Article Information

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Breaking news – The JobKeeper legislation: What it does and doesn't say

On Thursday, 8 April 2020, Parliament passed the Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 and the Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020.

The first of these measures authorises the introduction of the "JobKeeper" scheme, which will provide wage subsidies of $1500 per fortnight for up to 6 million workers whose jobs and income have been affected by COVID-19 and the measures taken to contain its spread.

The second, among other changes, amends the *Fair Work Act 2009* (Cth) (**the FW Act**) to give employers who are eligible for JobKeeper support greater flexibility to manage employees' hours, location and duties without their consent. It also allows those employers to more readily reach agreement with employees on the taking of annual leave.

11 April 2020 – Breaking news – The Rules for the JobKeeper subsidy have been released!

This article outlines the key aspects of the new legislation and what they could mean for your business. You can access further information on all manner of legal issues associated with the COVID-19 crisis by accessing Piper Alderman's COVID-19 Resource Hub.

Coronavirus Economic Response Package (Payments and Benefits) Bill 2020
Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020

In terms of new employer powers, relevant questions and their answers are:

Do the amendments to the FW Act apply to employers and employees who are not eligible to receive payments under the JobKeeper scheme?

No. The amendments only affect the rights and liabilities of employers and employees who are eligible for JobKeeper payments.

Which businesses and organisations are eligible for JobKeeper payments?

The rules to establish the JobKeeper scheme will be made under section 20 of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*. Those rules have not yet been released. The information below concerning eligibility to participate in the scheme is based upon fact sheets and FAQs previously provided by Treasury. The rules, once released, may not be entirely consistent with that information, and in any case may change as the scheme is implemented and problems or loopholes are identified.

Based upon Treasury's guidance, employers will be eligible for the subsidy if, at the time of applying:

- their business has an annual turnover of less than $1 billion and they estimate their turnover has fallen or will likely fall by 30 per cent or more; or
- their business has an annual turnover of $1 billion or more (or is part of a consolidated group for income tax purposes with turnover of $1 billion or more) and they estimate their turnover has fallen or will likely fall by 50 per

cent or more; or
- they are a charity registered with the Australian Charities and Not-For-Profit Commission (other than a school or university) and they estimate their turnover has or will likely fall by 15 per cent or more.

Treasury has indicated that self-employed individuals will be eligible if they meet the relevant turnover tests outlined above. The same is true for one (but only one) member of a partnership.

Treasury has also suggested that various types of employer will be ineligible to participate in the scheme. These include government agencies, local councils, businesses subject to the Major Bank Levy, and companies in liquidation.

Importantly, if a business does not meet the drop in turnover test at the time the scheme commences, Treasury has suggested that the business can apply to receive the payment at a later time once the turnover test has been met. In this case, the JobKeeper payment is not backdated to the commencement to the scheme.

It should also be emphasised that the scheme is not a compulsory one. Employers are not *obliged* to seek jobseeker support for their employees, even if they are eligible to do so.

Which employees are eligible for the JobKeeper payment?

Treasury has indicated that employees will be eligible for JobKeeper payments if:

- they were 'on the books' on 1 March 2020;
- they are currently employed by an eligible employer (this includes employees who were stood down as at 1 March 2020, or have since been stood down);
- they were aged 16 years or older at 1 March 2020;
- they were an Australian citizen, the holder of a permanent visa, or a Special Category (Subclass 444) Visa Holder, as at 1 March 2020;
- they were a resident for Australian tax purposes on 1 March 2020; and
- they have not received a JobKeeper payment from another employer.

Additionally, if the employee is a casual employee, they will only be eligible if they had been employed by their employer on a regular and systematic basis for at least 12 months as at 1 March 2020.

If an employee's position was made redundant after 1 March, the employee will be eligible if the employer re-employs the employee. The amendments to the FW Act do not appear to address what should occur when an employer re-hires a previously retrenched worker in order to make them eligible for JobKeeper support. It is unclear, for instance, whether any severance payments to the worker could be reclaimed, or whether their continuity of service will be broken.

It is understood that specific provision will be made in the JobKeeper payment rules concerning employees who are taking parental leave, or who are receiving workers' compensation payments.

Treasury has also suggested that a casual employee will be deemed to have met the above test if their employer has changed in the last 12 months by reason of a transfer of business.

What is not at present entirely clear is whether an eligible employer that decides to access the jobseeker scheme is obliged to do so in relation to every one of their eligible employees. It remains to be seen whether the jobseeker payment rules seek to impose such an obligation or, if they do not, to prevent an employer seeking commitments from employees as a condition for seeking payments on their behalf.

What payments need to be made to employees under the JobKeeper scheme?

For employers that qualify for a JobKeeper subsidy under the scheme and have their application to the Australian Taxation Office approved, they must ensure that each eligible employee they nominate receives at least $1,500 per fortnight.

Under the new FW Act provisions, this "minimum payment guarantee" applies even if an eligible employee would otherwise earn less than the amount of the jobseeker payment. Hence many part-time employees will receive more than they would previously have been earning.

If an eligible employee's wage for work they are performing exceeds the jobseeker payment, the excess of their wage must continue to be paid by the employer. The guarantee in this respect extends not just to the employee's base rate of pay, but any loadings, allowances, penalty rates or bonuses to which they would ordinarily be entitled.

The employer could only pay a lesser amount than they usually pay the employee if the employer and employee agree to reduce the employee's hours of work, or the employer is authorised to stand the employee down under one of the

provisions discussed below.

Employers are required to continue to pay superannuation in accordance with their obligations under superannuation guarantee legislation. Importantly, Treasury has indicated that no superannuation guarantee payments are required to be paid on any additional payment made because of the JobKeeper payment, however, an employer may choose to do so. That is, if the wage paid to the employee for the hours worked is $1,200, superannuation is to be paid on that amount and whilst the further $300 is to be paid to the employee, that additional payment is not subject to superannuation.

Can I direct an eligible employee to take annual leave while they are receiving the JobKeeper payment?

The amendments to the FW Act do not permit an eligible employer to direct an eligible employee to take annual leave. However, employers can *request* employees who are eligible for JobKeeper payments (**eligible employees**) to take annual leave, so long as complying with the request will not result in the employee having a balance of paid annual leave of fewer than 2 weeks. Employees must consider such requests, and cannot unreasonably refuse a request. Importantly, consultation obligations also apply.

The Act also permits an eligible employer and eligible employee to agree in writing to the employee taking twice as much paid annual leave at half the employee's rate of pay, for a period in which the employee is receiving payments for the employee.

The new legislation does not affect any power to direct, request or agree on the taking of annual leave that might already exist under the National Employment Standards, or under an award or enterprise agreement.

When can I change the duties to be performed by an eligible employee or the location or time of the employee's work?

An employer can change the duties of an employee who is entitled to JobKeeper payments if the duties are within the employee's skill and competency, the duties are safe, the employee has the appropriate licence or qualification (if applicable), and the duties are reasonably within the scope of the employer's business operations. However, under what is called the "hourly rate of pay guarantee", the employer must ensure that there is no reduction in the employee's base rate of pay, calculated on an hourly basis.

An eligible employer can also change an employee's location of work if the place is suitable for the employee's duties, the place does not require the employee to travel a distance that is unreasonable in all the circumstances (if the place is not the employee's home), and the performance of the employee's duties at the place is safe and reasonably within the scope of the employer's business operations. Once again, the employee must be entitled to payments under the scheme for the relevant period.

In either of the above cases, the direction will not apply to the employee if the direction is unreasonable in the circumstances. Additionally, any such direction has no effect unless the employer reasonably believes that the direction is necessary to continue the employment of one or more employees. Consultation obligations also apply.

The new FW Act provisions also contemplate that changes can be made to the day or days on which an eligible employee ordinarily works, or the time at which they ordinarily work, while they are receiving JobKeeper payments. Changes of this sort must be achieved by agreement rather than unilateral direction, although an employee must not unreasonably refuse an employer's request. Any agreement must not reduce the employee's ordinary hours of work.

In what circumstances can an eligible employee be stood down or have their hours of work reduced?

Section 524 of the FW Act already allows employers to stand down workers without pay where there is a stoppage of work for reasons outside the employer's control. The new amendments provide a much broader and more flexible power, though only for employees in receipt of JobKeeper payments.

An eligible employer can issue a "JobKeeper enabling stand down direction". Under this, an eligible employee may be directed:

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

The key condition of such a direction is that the employee cannot be usefully employed for the employee's normal days or hours during the JobKeeper enabling stand down period, because of changes attributable either to the COVID-19 pandemic

or government initiatives to slow the transmission of the virus.

The direction to stand down will not apply if it is unreasonable in the circumstances. Additionally, any such direction has no effect unless the employer reasonably believes that the direction is necessary to continue the employment of one or more employees of the employer. Consultation obligations also apply.

More specifically, in order to be able to give such direction the employer will need to meet these conditions:

- at least 3 days before the direction is given (unless the employee genuinely agrees to a lesser period), the employer must give the employee a written notice of its intention to give the direction;
- the employer must consult the employee about the direction;
- at the time the direction is given, the employer must have qualified for the JobKeeper scheme;
- the employee who is the subject of the direction cannot be usefully employed for the employee's normal days or hours because of changes attributable to the COVID-19 pandemic or government initiatives to slow its transmission;
- the implementation of the direction is safe;
- the employer is entitled to JobKeeper payments for the employee for a period or periods that consist of or include the period covered by the direction;
- the direction must not be unreasonable in the circumstances; and
- the employer must reasonably believe that the direction is necessary to continue the employment of one or more employees of the employer.

The requirement that has already raised some questions is the fourth of those points, where the change to days or hours needs to be attributable to the COVID-19 pandemic or government initiatives to slow its transmission. It is possible that the existence of this connection might be challenged, particularly where an employer is seeking to bring dismissed or stood down employees back to share available hours more equitably and to maximise the employer's return from the JobKeeper subsidy.

Where a JobKeeper enabling stand down direction is made, the hourly rate of pay guarantee mentioned earlier in relation to changes of duty applies. Hence a direction cannot be used to reduce an employee's base rate of pay.

For completeness, we again note, nothing in the newly inserted JobKeeper enabling stand down precludes an employer from standing employees down under the existing stand down provision in s 524 of the FW Act, or from relying upon a clause in an enterprise agreement or contract of employment which provides for stand down.

Does an eligible employee need to be paid the JobKeeper payment for the duration of a JobKeeper enabling stand down direction?

The new provisions contemplate that the period for which the employee is receiving JobKeeper payments will *include* the period of the stand down. Additionally, a JobKeeper enabling direction (such as a direction standing employees down) ceases to have effect on 28 September 2020.

Can eligible employees complain if their employer does not claim the JobKeeper payments, or claims it in respect of some workers but not others?

There is no provision in the legislation introduced yesterday for eligible employees to complain if their eligible employer fails to claim JobKeeper payments, or does so for some employees but not for them. However, as noted earlier it is possible that the JobKeeper payment rules may provide that employers who choose to make a claim are required to do so for all of their eligible employees, not just some.

In conclusion:

Employers should consider, firstly, whether they are eligible for payments pursuant to the rules (which we expect will be released in the coming days), and secondly, which employees the business assesses are eligible.

Assuming employees are eligible for JobKeeper payments, employers should also move quickly to assess whether they meet the thresholds required for varying an employee's days, location of work, or duties, requesting an employee to take annual leave or standing an employee down (including reducing the hours of employees), noting that the Fair Work Commission is empowered to deal with disputes about many of these matters.

Key takeaways

- The JobKeeper scheme will allow eligible employers to apply to the Australian Taxation Office to receive wage

subsidies for their eligible employees. Employers will be able to claim a fortnightly payment of $1,500 before tax per eligible employee from 30 March 2020 for a period of up to 6 months.

- The scheme will be introduced by a set of rules to be made by the Treasurer. It is those rules, rather than the legislation passed by Parliament, which will set out eligibility for the scheme and deal with other aspects of its operation.
- A new Part 6-4C of the FW Act will operate until 28 September 2020. While in effect it will allow employers accessing the JobKeeper scheme to make various changes to their employment arrangements.
- Employees who are receiving jobseeker payments will not be able to unreasonably refuse a request to take annual leave. However, any such request must leave an employee with at least two weeks' annual leave remaining.
- Eligible employers will be able to alter the usual duties, days and location of an employee's work, provided the employee is receiving JobKeeper payments. This will be possible regardless of any award, enterprise agreement or employment contract provisions that would otherwise apply.
- Eligible employers who might not have been able to stand down employees under section 524 of the FW Act may now be able to do so.
- The Fair Work Commission will have jurisdiction to deal with disputes about various aspects of the operation of Part 6-4C.
- Penalties will apply for breaches of key aspects of the JobKeeper scheme. For example, employers will face a penalty of up to 60 penalty units ($12,600) for contravention of a new "minimum payment guarantee".

Importantly, the JobKeeper payment rules, which will set the criteria for receiving the JobKeeper subsidy, have not yet been released. We expect them shortly. Accordingly, while we have endeavoured to flag areas of continued uncertainty throughout the article, employers should keep up to date with developments to the scheme.

For advice on how these changes will affect your business please contact a member of Piper Alderman's Employment Relations team.