
JobKeeper Changes to the Fair Work Act

On 9 April 2020, the *Fair Work Act* was amended to reflect the changing needs to be able to implement the JobKeeper wage subsidy scheme (*Part 6-4C – Coronavirus economic response*). The changes are temporary and will cease on 28th September 2020.

JobKeeper Enabling Directions

The JobKeeper enabling directions relate to new stand-down provisions, location of work, duties, and days and times of work.

For all JobKeeper Enabling Directions, there are overarching conditions to be met including:

- The business is a national system employer in the Fair Work system
- They qualify for and have register for the JobKeeper scheme
- They are entitled to JobKeeper payments for the affected employee
- The direction/agreement must be implemented safely having regard to the nature and spread of COVID-19 and be reasonable based on the scope of the employer's business operations

What test applies to giving these directions?

These directions can only apply if the employer has information that leads them to reasonably believe that the JobKeeper direction is necessary to maintain the employment of the employee. There are three elements to this test:

1. The belief needs to be based on "information" i.e. there needs to be some form of factual material before the employer.
2. Reasonable belief is just that. The belief must be available on the information the employer has before them and needs to be reasonably available.
3. Necessary to maintain the employment of the employee i.e. if you didn't direct them to do this (different duties or work from home etc), the employee would be made redundant.

Unreasonable in any of the circumstances is a very broad test and requires a consideration of anything relevant including the personal circumstances of the employee concerned.

Other Points

- A JobKeeper direction continues in effect until:
 - o it is withdrawn or revoked by the employer
 - o it is replaced by a new JobKeeper enabling direction
 - o an order of the Fair Work Commission requires it
 - o there is no further JobKeeper payment.
- A JobKeeper direction must be in writing in any prescribed form (set out in the Regulations to the legislation). It is not yet clear whether a form will be prescribed.
- The period that the direction operates for counts as service (even if they receive no pay).
- The employee continues to accrue entitlements (leave, redundancy pay, payment in lieu of termination) as if no direction or agreement has been made under these new rules.
- If an employee is stood down (in whole or part) they may request to get a second job or undertake training or professional development while they have been stood down. The employer must then consider the request and not unreasonably refuse the request.

JobKeeper Enabling Stand-Down

An employer can give a direction to an employee to:

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

and **not be paid** for the period that work is not performed.

A direction to reduce hours or days of work can be given when:

- 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
- because of government initiatives to slow the transmission of COVID-19 (for example, because of an enforceable government direction)

The employer must still pay the employee their ordinary base hourly rate of pay (i.e. the rate they are normally paid at) for the hours of work.

How do I know an employee cannot be usefully employed?

This situation arises when an employee has no (or a reduced level of) useful work available to perform because of the COVID-19 pandemic or because of the Public Health Orders and Directions (however described in each state and territory) imposing restrictions on individuals and businesses.

Useful work does not have to be the work that the employee ordinarily performs but needs to be genuine productive work that provides a "net benefit" to the employer.

The Explanatory Memorandum provided by Parliament clarifies that 'changes in business' could include, for example, less patronage and the closing of stores.

You should be able to demonstrate that the impacts of the virus or the government's measures to deal with it have caused the fact that there is none, or less useful, work available.

When does a stand down direction not apply?

A stand down direction does not apply to the employee during a period when the employee is:

- Taking paid or unpaid leave that is authorised by the employer.
- Otherwise authorised to be absent from the employee's employment.

Workforce Flexibility Provisions – Duties, Location and Days of work

Duties of work:

- An employer can direct an employee to perform different duties to normal provided:
 - those duties are within their skills and competencies and they hold any required licence or qualifications (where applicable)
 - the employee continues to be paid the greater of either
 - their ordinary base hourly rate of pay; or
 - the base hourly rate of pay that is applicable to the duties (i.e. if they are performing higher duties which would attract a higher pay rate under an Award, this must be paid)

Location of work:

- An employer can direct an employee to perform their work at a different location (including the employee's home) provided:
 - The place is suitable for the duties
 - It does not require unreasonable travel

Days of work:

- An employer may request an employee to make an agreement for different days or different times of work (compared to their ordinary days or times of work) and the employee must consider this and not unreasonably refuse.
- If agreed to (in writing), the days and times of work can be changed for the relevant period provided:
 - The agreement does not reduce the employee's number of work hours

Disputes

The Fair Work Commission can deal with a dispute about any of these matters. The Commission has the power to arbitrate such a dispute and impose a decision on the employer and employee including:

- make an order that the Commission considers desirable to give effect to a direction
- make an order setting aside a direction
- substitute a different JobKeeper direction for the one made
- make any other order that the Commission considers appropriate.

Important Links:

[Coronavirus Economic Response Package \(Payment & Benefits\) Bill 2020](#)
[Coronavirus Economic Response Package Omnibus \(Measures No.2\) Bill 2020](#)
[Explanatory Memorandum](#)