



JobKeeper Payment: Changes to the Fair Work Act

The Government has amended the Fair Work Act to enable employers who qualify for, and are entitled to, the JobKeeper Payment to temporarily vary work arrangements for eligible employees in order to keep people employed.

OVERVIEW

The Government has amended the Fair Work Act to enable employers who are entitled to receive the JobKeeper payment to temporarily vary working arrangements for eligible employees in order to keep people employed. The amendments to the Fair Work Act will only apply to national system employers who receive JobKeeper payments and can only be used for employees to whom those payments relate. There are strong protections for employees from employer misuse of these provisions. These amendments cease entirely on 28 September 2020.

VARIATION TO WORK ARRANGEMENTS

JobKeeper Enabling Directions

Jobkeeper Enabling Stand Down Direction

If an employee cannot be usefully employed for their normal days or hours because of changes to business attributable to Coronavirus (and associated government initiatives), an employer may make a JobKeeper Enabling Stand Down Direction (Stand Down JED) which directs an employee to:

- not work on particular days they would ordinarily work; or
- work for a lesser period than they would ordinarily work on particular days; or
- 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 Direction

If an employer reasonably believes it is necessary to continue the employment of one or more employees, the employer can also give a JobKeeper Enabling Direction (JED) which directs an 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); or
- 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 do not have to comply with either of these types of JED if it is unreasonable in all the circumstances.

Obligations on Employers

An employer must:

- not misuse a JED;

- consult employees at least 3 days' prior to the JED being given (unless a shorter period is genuinely agreed to by the employees); and
- provide the JED in writing.

Timing and Effect on Service

An authorised JED will remain in effect until revoked or replaced by the employer, or until the JobKeeper provisions cease completely on 28 September 2020.

A period to which a JED applies counts as service for all purposes, including where a Stand Down JED has reduced an employee's hours to zero.

Agreements to vary days of work and annual leave

Employers receiving the JobKeeper Payment can also request that an eligible employee:

- work on different days and 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); or
- take annual leave at full pay (provided the employee will have at least 2 weeks of annual leave remaining).

An employee must consider such requests from their employer, and must not unreasonably refuse the request. This means that an employee cannot be forced to take annual leave or work on different days or at different times.

Employers and employees may also agree to the employee taking annual leave at half pay for twice the time.

Rates of pay

Employers receiving the JobKeeper Payment must ensure that employees receive a minimum of \$1,500 per fortnight (before tax). An employee's hourly rate of pay cannot be reduced by a JED. 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.

If an employee worked enough so that they are entitled to more than \$1,500 per fortnight (before tax), including any applicable penalty rates, allowances, loadings or leave payments, the employer must pay them the full amount.

DISPUTES

An employee, an employer, an employee organisation or an employer organisation can make an application to the Fair Work Commission (FWC) in relation to a dispute about these new provisions. The FWC may mediate, conciliate 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.

EMPLOYEE PROTECTIONS

The temporary changes to the Fair Work Act do not remove or diminish existing protections under the Fair Work Act from unfair dismissal or discrimination, and maintains the full operation of the general protections and employees' right to be represented by a union in the workplace.

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 being entirely set by the relevant award, agreement or contract in the same way it was before the JED was given or agreement made.

PENALTIES

Serious penalties of up to 600 penalty units for an individual (\$126,000) and 3,000 for a body corporate (\$630,000) will apply to employers who seek to misuse the temporary amendments to the Fair Work Act. Serious penalties of up to the same amount can also apply to employers who:

- fail to pass on the JobKeeper payment to an employee who is entitled to the payment; or
- fail to pay an employee whatever the employee is entitled to receive for work actually performed; or
- request an employee spend or pay a portion of their JobKeeper payment in an unreasonable way (such as giving the payment, or a portion of it, to the employer).

The Minister also has the power to exclude employers from using the provisions – meaning that employers found to be misusing the system could be prevented from making any JEDs.

MORE INFORMATION

To find out more about the temporary changes to the Fair Work Act, you can visit the FWO's website at www.fairwork.gov.au or call on 13 13 94. To find out more about the FWC's dispute resolution powers, you can visit www.fwc.gov.au, or call the FWC on 1300 799 675.

Coronavirus economic response temporary Fair Work Act provisions

In order to access the COVID-19 Fair Work Act provisions relating to directions and agreements, an employer must be a national system employer who qualifies and is entitled to receive the JobKeeper payment in respect of certain employees

Under these provisions, an employer...

Cannot direct but can request

an employee to work on different days and times to their ordinary days or times of work

- the employee must consider and not unreasonably refuse the request
- the agreement must be in writing [section 789GG]

Cannot direct but can request

an employee to take annual leave (as long as this will not result in the employee having a balance of paid annual leave of fewer than 2 weeks)

- the employee must consider and not unreasonably refuse the request

Employers and employees can also agree in writing for the employee to take annual leave for twice the period of time at half pay. [section 789GJ]

Can make a JobKeeper enabling direction (JED), including a JobKeeper enabling stand down direction

The direction must be safe for the employee, and provide arrangements that are reasonably within the scope of the employers' business operations. If a JED is unreasonable, it does not apply. [section 789GK]
An employer seeking to issue a JED must have consulted with the employee and provided 3 days' notice in writing of their intention to issue a JED (or less notice if employee genuinely agrees). The JED must be provided to the employee in writing. [sections 789GM; 789GN]

With a JED, an employer can...

If the employer has information that leads them to reasonably believe that the direction is necessary to continue the employment of one or more employees [section 789GL]

If the employee cannot be usefully employed for their normal days or hours because of changes attributable to COVID-19 or government initiatives to slow the transmission of COVID-19

Direct

an employee to perform any duties within their skill and competency, provided:

- the employee has any relevant licence or qualification
- [section 789GE]

Direct

an employee to work somewhere other than their usual place of work (including their home), provided:

- the place is suitable for the employee's duties;
- if the place is not the employee's home, does not require the employee to travel an unreasonable distance [section 789GF]

Direct

Make a JobKeeper enabling stand down direction, to direct an employee:

- not work on a day or days on which the employee would usually work; or
- work for a lesser period than normal on a particular day or days; or
- work reduced hours [section 789GDC]

A period served under a JED counts as service for all purposes [section 789GR]

If a JobKeeper enabling stand down direction applies to an employee or they have an agreement about taking annual leave at half pay under these provisions, entitlements accrue and are calculated according to their ordinary hours of work as if the direction or agreement was not in place [section 789GS]

If a JobKeeper enabling stand down direction applies to an employee, the employer must ensure the hourly rate of pay is not less than their normal base rate of pay. If the employee is performing duties that attract a higher rate of pay under a JED, they must be paid the higher rate of pay [section 789GDB]

If a JobKeeper enabling stand down direction applies to an employee, they may request to engage in reasonable secondary employment, training or professional development, which must be considered and cannot be unreasonably refused [section 789GU]

Benefits employees have under these provisions constitute workplace rights for the purposes of the general protections [section 789GY]

An employee, an employer, an employee organisation or an employer organisation can apply to the FWC for orders relating to the JED or a dispute about the operation of these provisions [section 789GV]

An employee must comply a valid JED [section 789GQ]
An employee does not have to comply with a JED if it is unreasonable in all the circumstances [section 789GK]

An employee can be represented by their employee organisation or, in line with s.596 of the FW Act, seek leave of the FWC to be represented by a lawyer or paid agent.

The FWC may mediate, conciliate or arbitrate the dispute and can make any order it considers appropriate, including upholding, varying or cancelling a JED. [section 789GV]

Safeguards

A JED can't be used to make an employee redundant [section 789GZA]

A JED cannot be used to reduce the hourly rate of pay for an employee [section 789GDB]

An employer can't misuse a JED by giving one when they know that they are not authorised to [section 789GXA]

An employee must be paid at least the JKP amount or the amount they are entitled to be paid for the hours they have actually worked, whichever is greater [section 789GDA]

The new provisions operate subject to the existing FW Act payment of wages provisions, general protections, unfair dismissal, and unlawful termination in s 772, and any anti-discrimination, WHS or workers' compensation laws [section 789GZ]

The Courts can enforce very serious penalties against employers that don't comply with these provisions [sections 789GD, 789GT, 789GU, 789GW]

The Minister can exclude employers from the operation of these Provisions [section 789GX]

Any other order that the FWC considers appropriate

Cancel the JED

Vary the terms of the JED

Uphold the terms of the JED

The employer and employee must comply with the FWC's order [Section 789GW]

The JED will continue in effect until it is withdrawn or revoked by the employer, or is replaced by a new JED [section 789GP].

The JED and agreement provisions will cease on 28 September 2020. This means that on this date all JEDs and agreements cease, employment terms and conditions revert to what they were without the JEDs or agreements in place.

Normal conditions apply