

Article Information

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So, you've qualified for JobKeeper. What next....?

On 8 April 2020, the Government passed the Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020. Some of the key measures of this Bill included amendments to the Fair Work Act 2009 which provided employers with the power to give "JobKeeper enabling directions" aimed at providing greater flexibility for employers in managing their labour resources.

Outside of an enabling direction, the Act also provided powers to an employer in relation to reaching agreements with employees regarding their days of work and taking annual leave.

On 8 May 2020, the Prime Minister announced a 3 step approach to lifting the COVID-19 lockdown restrictions and with that, a return to businesses operating. The transition from lockdown to returning to '*business as usual*' is an important one to be managed by employers.

Operation of the JobKeeper enabling directions generally

A "JobKeeper enabling direction" is defined to mean a direction authorised by either section 789GDC (stand down), 789GE (duties of work) or 789GF (location of work) of the *Fair Work Act 2009*. While each direction has different requirements, there are common themes throughout.

A key feature of all of the JobKeeper enabling directions and powers is that they have effect despite a "designated employment provision". This means that employers can utilise these powers despite the operation of another provision of the Fair Work Act 2009, an award, enterprise agreement or contract of employment.

It is important to appreciate that a "JobKeeper enabling direction" can only be utilised where the employer and the employee who is given the direction are both eligible for the JobKeeper scheme. As such, where an employer has an ineligible employee (such as a short term casual or an employee in Australia on a visa) they will not be able to make a "JobKeeper enabling direction" in relation to that employee.

A "JobKeeper enabling direction" must also pass an overarching test of being reasonable. Where a direction is unreasonable in the circumstances, it will not apply to that employee. Finally, a degree of consultation with employees is also required when giving a direction. Written notice of an employer's intention to give a "JobKeeper enabling direction" must be provided at least 3 days prior to that direction being given unless genuinely agreed otherwise.

Once a "JobKeeper enabling direction" has been given it will remain in effect until it is withdrawn by the employer or it is replaced by a secondary enabling direction. Otherwise, all "JobKeeper enabling directions" will cease to have effect from 28 September 2020 when the JobKeeper scheme ends.

What are the JobKeeper enabling directions?

Stand Down: Section 789GDC

An employer is authorised to issue a JobKeeper enabling stand down direction in accordance with section 789GDC. The stand down direction can be to either:

- not work on a day or days which ordinarily would have been worked by an employee;
- work for a lesser period than which ordinarily would have been worked on a day; or

- for an employee to work a reduced number of hours (including nil hours).

In order for an enabling stand down direction to be given, the employee must be unable to be usefully employed because of changes to the employer's business due to the COVID-19 pandemic or the related government initiatives.

However, a JobKeeper enabling stand down direction will not apply where an employee is taking authorised leave or is otherwise authorised to be absent from the employment.

Duties of Work: Section 789GE

An employer is authorised to provide a direction to an employee to perform any duties that are within the employee's skills and competency. The duties must be able to be safely performed and must be reasonably within the scope of the employer's business operations.

In addition to this, an employee must hold the relevant licence or qualifications where this is required to perform certain duties.

Location of Work: Section 789GF

Much like the operation of a direction to vary the duties of an employee, an employer is authorised to direct an employee to work at a place which is different from the normal place of work. The alternative place must be suitable for the employee to perform their duties and it must not require unreasonable travel, whether that is due to distance or COVID-19 restrictions.

The alternative work place must also be safe and be reasonably within the scope of the employer's business.

Penalties

Significant penalties apply where an employer misuses a "JobKeeper enabling direction". Where an employer purports to give a "JobKeeper enabling direction" that is not authorised under the provisions, and does so knowingly, an individual could face penalties of up to \$126,000 (600 penalty units) or \$630,000 (3,000 penalty units) for a body corporate.

Other JobKeeper Powers vs JobKeeper enabling directions?

The legislation also provides for "JobKeeper powers". The key difference between JobKeeper powers and an enabling direction is that a direction does not require the agreement of the employee. In the case of a JobKeeper power, an employee must consider a request made by an employer, and must not unreasonably refuse, but the employee is not required to comply with the request in all circumstances as is the case for a direction.

Any agreement between an employer and employee under these powers must be recorded in writing. As with an enabling direction, these powers operate despite a "designated employment provision" which might otherwise apply under the Fair Work Act, an award, enterprise agreement or a contract of employment.

What are the JobKeeper powers?

Days of Work: Section 789GG

An employer may request an employee to work on days or times that are different from the employee's ordinary days or times. The employee may not unreasonably refuse this request. The agreement must not result in the employee working fewer hours than normal and it must be safe and within the employer's normal business.

While an employee's hours cannot be reduced by agreement under this section, there does not appear to be any limitation on requesting an employee to work more hours. If a reasonable request is made that an employee work more hours, it seems that the employee must consider the request and cannot unreasonably refuse. If an employee was to refuse the request, this could be arbitrated by the Fair Work Commission.

Taking Paid Annual Leave: Section 789GJ

An employee and employer may also agree to an employer's request that an employee take annual leave as long as this does not result in the employee having less than 2 weeks of annual leave entitlements. In addition, an agreement can be reached that the employee take annual leave at half-pay for twice the length of time.

Getting people back to work

As COVID-19 develops and with Australia slowing the spread of the virus, steps will begin towards removing the lockdown restrictions and the reopening of businesses. This will introduce a new set of challenges for employers in managing employees returning to the physical workplace in a safe and orderly way recognising the need for continued physical distancing and that workflows may not immediately return to pre COVID-19 levels.

On 8 May 2020, the Prime Minister announced a 3 step approach to lifting restrictions. While this provides a high level view of what will be to come, each state and territory has been left to decide how it will best manage the lifting of restrictions. As a result, what may be possible in one state, may not be in another and it will be necessary to review the position in each jurisdiction and for national organisations to be on top of the latest requirements for each state or territory in which it operates.

However, there are certain considerations which should be taken into account across the board by any workplace as a return to operations begins:

- When preparing for the lifting of restrictions, it is essential to consider that revenue is unlikely to return to pre-lockdown levels in the immediate future. As a result of this, work force planning will be of significant importance. Decisions will need to be made regarding which employees will return to the workplace and when, or for those already there, if hours of work will need to be increased.
- If the logistics of physical distancing and floorplans are an issue, an analysis on which employees are able to operate in a remote environment effectively and which employees are most critically needed in the physical workplace.
- If the “JobKeeper enabling directions” are still available to you at this stage, consideration should be given to providing a new direction to employees which will replace the earlier direction. This may mean that the direction given will increase the hours currently being worked by employees to closer to ordinary hours but not yet at full capacity.
- Alternatively, some changes to your workforce may be more than temporary and decisions on the ongoing structure and staffing changes should not be delayed until everything “gets back to normal” as that may be sometime away. Reshaping the workforce structure now to deal with a changed landscape may be required. If it is determined that business will not return to pre-COVID-19 operations or levels, redundancies may need to be considered including obligations to consult with staff and how that might look for employees who are stood down or working remotely.
- Another key consideration is in relation to work, health and safety. In planning a return to work for your employees, a valuable source of information is the Safe Work Australia website and the information provided in relation to COVID-19 risk management for workplaces.
- Finally, the management of mental health and how employers deal with employees’ concerns about returning to work will be significant. Employees may be apprehensive about returning to the workplace, whether this is due to their acclimation to remote working or a perception of increased risk in relation to contracting COVID-19. Clear communication with employees about the strategies that the workplace has in place in relation to hygiene and safe work practices will be essential together with active engagement by supervisors and ongoing access to supports such as an employee assistance program (EAP).

As businesses begin to recommence operations in the COVID-19 environment, there are important tools available to employers in order to manage this change. Utilising the “JobKeeper enabling directions” as well as other powers under the JobKeeper legislative amendments will be of significant importance. Ensuring that the powers are used in the most effective manner will require careful consideration and planning, whether this is directly in relation to your workforce or more generally in how to best return to operating as close to normal as possible.

For specific advice on how these changes will affect your business or how to best utilise any of the powers available to you, please contact a member of Piper Alderman’s Employment Relations team.