JobKeeper Extension: 'Legacy employers'

The Government has extended the temporary JobKeeper provisions in the Fair Work Act 2009 (Fair Work Act), with some changes. A national system employer who qualified for, and was entitled to, a JobKeeper payment for a particular employee before 28 September 2020 but who does not qualify after that date is known as a 'legacy' employer. Legacy employers who obtain the required certificate from an 'eligible financial service provider' stating that they meet the 10% decline in turnover test will have access to modified flexibility measures. These measures will only be available in relation to employees for whom the employer previously received a JobKeeper payment (eligible employees).

CHANGES TO THE FAIR WORK ACT FOR 'LEGACY EMPLOYERS'

Existing safeguards continue to apply in relation to the extended flexibilities, including that all JobKeeper Enabling Directions (JEDs) must be reasonable. Legacy employers must comply with enhanced notice and consultation requirements for JobKeeper enabling directions. The extended notice period requires legacy employers to give at least seven days' notice.

This Factsheet provides information on the types of flexible work measures available under these amendments for legacy employers. Information for employers who continue to qualify for JobKeeper payments can be found in the JobKeeper Extension: Change to the Fair Work Act for 'qualifying employers' Factsheet.

As is the case for employers who do qualify for the JobKeeper scheme after 28 September 2020, legacy employers will not be able to request employees agree to take annual leave in accordance with the temporary flexibility provisions of the Fair Work Act on or after 28 September 2020.

10 PER CENT DECLINE IN TURNOVER TEST

Legacy employers must satisfy the 10% decline in turnover test to access the flexible work measures. This means that their business must have suffered at least a 10% decline in actual GST turnover for the designated quarter compared to the corresponding 2019 quarter.

In order to be eligible to give directions or reach agreements with employees, a legacy employer must obtain a '10% decline in turnover certificate' from an 'eligible financial service provider' stating that they have satisfied the test. Eligible financial service provider means

registered tax agents and BAS agents under the Tax Agent Services Act 2009 or qualified accountants as defined in the Corporations Act 2001.

The issuing of a 10% decline in turnover certificate is a simple and streamlined evidentiary process for employers, and does not require the eligible financial service provider to undertake an audit or assurance engagement of the employer's accounts and records. Rather, the certificate requires a declaration from the eligible financial service provider that relates to the specified employer, and confirms that, based on the information provided, the employer satisfied the 10% decline in turnover test for the designated quarter applicable to a specified time.

Civil penalties apply to employers who knowingly provide an eligible financial service provider with false or misleading information in relation to a 10% decline in turnover certificate.

Note: More detailed guidance about the certification requirements is available at: https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/pay-and-leave-during-coronavirus/jobkeeper-wage-subsidy-scheme/legacy-employers/information-for-eligible-financial-service-providers.

Alternatively, a small business employer may choose to rely on either a 10% decline in turnover certificate or a statutory declaration confirming that they have met the 10% decline in turnover test for the applicable quarter. The statutory declaration must be made by an individual who is, or is authorised by, the employer and who has knowledge of the financial affairs of the employer. Such a statutory declaration is taken to be a 10% decline in turnover certificate for that employer.

The term small business employer is defined in section 23 of the Fair Work Act and broadly means an employer with less than 15 employees.

Civil penalties apply to individuals who knowingly make a false statement in a statutory declaration for these purposes.

The test must be satisfied, and the relevant certificate (or statutory declaration) obtained as follows:

When the direction/request is to be made	Designated quarter in which the 10% decline in turnover test must be satisfied
Before 28 October 2020	Quarter ending on 30 June 2020
28 October 2020 – 27 February 2021	Quarter ending on 30 September 2020
On or after 28 February 2021	Quarter ending on 31 December 2020

For example, to have a legacy employer JED or agreement in place between 28 September 2020 and 28 October 2020, the employer must have experienced a 10% decline in their actual GST turnover in the June 2020 quarter (April, May and June 2020) compared to the June 2019 quarter.

VARIATION TO WORK ARRANGEMENTS

Any JEDs issued or agreements made before 28 September 2020 by legacy employers will cease to have effect on that date. This means legacy employers will need to issue new JEDs, and reach new agreements about days or times of work, after that date. JEDs and agreements must be in writing.

JobKeeper Enabling Directions

JobKeeper enabling stand down directions

If an eligible employee cannot be usefully employed for their normal days or hours because of changes to business attributable to COVID-19 or government initiatives to slow its transmission, a legacy employer may issue a stand down JED which directs in writing that employee to:

- not work a day or days on which the employee would ordinarily work
- work for a lesser period than the employee would normally work on a particular days or days
- work a reduced number of hours.

Legacy employers can only reduce an eligible employee's hours to a minimum of 60% of their ordinary hours of work as at 1 March 2020.

- This does not refer to the actual hours an employee worked on 1 March 2020, or the specific days or rostering arrangement an employee would normally work.
- Rather, 'ordinary hours' refers to the number of hours the employee is contracted to work, as set out in the modern award, enterprise agreement or contract of employment that applied to them on 1 March 2020. If the employee is award/agreement free, and their contract does not specify their ordinary hours, their ordinary hours is as defined in s 20 of the Fair Work Act. For example, an employee's ordinary hours as assessed at 1 March 2020 might be 38 hours per week.
- Casual employees do not have 'ordinary hours'. These employees will continue to have their hours determined on a shift by shift basis.

An additional new requirement for legacy employers is that the JED cannot require an eligible employee to work less than 2 consecutive hours in a day on which the employee does perform work.

Employees must comply with a stand down JED unless it is unreasonable in all the circumstances. Employees subject to a stand down JED 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 a legacy employer reasonably believes it is necessary to continue the employment of one or more employees, the employer can also give a JED which directs in writing an eligible employee 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)
- work somewhere other than their usual place of work, including their home (provided that 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 both safe and reasonably within the scope of the employer's business operations)

Employees must comply with a JED unless it is unreasonable in all the circumstances.

Obligations on employers when giving a JobKeeper enabling direction

In accordance with new enhanced notice and consultation provisions, legacy employers must give an employee written notice of an intention to issue a direction at least seven days before issuing a direction (or less, if genuinely agreed by the employee).

During the seven day consultation period, legacy employers must:

- recognise any representative the employee has appointed to act on their behalf in the consultation process
- provide the employee or their representative with information about the proposed direction
- invite the employee or their representative to give views about the proposed direction
- give genuine and prompt consideration to any views of the employee or their representative within the seven day period.

If a JED is issued it must be in writing.

Agreements to vary days or times of work

Legacy employers can also request that an eligible employee agree to work on different days or 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). Legacy employers cannot make an agreement about days or times of work if the agreement would require the employee to work less than two consecutive hours in a day on which the employee will perform work. An employee must consider such a request and not unreasonably refuse the request. Any agreements made must be in writing.

Agreements about taking annual leave

Legacy employers will not be able to request that employees agree to changes in relation to annual leave from 28 September 2020, consistent with the original repeal date of the provisions.

Timing

All legacy agreements and JEDs will automatically cease to have effect on specified dates if the employer does not re-satisfy the 10% test each quarter and obtain the relevant 10% decline in

turnover certificate. Employers must notify employees if a direction ceases to apply as a result of not obtaining the relevant certificate or if it continues to apply as a result of obtaining the relevant certificate. At their latest, all JEDs and agreements will cease completely on 29 March 2020 unless withdrawn, revoked or replaced before that date, or as otherwise provided in an order of the Fair Work Commission (FWC).

DISPUTES

An employee, an employer, an employee organisation or an employer organisation can make an application to the FWC in relation to a dispute about these new provisions. The FWC may mediate, conciliate, make a recommendation or express an opinion, or arbitrate the dispute, and can make any order it considers appropriate, including upholding, setting aside, or varying a JED, or making any other order it considers appropriate. The Federal Court can also examine whether an employer has satisfied the 10% decline in turnover test.

EMPLOYEE PROTECTIONS

Eligible employees who are subject to a JED must be paid for all hours worked and do not have to comply with a JED if it is unreasonable in all the circumstances. Additional penalties also apply to legacy employers, including those who give a JED or make an agreement when they knew they did not satisfy the 10% decline in turnover test, or were reckless as to whether they satisfied the test.

If an employee has been given a JED 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. An employee's hourly rate of pay cannot be reduced by a JED.

The amendments do not remove or diminish existing protections under the Fair Work Act relating to unfair dismissal, discrimination, work, health and safety requirements and workers' compensation. The full operation of the general protections provisions, including an employee's right to be represented by a union in the workplace is also maintained.

Employers face penalties of up to $666,000 if found to have knowingly misused a JobKeeper enabling direction.

APPLICATION OF NORMAL TERMS AND CONDITIONS OF EMPLOYMENT

Limitations of JEDs and agreements

While a JED or agreement under the new provisions 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. When a JED or agreement ceases, the employee's terms of employment revert back to what they were as if the JED or agreement was never made. A period to which a JED applies counts as an employee's service for all purposes

A period to which a JED applies counts as service for all purposes, including where a stand down JED has reduced an eligible employee's hours to zero. Employees continue to accrue leave, such as annual leave and personal leave, during this period as if the JED had not been given.

EMPLOYER RIGHTS

An employee must comply with a validly issued JED. Disputes about a JED can be taken to the Fair Work Commission for resolution. An employer could also seek enforcement of a direction in the Federal Court.

The JobKeeper amendments in the Fair Work Act do not disturb ordinary employment obligations under workplace laws. These amendments (and receipt of the JobKeeper payment for eligible employees) do not confer additional protections from dismissal or standard disciplinary procedures on employees who refuse to obey a lawful and reasonable direction.

FURTHER ASSISTANCE

For free advice on workplace rights and obligations under the extended JobKeeper provisions of the Fair Work Act, contact the Fair Work Ombudsman on 13 13 94 or visit their website at www.fairwork.gov.au.

To lodge a dispute in relation to the extended JobKeeper provisions of the Fair Work Act, contact the Fair Work Commission on 1300 799 675 or visit their website at www.fwc.gov.au.