



JobKeeper Extension: ‘Qualifying employers’

The Government has extended the temporary JobKeeper provisions in the Fair Work Act 2009 (Fair Work Act), with some changes. National system employers who qualify for the JobKeeper payment scheme under the revised eligibility criteria after 28 September 2020 have access to all of the original workplace flexibility measures in relation to the employees they are entitled to claim the payment for, except with respect to requests about agreements to take annual leave.

CHANGES TO THE FAIR WORK ACT FOR ‘QUALIFYING EMPLOYERS’

Qualifying employers can only give a JobKeeper enabling direction (JED) or reach an agreement with an employee in relation to whom they are receiving the JobKeeper payment (eligible employees). Existing safeguards will continue to apply, including that all JEDs must be reasonable, and employers must comply with mandatory notice and consultation requirements in relation to JEDs.

This Factsheet provides information on the types of flexible work measures available under these amendments for qualifying employers. Information for employers who qualified for JobKeeper payments before 28 September but do not qualify after that date can be found in the JobKeeper extension: Change to the Fair Work Act for ‘legacy employers’ Factsheet.

VARIATION TO WORK ARRANGEMENTS

JEDs and agreements about days or times of work made in writing by qualifying employers and still in effect on 27 September 2020 automatically carry over where the employer qualifies for the JobKeeper scheme from 28 September 2020, provided that they still meet the relevant requirements for each type of JED or agreement under Part 6-4C of the Fair Work Act.

JobKeeper Enabling Directions

JobKeeper enabling stand down direction

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 qualifying employer may give 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 day or days
- work a reduced number of hours (including nil hours).

Employees do not have to comply with a stand down JED if 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 qualifying 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 employee's duties at the place is both safe and reasonably within the scope of the employer's business operations).

Employees do not have to comply with a JED if it is unreasonable in all the circumstances.

Obligations on employers when giving a JobKeeper enabling direction

A qualifying employer must give the employee written notice that it intends to issue a JED at least three days before issuing the JED (or less, if genuinely agreed to by the employee) and consult with the employee or their representative during that period. The employer must then provide the JED in writing to the employee.

Agreements to vary days or times of work

Qualifying 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 employee's duties on those days or at those times is safe and reasonably within the scope of the employer's business operations). An employee must consider such a request and not unreasonably refuse the request. Any agreements must be made in writing.

Agreements about taking annual leave

From 28 September 2020, qualifying employers will not be able to request that employees agree to take annual leave in accordance with the temporary flexibility provisions in Part 6-4C of the Fair Work Act. After this date, annual leave arrangements will revert to the arrangements that existed prior to the inclusion of Part 6-4C.

Timing

An authorised JED will remain in effect until revoked or replaced by the qualifying employer, or as provided in an order of the Fair Work Commission (FWC), or until the JobKeeper provisions cease completely on 29 March 2020.

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 extended provisions. The FWC may mediate, conciliate, make a recommendation or express an opinion, or arbitrate the dispute, and can make any order it considers desirable to give effect to a JED, including upholding, setting aside, or varying a JED, or making any other order it considers appropriate.

EMPLOYEE PROTECTIONS

Qualifying employers receiving the JobKeeper payment must ensure that eligible employees receive a minimum amount equal to their tier payment per fortnight (before tax), or the amount payable to the employee for the work performed, whichever is greater.

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. More information on rates of pay can be found on the Fair Work Ombudsman's website at <https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/pay-and-leave-during-coronavirus/jobkeeper-wage-subsidy-scheme/pay-and-the-jobkeeper-scheme>.

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.

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 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.