeeper enabling stand down direction?

A JobKeeper enabling stand down direction allows an employer to direct an employee to:

- not work on a day or days on which the employee would usually work; or
- work for a lesser period than the period which the employee would ordinarily work on a particular day or days; or
- work a reduced number of hours (compared with the employee's ordinary hours of work), including reducing hours to nil.

During a JobKeeper enabling stand down, the employer must:

- pay the employee each fortnight at least the greater of:
 - the \$1500 JobKeeper payment; or
 - the amounts payable to the employee in relation to the performance of work during the fortnight (including all wages, allowances, loadings, penalties, etc); and
- not reduce the employee's ordinary hourly rate of pay for each hour of work performed.

However, a JobKeeper enabling stand down direction can only be given, among other restrictions, if the employee cannot be usefully employed for their normal days or hours of work because of changes to business attributable to:

- the COVID 19 pandemic; or
- Government initiatives to slow the transmission of COVID 19.

When a JobKeeper enabling stand down direction is given to an employee, the employer must not unreasonably refuse a request by that employee:

- to engage in reasonable secondary employment; or
- for additional training or professional development.

How does an employer know if an employee cannot be "usefully employed"?

This situation arises when an employee has no useful work available to perform because of the COVID-19 pandemic or because of the Public Health Orders and Directions (however described in each State and Territory) imposing restrictions on individuals and businesses.

Useful work does not have to be the work that the employee ordinarily performs but needs to be genuine productive work that provides a "net benefit" to the employer. Employers should be able to demonstrate that the impacts of the virus or the Government's measures to deal with it have caused the fact that there is no useful work available for the period the employee is stood down.

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What are the other types of JobKeeper enabling directions?

Two other types of JobKeeper enabling directions are available to employers, being a direction to

- undertake alternate duties; or
- work at an alternate location.

When can an employer alter an employee on JobKeeper's location of work?

An employer can direct an employee who qualifies for JobKeeper and is entitled to payments to perform their duties at a place different to their normal workplace including the employee's home provided that:

- The place is suitable for the employee's duties
- The performance of the duties at that place is generally safe and specifically safe having regard to the nature and spread of COVID-19.
- The performance of the duties at that place is reasonably within the scope of the employer's business operations.

AND the employer has information before them that leads them to reasonably believe that this JobKeeper direction with respect to location of work is necessary to maintain the employment of the employee.

(Note: "Necessary" is should not be considered as merely desirable or preferred, but actually "necessary" or "but for" directing the employee to a different work location, the employee would be made redundant.)

What are the rules employers must follow when issuing JobKeeper enabling directions to employees?

A JobKeeper enabling direction given to an employee to stand down, undertake alternate duties or work at an alternate location, will be of no effect if either:

- if the direction is unreasonable in all of the circumstances; or
- the consultation obligation has not been complied with.

The consultation obligation for JobKeeper enabling directions requires an employer:

- to give an employee at least 3 days' written notice of its intention to issue the direction; and
- to consult with the employee (or their representative) prior to giving the direction.

A JobKeeper enabling direction given to an employee to undertake alternate duties or work at an alternate location, will also be of no effect unless the employer has information before them that leads them to reasonably believe that the direction is necessary to continue the employment of one or more employees of the employer.

All JobKeeper enabling directions will cease to have effect at 12.00 am on 28 September 2020, unless

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removed prior to that time.

Do JobKeeper directions need to be in writing?

A JobKeeper direction must be given to an employee in writing (this could include by electronic means) and in a form set out in the regulations (note this is not yet published).

Does an employee have to follow a JobKeeper direction given by an employer?

Yes, employees must comply with a JobKeeper employer direction unless the direction is unreasonable in all the circumstances (this could for example, depend on its impact on an employee's caring responsibilities). Where a direction is unreasonable it does not apply to an employee.

Can an employer give a JobKeeper direction which has the effect of making an employee redundant?

No, a JobKeeper direction cannot amount to redundancy.

What happens if there is a dispute or disagreement?

Employers, employees and their representatives may raise disputes with the Fair Work Commission (FWC) about JobKeeper requests and directions.

The FWC may deal with disputes in whatever way it sees fit, including by arbitration (meaning that it can make decisions that are binding on the parties).

In dealing with a dispute, the FWC must take into account fairness between the parties concerned.

What protections exist to stop workplaces exploiting or abusing JobKeeper enabling directions?

An employer will be subject to stiff fines (up to \$63000 per contravention for companies and up to \$12600 per contravention for an individual) if it tries to give a JobKeeper enabling direction that the legislation does not allow and the employer knew that this was the case.

JobKeeper and payments to employees

What conditions must be satisfied regarding JobKeeper payments to employees?

There are three things to satisfy

- The "wage condition" guarantee: which requires all employees to be paid at a minimum \$1,500 per fortnight before tax.
- The minimum payment guarantee: An employer must ensure that the amount payable to a particular employee each fortnight is the greater of:
 - The \$1,500 JobKeeper amount; or
 - The total amount owed to the employee for the performance of work during the fortnight (in full).

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- o Note: The “total amount” includes any of the following that may have become payable during the fortnight:
 - Incentive-based payments and bonuses.
 - Loadings.
 - Monetary allowances.
 - Overtime or penalty rates.
 - Leave payments.
- o The hourly rate of pay guarantee: this requires that any reduction to the hours/ days of an employee cannot reduce an employee’s “hourly base rate of pay” (the hourly rate the employee earned before the reduction in hours/days). An employee must still be paid their “hourly base rate” for any work they perform during the fortnight. An employee’s “hourly base rate” does not include any additional allowances, loadings or penalties added.

What rate do I pay if an employee is working different duties?

For an employee performing new duties their hourly base rate is either:

- The employee’s new hourly rate for the new duties being performed if they attract a higher rate of pay; or
- The employee’s old hourly rate if the new hourly rate for the new duties is lower than the old rate (prior to the direction to change duties)

What happens to employee entitlements and accruals during JobKeeper?

Employees subject to a JobKeeper enabling direction will continue to accrue and take service-related entitlements as if the direction had not been issued.

This means that employees will continue to accrue annual and personal leave at their usual rate and will be entitled to service related entitlements such as redundancy pay and payments in lieu of notice as if they were working their usual hours of work.

Can a stand down direction issued by an employer apply when an employee is on leave (annual, personal etc.)?

No, a stand down direction does not apply to an employee during a period when the employee is taking paid or unpaid leave.

This means that when an employee is stood down (partial or full) and they subsequently go on leave, their rate of pay will return to what it was prior to the direction to stand down.

If an employee is stood down as a result of JobKeeper direction from an employer what happens to the accrual of their leave entitlements?

The employee accrues leave entitlements as if the direction to stand down had not been given.

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Does the period when an employee is stood down count towards continuity of service?

Yes, it counts for the purpose of continuity of service.

Will tax and superannuation apply to JobKeeper payments?

JobKeeper payments to employees are taxable like other payments to employees, and PAYG withholding obligations will apply. The \$1500 payment is before tax.

For payments made to cover an employee's usual wages, superannuation is payable according to the ordinary rules for payments to employees for ordinary time earnings.

For payments (or parts of payments) to employees in excess of an employee's usual wages, superannuation is not required to be paid. This situation may arise where:

- an employees' usual wages are less than \$1500 per fortnight (ie superannuation would be payable on the part of the \$1500 payment necessary to cover the employee's wages, but not on any windfall balance); or
- employees have been stood down without pay (ie superannuation will not be payable on the \$1500 JobKeeper payment paid to employees as it is not paid as ordinary time earnings for work that has been undertaken).

Where can I register?

Eligible businesses can apply for the payment online and are able to register their interest via ato.gov.au

Other recent covid-19 changes to modern awards

I understand that the Fair Work Commission has also made some COVID-19 changes to Modern Awards – what are they?

The Fair Work Commission has made temporary changes to almost 100 Modern Awards, creating two new types of leave arrangements as a means to help employers and employees respond to COVID-19 challenges. The new leave arrangements involve an 'Unpaid Pandemic Leave' and a flexible approach to annual leave.

- Unpaid pandemic leave will be 2 weeks unpaid leave if an employee is required, by government or medical authorities or acting on the advice of a medical practitioner, to self-isolate and is consequently prevented from working, or is otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic.
- Annual leave changes mean instead of an employee taking paid annual leave on full pay, the employee and their employer may agree to the employee taking twice as much leave on half pay.

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Do the COVID-19 changes apply to all awards? Have construction Awards changed?

The FWC COVID-19 changes do not apply to all awards and the major Construction Awards have not changed at this time as the Fair Work Commission is making the changes in stages and the changes do not yet apply to every Modern Award.

Instead, Master Builders and other employer groups were encouraged to have discussions with building unions to see if we can agree to some industry specific changes.

Where can I find out which awards have had the COVID-19 changes applied?

A summary of the FWC decision and changes can be [found here](#) including a list of Awards that have been changed. Specific variations for each Modern Award can be [found here](#).

Do the COVID-19 Modern Award changes apply to my business if I am not eligible for JobKeeper?

The COVID-19 Modern Award changes will apply to all workplaces if they are covered by the Award (and there are no other arrangements in place, such as an EBA) and the Award has been varied.

Note: An EBA may operate to override or vary Modern Award leave provisions, so the COVID-19 Modern Award changes may be impacted by your EBA. Call your local Master Builders for specific advice.

I am eligible for JobKeeper so the Fair Work Act JobKeeper changes apply to me, and I also use a Modern Award which has been varied to include the COVID-19 Modern Award changes – which one applies?

The Fair Work Act JobKeeper changes operate to the exclusion of any other applicable instrument or arrangement, so they will always override the Modern Award.

Where can I find further information?

Please contact your our MBAV IR team on 03 9411 4513 with any questions or for further information.

The content of this publication has been prepared based on material available to date (14 April 2020). The material in this guide is of a general nature and should not be regarded as legal advice or relied on for assistance in any particular circumstance or situation. In any important matter, you should seek appropriate independent professional advice in relation to your own circumstances. Master Builders Australia or any of its State or Territory Association Members (collectively 'Master Builders') accepts no responsibility or liability for any damage, loss or expense incurred as a result of the reliance on information contained in this guide.