



# The JobKeeper scheme: employee entitlements and employer responsibilities

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**Date:** Wednesday April 22, 2020

As a result of coronavirus (COVID-19), the Federal Government introduced the JobKeeper scheme aimed to assist employers who have been impacted by the pandemic to retain employees. Although the scheme has been widely heralded, there have also been a number of concerns raised; particularly in relation to potential unscrupulous behaviour by some employers.

The JobKeeper scheme provides eligible employers an amount of up to \$1,500 per fortnight to enable them to pay each of their eligible employees during the pandemic. The primary condition is that employers must pay at least \$1,500 every fortnight to all employees. It should be noted that this is a pre-tax figure.

## What is an eligible employer?

For a majority of Australian businesses to qualify for the scheme, the employer must have experienced a decline or be able to prove a projected decline in turnover of at least 30% when compared to a comparable period in 2019.

However, the required percentage will be different if the employer is:

- a charity registered under the Australian Charities and Not-for-profits Commission, where the employer will need to have experienced at least a 15% decline in turnover; and
- a large business (with a likely turnover to exceed \$1 billion), where the employer will need to have experienced at least a 50% decline in turnover.

# Who is an eligible employee?

To be an eligible employee, you must be:

- employed with the applicant employer (including employees who have been stood down and subsequently re-hired);
- as at 1 March 2020, a full-time or part-time employee or been a long-term casual employee employed on a regular and systematic basis for at least 12 months;
- over the age of 16;
- as at 1 March 2020, an Australian resident or an Australian tax resident holding a Special Category (Subclass 444) Visa; and
- have given your employer the requisite nomination notice.

## Amendments to the *Fair Work Act 2009* (Cth) in place during COVID-19

With the introduction of the JobKeeper scheme, amendments have been made to the *Fair Work Act 2009* (Cth) ('**FW Act**') to assist qualified employers to participate in the JobKeeper scheme. These amendments commenced from 9 April 2020 and will be in place until 27 September 2020.

The amendments include a new Part 6-4C and will overrule any other contradictory provisions of the FW Act, a fair work instrument or a contract of employment.

### Part 6-4C of the *Fair Work Act* provides the employer with the ability to:

- **stand down employees** in circumstances where the employee cannot be usefully employed for the employee's normal days or hours because of changes to business attributable to the COVID-19 pandemic or government initiatives to slow the transmission of COVID19;
- **direct employees to perform different duties**, provided that the duties are within their skill and competency and is licenced/qualified to perform them within the scope of the employer's business;
- **direct employees to perform duties at a different location**, provided that the place is suitable for the employee's duties and that the place is safe (having regard to the nature and spread of COVID-19) and is reasonably within the scope of the employer's business operations;
- **direct employees to work different days or times**, provided that the performance of the employee's duties on those days or at those times is safe (having regard to the nature and spread of COVID-19), is reasonably within the scope of the employer's business operations and the agreement does not have the effect of reducing the employee's number of hours of work; and
- **request employees to take annual leave**, provided the request will not result in the employee having a balance of paid annual leave of less than two weeks. It can also be agreed that twice as much paid annual leave be taken, at half the employee's rate of pay.

Various considerations will arise where directions of the above kind are given, including whether the direction meets the requirements of the legislation and is "reasonable in all the circumstances". If you are subject of such a direction and have any doubt as to its legality, you should seek advice.

## Employer obligations to adhere to the "minimum payment guarantee"?

If your employer is entitled to receive a JobKeeper payment in relation to you, and you have performed work in that fortnight, then other considerations will arise. For example, your employer must ensure that, for the relevant fortnight, you are paid the greater of the \$1500 amount or the amounts usually payable to you in relation to the performance of work during the fortnight. This is referred to as the 'minimum payment guarantee'.

## Reports of unscrupulous employer behaviour and rumours of payment skimming

Even before the payments have commenced, there has been reporting of some businesses finding ways to not pass on the full \$1,500 payment to employees.

Employers **must** pay the full \$1,500 to each employee they have claimed the payment for.

The Federal Government has asked that any such behaviour be reported to Police and to the ATO.

A Treasury Department fact sheet advises:

*"An entity that does not comply with its obligations in relation to the JobKeeper Payment is also potentially liable for a wider range of significant administrative and criminal sanctions under the tax law and general criminal law."*

## Other potential issues that could arise with the scheme

While the JobKeeper may assist employers in retaining employees, there is no doubt that potential issues may arise that may breach the JobKeeper scheme.

They include:

- whether the individual was an employee or an individual contractor;
- identification of employees who are casuals and long-term casuals;
- standing-down employees where there is in fact useful work for them to perform;
- potential for underpayments; and
- potential breach of employment contracts if the directions were not authorised.

# Get help from an employment lawyer

If you think your employer is not behaving appropriately in accordance to the JobKeeper scheme and the recent amendments of the FW Act, you should contact your Union or [our employment team for further urgent advice and assistance](#).

Today's article was researched by [Hall Payne Research Clerk Kelvin Lee](#) and authored by [Principal Joseph Kennedy](#).

## Legal advice and assistance continues during COVID-19

We continue to provide our client services during the coronavirus outbreak.

Most of our teams have now returned to their respective offices with others remaining fully equipped to work remotely, where necessary.

### Contacting Hall Payne Lawyers

You can contact us by phone or email to arrange your consultation; either face-to-face at one of our offices, by telephone or by videoconference consultation.

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