

Article Information

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Breaking news - The Rules for the JobKeeper subsidy have been released!

Late on Thursday 9 April, the Treasurer released the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020. These Rules set the formal criteria for employers receiving the JobKeeper subsidy to enable relevant employees to receive their \$1,500 fortnightly JobKeeper payment.

The Rules largely reflect what the government had previously announced. However, there are important details in relation to the application process, timing of the subsidy payments and ongoing reporting obligations, which should be noted. In particular, employers will need to pay eligible employees in advance of payment of the subsidy, which should be taken into account by employers when they consider applying for JobKeeper subsidies.

Updated information about the scheme has also been made available on the [Treasury website](#). Further details will also soon be available from the [Australian Taxation Office \(ATO\) website](#).

This article outlines the key aspects of the Rules. 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 \(Payments and Benefits\) Rules 2020*](#)

In terms of the Rules, relevant questions and their answers are:

Which businesses and organisations are eligible for JobKeeper payments?

The Rules confirm 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 pre-school, school or university) and they estimate their turnover has or will likely fall by 15 per cent or more.

There appears to be uncertainty over the extent to which overseas income should be taken into account in determining eligibility for Australian businesses that are part of multi-national groups. According to information on the Treasury website, however, "only Australian based turnover is relevant" for the purpose of determining by how much turnover has declined.

The Rules also confirm that self-employed individuals will be eligible if they meet the relevant turnover test. Other small business operators, including trusts, partnerships and director operated companies, may also be able to claim payments for one "eligible business participant", such as a partner or director, in addition to any eligible employees.

Although there are monthly reporting requirements (noted below), once an eligible employer meets the turnover test, they are not required to continue to pass it for the duration of the scheme.

As foreshadowed by Treasury, the Rules exclude various types of employers from participation in the scheme. These include government agencies, local councils, and businesses subject to the Major Bank Levy, companies in liquidation, or sole traders with a trustee in bankruptcy appointed.

Importantly, if a business does not meet the drop in turnover test at the time the scheme commences, the Rules indicate that the employer can apply to receive the payment at a later time, once the turnover test has been met. In this case, the JobKeeper subsidies are only payable for the fortnight the application is made and then up to 27 September 2020.

It should also be emphasised that the scheme is not a compulsory one. Employers are not *obliged* to seek JobKeeper support for their employees, even if they are eligible to do so. However, it appears that an employer cannot be selective in their application. If the Employer applies for one eligible employee, they must apply for all eligible employees.

The Explanatory Memorandum to the Rules state that: *“(an) employer cannot select which eligible employees will participate in the scheme. This ‘one in, all in’ rule is a key feature of the scheme”*. The Rules do not specifically impose such an obligation, or prevent an employer seeking commitments from employees as a condition for seeking payments on their behalf. That said, the Rules do require employers to submit ATO-approved forms, so it may be relevant conditions will be contained within one of those forms.

Which employees are eligible for the JobKeeper payment?

The Rules confirm 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, the Rules have not softened the government position in relation to casuals. Casuals 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. A casual employee will not be disadvantaged if their employer has changed in the last 12 months by reason of a transfer within group entities, or a sale of business (and equivalent for non-profit bodies). But it appears a change in a casual’s employer as a result of an insourcing or outsourcing of work will restart a casual’s period of service for this purpose and make them ineligible.

If an employee’s position was made redundant after 1 March 2020, the employee will be eligible if the employer re-employs the employee. The amendments to the FW Act did not address what should occur when an employer re-hires a previously retrenched worker in order to make them eligible for JobKeeper support and the Rules do not address this issue either.

Therefore, it seems likely that severance payments made to the worker could not be reclaimed, although how continuity of service should be treated may be unclear.

During a relevant fortnight if an otherwise eligible employee is receiving parental leave pay or dad and partner pay under the Paid Parental Leave Act 2010, they will not be eligible for a JobKeeper payment for the fortnight. However, receipt of parental leave pay under an employer’s paid parental leave scheme is not a disqualification to receive a JobKeeper payment.

For those employees receiving workers compensation payments, the Rules state that if the employee is wholly incapacitated and receiving workers compensation payments due to that incapacity, they will not be eligible for a JobKeeper payment for the relevant fortnight. But those working reduced hours while in receipt of workers compensation can still be eligible.

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 ATO approved, they must ensure that each eligible employee they nominate receives at least \$1,500 per fortnight and the payment is made before the employer receives their JobKeeper subsidy.

Under the Rules and the new FW Act provisions, the “minimum payment guarantee” applies even if an eligible employee would otherwise earn less than the amount of the JobKeeper payment. Hence many part-time and casual employees will receive more than they would previously have been earning, as will employees on unpaid parental leave or on employer

paid parental leave schemes.

If an eligible employee's wage for work they are performing exceeds the JobKeeper 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 the provisions discussed in our [earlier insight](#).

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. The formalisation of these requirements are not in the Rules, but will be addressed in amendments to the superannuation guarantee regulations.

When will employers receive the JobKeeper subsidy?

Of course employers must apply for a JobKeeper subsidy to receive it, meet the criteria noted above and complete the relevant ATO approved form(s). Eligible employees are required to provide their employer with a notice (again in an approved form), agreeing to be nominated and confirming they have not agreed to be nominated by another employer.

The JobKeeper subsidy will be paid in arrears within 14 days of the end of each calendar month of the scheme, so for eligible employers that apply by 26 April 2020, the first subsidy payments will be paid in the second week of May 2020 and at a similar time in each following month.

If employers wish to receive a subsidy for the first 2 fortnights of the scheme, they should make application by 26 April 2020.

Are there reporting requirements?

There are ongoing reporting requirements that must be completed by employers who are receiving subsidies under the scheme. Those requirements include providing the employer's GST turnover for the reporting month and their projected GST turnover for the following month.

That information is not required to re-assess the employer's eligibility under the scheme, but to assist the government to assess the ongoing economic impact of COVID-19.

In conclusion

Employers now have clarity as to the Rules that determine whether they are eligible for payments and which of their employees are eligible. Applications should be promptly made, particularly if employers believe they currently qualify for the scheme.

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. [Breaking news - The JobKeeper legislation: What it does and doesn't say](#).

Key takeaways

- The JobKeeper scheme will allow eligible employers to apply to the ATO to receive wage subsidies for their eligible employees.
- Turnover must be assessed to have dropped by a requisite amount which is generally 30%, but lower for certain charities and higher for businesses with an annual turnover greater than \$1 billion.
- Subsidies can only be applied for in relation to employees who were employed as at 1 March 2020 and who meet other eligibility requirements.
- Employers will be able to claim a fortnightly payment of \$1,500 before tax per eligible employee from 30 March 2020 for the period up to 27 September 2020.

- The subsidy is paid in arrears within 14 days of the end of each calendar month of the scheme, so eligible employees must be paid their JobKeeper payment in advance of the employer receiving the subsidy.

It's worth noting that the criteria in the Rules may be supplemented by requirements in the ATO's approved form(s) which have not yet been released. For instance, it is said in the Explanatory Statement for the Rules that an employer cannot selectively apply for some, but not all, eligible employees and that the scheme operates on a "one in, all in" basis. That is not made explicit in the Rules, but it may well be a requirement included in one of the ATO forms.

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