

Fair Work Act Changes and the JobKeeper Scheme

Interactive Summary

[Current as at 05/05/20]



EMPLOYEE
RELATIONS
STRATEGIES

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Current as at 05/05/20

Jobkeeper changes to FW Act

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version of
legislation

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Agreements

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Overview

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- The changes are complex due to the compressed time in which it was drafted and politically negotiated outcomes
 - For example, different rules apply to different aspects – the justifying logic can be hard to fathom at times
- Don't assume commonality of principles across different categories of employment changes
 - Some changes permit employer directions after consultation, others require trying to reach agreement
 - e.g. [stand down directions](#) v. an [agreement to change working hours](#)
- Provided solution in face of employee opposition may not be practical
 - For example, choice of reaching agreement with an employee to alter their working times or take annual leave, or having to go to arbitration if employee disagrees
- But other options may be more feasible...
 - For example, directing employee to [stand down or reduce their hours](#) instead of reaching agreement to take annual leave, as long as it is reasonable etc.
- Importantly, accessing the flexibility created by the changes (e.g. such as a stand down direction) requires the employer to be **paying the employees and** accessing **reimbursement of** the payments under the JobKeeper scheme
 - It seems to us this requires the employee to be paid at least \$1500 per fortnight, in the fortnight the flexibility is being utilized (see s.789GDC(1)(e))
 - **[Make sure you are eligible for the JobKeeper scheme and to be able to use the changes, before acting!](#)**
- The technical process steps need to be closely followed so as not to void the process
 - E.g. giving [3 days written notice of intent to issue a direction, issue direction in writing etc](#)

Definitions – s.789GC

- **designated employment provision** means:
 - (a) a provision of this Act...; or
 - (b) a provision of:
 - (i) a fair work instrument; or
 - (ii) a contract of employment; or
 - (iii) a transitional instrument...
- **fortnight** means a 14-day period beginning on a Monday.

Accessing JobKeeper (JK) changes to FW Act

01

Employer must
qualify for JK
due to turnover
reductions

02

Employee must
qualify as
eligible
employee

03

Employer must
pay employee
at least \$1500
per fortnight

Employer turnover reductions to qualify for JK scheme

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30% reduction in turnover; turnover \leq \$1billion

50% reduction in turnover; turnover $>$ \$1billion

Charities – 15% reduction

Definition of turnover

Ineligible employers

Minimum payment guarantee

Employer eligible for the Jobkeeper scheme to ensure the total amount payable to a particular employee in respect of a fortnight is either:

- the amount of the JobKeeper payment for the employee (currently \$1500 per fortnight); or
- if a greater amount is payable to the employee for the performance of work during the fortnight, that amount (in full).
- See s.789GDA

Self-employed

Self-employed individuals will be eligible to receive the JobKeeper Payment where they meet the relevant turnover test.

- [See additional information](#) regarding sole traders and other entities on ATO website.

Source – [Explanatory Memorandum](#) at 2.9

Charities

For charities registered with the Australian Charities and Not-For-Profit Commission (ACNC), they will be eligible for the subsidy if they estimate their turnover has or will likely fall by 15 per cent or more relative to a comparable period.

- See [Fed. Government announcement](#) regarding charities allowing them to exclude government revenue from the turnover test.

- Source [Treasury.gov.au](https://www.treasury.gov.au)

Ineligible employers

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The Australian Government and its agencies, State and Territory governments and their agencies, foreign governments and their agencies, local governments and wholly-owned corporations of these bodies are not eligible for the JobKeeper payment.

Businesses subject to the Major Bank Levy are also ineligible.



Source [Treasury.gov.au](https://www.treasury.gov.au)

Definition of turnover

- “To establish that a business or not-for profit has faced or is likely to face the relevant fall in turnover, most would be expected to establish that their turnover has or will likely fall in the relevant month or quarter (depending on their Business Activity Statement reporting period) relative to their turnover in a corresponding period a year earlier. Turnover is calculated as it is for GST purposes, and is reported on Business Activity Statements. It includes all taxable supplies and all GST free supplies but not input taxed supplies.
- “Where a business or not-for-profit was not in operation a year earlier, or where their turnover a year earlier was not representative of their usual or average turnover, (for example, because there was a large interim acquisition, they were newly established, were scaling up, or their turnover is typically highly variable), the Tax Commissioner will have discretion to consider additional information that the business or not-for-profit can provide to establish that they have been adversely affected by the impacts of the Coronavirus. Businesses that are in liquidation are not eligible for this payment.
- “The Tax Commissioner will also have discretion to set out alternative tests that would establish eligibility in specific circumstances (for example, eligibility may be established as soon as a business ceases or significantly curtails its operations). There will be some tolerance where employers, in good faith, estimate a 30 per cent or more or 50 per cent or more fall in turnover but actually experience a slightly smaller fall.
- “If a business is part of a consolidated group for income tax purposes, with a turnover of more than \$1 billion, the 50 per cent or more turnover test will apply to each business in that consolidated group. If the consolidated group has turnover of less than \$1 billion, the 30 per cent or more turnover test is applied to each business in that consolidated group. Individual businesses within a consolidated group may be eligible for the JobKeeper payment while other businesses in the group may not be eligible.”
- See [Fed. Government announcement regarding special purpose entities](#).
- Source [Treasury.gov.au](https://www.treasury.gov.au)

Eligible employees

Note –

1. each qualifying condition must be satisfied;
2. Employers are [not permitted to pick and choose between employees](#), as the scheme is meant to be “One-In, All-In”. “One-In, All-In” confirmed in [amendments to the JobKeeper Rules](#), further requiring employers to provide written notice to employees of the employer’s election to participate in the scheme. Nomination forms can be found on the ATO site [here](#).

Must have been
employed as at 1 March
2020

Must be at least 18
years old

Or

An [employee aged 16 or 17](#) who is
considered ‘independent’ or not in full-
time study as defined by the Social
Services Act 1991

Full-time or Part-time

Regular/systematic
Casual

- see conditions

Aust. Citizen, resident or
444 Visa holder

Self-employed

Ineligible employees

Employed as at 1 March 2020

- Eligible employers will receive the payment for eligible employees on their books on 1 March 2020 and continues to be engaged by that employer
 - including full-time, part-time, long-term casuals and stood down employees
- Ok to rehire an employee subsequently terminated, but who was employed as at 1 March, 2020

Source [Treasury.gov.au](https://www.treasury.gov.au), Fact Sheet p.2

Employees aged 16 or 17 years of age

- Commencing from the JobKeeper fortnight starting 11 March 2020, [16 and 17-year-old employees](#) will only be eligible to participate in the scheme if they are considered:
 - Independent, **or**,
 - Not undertaking full-time study
 - as defined by the [Social Security Act 1991](#).
- Eligible 16 and 17 year old employees must provide a statement confirming which eligibility condition they satisfy along with their [nomination notice form](#)
- [Click here](#) for information relating to JobKeeper fortnights prior to 11 May 2020 for 16 and 17 year old employees

Casuals

Casual employees eligible for the JobKeeper Payment are those employees who have been with their employer on a **regular and systematic** basis for at least the previous 12 months as at 1 March 2020

- Source [Treasury.gov.au](https://www.treasury.gov.au)

Visas, Overseas workers, etc

- To be eligible, an employee must be –
- an Australian citizen (or permanent resident),
- the holder of a permanent visa, or
- a Special Category (Subclass 444) Visa Holder as at 1 March 2020.

The employee must also be a resident for Australian tax purposes on 1 March 2020.

- Source [Treasury.gov.au](https://www.treasury.gov.au), Fact Sheet p.2

Ineligible employees

- Employees receiving Parental Leave Pay from Services Australia not eligible for JobKeeper Payment
 - However, employees on parental leave from their employer will be eligible.
- Employees receiving workers compensation will be eligible for the JobKeeper Payment if they are working
 - for example on reduced hours
 - but generally not be eligible if not working

Source [Treasury.gov.au](https://www.treasury.gov.au), Fact Sheet p.2

Minimum hourly rate guarantee

An employee's hourly rate cannot be reduced as a result of a JobKeeper enabling direction and in some cases it may increase.

- Employers cannot use a JobKeeper **stand down direction** to reduce an employee's hourly base rate of pay.
- Similarly, the changes require the employer to ensure that where an employee is given a **direction about their work duties**, the employee's hourly base rate of pay is **not less than** the greater of:
 - the base rate of pay on an hourly basis that would have applied if the direction had not been given S.789GDB(3)(a); or
 - the base rate of pay on an hourly basis applicable to the duties performed. S.789GDB(3)(b)
- There are also provisions designed to ensure that employees paid under an annualised salary arrangement, have similar rules for how their pay arrangements are treated for the purpose of the hourly rate of pay guarantee. S. 789GDB

Note - the Fair Work Act provides for penalties and compensation to remedy contraventions.

- Source [Treasury.gov.au](https://www.treasury.gov.au)

Stand downs, reduced hours

- Eligible employer can give a stand down direction to employees (s.789GDC)
 - includes working fewer days and / or hours, or no hours
 - Overrides award, EBA etc - s.789GDC(5).
- [Only applies when employer qualifies for JobKeeper payment](#)
 - So would need to meet the [minimum payment guarantee](#), but not otherwise have to pay the employee their normal wage
- Must be –
 - because employee cannot be usefully employed for normal hours or days,
 - due to business changes caused by Coronavirus Pandemic,
 - e.g. reduced patronage, store closures etc
 - able to be implemented safely having regard to Coronavirus
- [Must meet rules relating to direction safeguards](#)
- Employee need not comply with direction if unreasonable
- Direction does not apply if employee on authorised leave, or authorised absence - s.78GDC(3).
 - e.g. annual leave, public holidays
 - Note you have to pay the employee for public holidays falling within the stand down period
- Employee [may request secondary employment, training etc](#)

Employee duties

- Employer may give direction to employee to perform any duties that meet criteria below – s.789GE
 - Overrides award, EBA etc - s.789GE(2).
- [Only applies when employer qualifies for JobKeeper payment](#)
- [Can't reduce employee's hourly rate of pay](#)
 - And must pay higher rate if applicable to work performed
- [Must meet rules relating to direction safeguards](#)
- Duties must be: s.789GE(1)
 - safe, including Coronavirus related
 - within employee's skill and competency (e.g. licenses etc)
 - reasonably within scope of employer's business operations
- Employee need not comply with direction if unreasonable

Employee work location

- Employer able to direct employee to perform duties at different place
 - Including employee's home
- [Only applies when employer qualifies for JobKeeper payment](#)
- [Must meet rules relating to direction safeguards](#)
- Overrides award, EBA etc – s.789GF
- Place must:
 - be suitable for employee duties
 - not require unreasonable travel
 - safe
 - reasonably within scope of employer's business
- Employee need not comply with direction if unreasonable (s.789GK)
 - E.g. interferes with employees caring responsibilities

Agreements over taking annual leave

- Employer and employee may agree for employee to take paid annual leave – s.789GJ
 - as long as employee retains minimum 2 weeks of leave
 - including twice the leave at half the pay, but must then be agreed in writing
 - [Accruals apply as if no agreement in place](#)
- Employee cannot unreasonably refuse agreement
 - But employer may need a [FWC arbitration](#) to finalise it
- [Applies if Employer qualifies for Jobkeeper scheme](#)
 - where entitled to JobKeeper payments for a particular employee
- Overrides any limitations under award, EBA etc
 - Note - must be made as a JobKeeper agreement or normal rules will apply

Agreements over days, times of work

- Employer and employee may agree to work different days &/or times (s.789GG)
 - compared with employee's ordinary days / times
- Employee cannot unreasonably refuse agreement
 - But employer may need a [FWC arbitration](#) to finalise it
- [Only applies when employer qualifies for JobKeeper payment](#)
- Overrides limitations under award, EBA etc
- Agreement must be: s.789GG(2) -
 - be suitable for employee duties
 - safe (including from Coronavirus)
 - reasonably within scope of employer's business
- But can't reduce employee's ordinary hours - s.789GG(2)(d)
 - that must be under a [Stand Down direction](#)

Directions safeguards

- Directions apply to stand down / reduced hours changed duties or work location
 - Employee **must comply** with direction (s.789GQ)
 - Directions must not be unreasonable, or it simply won't apply (s.789GK)
 - Must include employer's belief that direction is necessary to continue employment of one or more employees (s.789GL)
- Employer **must consult** the employee (or employee's rep) before giving a direction
 - Must give 3 days written notice of intent (less by agreement) and keep a written record of the consultation(s.789GM)
 - Direction must be in writing (s.789GN) (regs may prescribe the format)
- Safeguards apply
 - subject to other particular listed laws, which contain other safeguards
 - e.g unfair dismissals, discrimination laws etc
 - [FWC may deal with disputes](#)
- Duration of directions – [see here](#)

Employee requests during stand down

- Employee may give employer following requests (s.789GU)
 - to engage in reasonable secondary employment;
 - a request for training;
 - a request for professional development
- Employer must consider the request
 - must not unreasonably refuse the request.

Fair Work Commission reviews

- FWC may deal with disputes arising under changes - s.789GW
 - Including by Arbitration
 - Must take 'fairness between the parties' into account

Service, leave accruals applying under the changes

- Period of a stand down direction counts as (a special type) 'service' (s.789GS)
 - Leave entitlements accrue as if direction never given
 - Redundancy, notice calculations likewise
- Where employee takes annual leave at half pay-s.789GS(3), (4) -
 - Leave accrues as if agreement never happened
 - Redundancy, notice calculations likewise

Duration of changes

- Implementation
 - Can start when employer can access payments
- Directions cease –
 - when withdrawn or revoked by employer
 - Replaced by a new direction
- Subject to FWC orders
- Changes will cease 28 Sept 2020
 - unless extended
- See s.789GP



Australian Government
Australian Taxation Office

Employers must elect to participate in the scheme. They will need to make an application to the Australian Taxation Office (ATO) and provide supporting information demonstrating a downturn in their business.

[Register for JobKeeper
updates](#)