
CIRCULAR No: GEN/25/CCV/2020
DATE: 9 April 2020
SUBJECT: JobKeeper Payment – Variations to Fair Work Act
ATTENTION: Club Managers

Last night Federal Parliament passed a number of measures to facilitate the provision of the JobKeeper payments to 'eligible employers' and their 'eligible employees.' Part of these measures include changes to the *Fair Work Act 2009* (Cth) (**FW Act**) enabling eligible employers to enact a stand down of staff in broader circumstances than the Act originally contemplated, or otherwise unilaterally vary an employee's hours, duties and/or location of work in response to COVID-19 effects on the business.

The purpose of this circular is to provide you with summary of the changes to the FW Act which are designed to assist businesses pay wages and retain staff, and enable more flexible working arrangements, for six months amid the COVID-19 pandemic.

What is the JobKeeper payment?

As set out in our 31 March 2020 circular:

- the Federal Government's "JobKeeper Payment" will involve flat-rate payments of \$1,500 (gross) per fortnight per eligible employee for a period of up to 6 months – paid to the eligible employer.
- Eligible employers will include those who are not subject to the Major Bank Levy and:
 - with an annual turnover of less than \$1 billion who estimate their turnover has, or will likely, fall by at least 30%; or
 - with 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) who estimate their turnover has, or will likely, fall by at least 50%; or
 - charities registered with the Australian Charities and Not-For-Profit Commission, whose estimated turnover has, or will likely, fall by at least 15%;relative to a comparable period of at least one month.

Payments are due to made to eligible employers monthly in arrears by the ATO, commencing 27 April 2020.

Further particulars as to the 'eligibility' of employers and employees for the scheme are set out in the [factsheets and FAQs available on Treasury's website](#), but the scheme will ultimately be subject to the rules made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth). Whilst the legislation was passed by parliament yesterday, the rules made under the Act are yet to be released.

Critical to the payment scheme is the need for employers to register their interest in the scheme via the [ATO website](#). We note that the scheme not compulsory for employers, although businesses looking to provide financial support to their employees during the pandemic are strongly encouraged to register.

It is also understood that only employers who register for the scheme, and meet the eligibility criteria, will be able to access the flexibility provisions contained in the amendments to the FW Act – set out below.

JobKeeper enabling stand down and directives

It is important to note that the changes passed to the FW Act are temporary and will take effect once the amending Act receives royal assent (TBC) and end on 28 September 2020.

In summary, the amendments provide for three broad directions that an eligible employer may give where their business changes because of the effects of the COVID-19 pandemic.

The most significant direction is the JobKeeper enabling stand down contained at the new section 789GDC, which allows an 'eligible employer' to direct an employee to either:

- not work on certain days they would normally work;
- work for shorter hours on the days they would normally work; or
- work a reduced number of hours in total.

The key condition of such a direction is that the employee cannot be usefully employed for on their normal days or for their normal hours during the proposed stand down period, because of changes attributable either to the COVID-19 pandemic or government initiatives to slow the transmission of the virus.

It is important to note that the new JobKeeper enabling stand down does not preclude an employer from effecting a stand down of employees under the existing provisions of section 524(1)(c) of the FW Act, or from relying upon a clause in an enterprise agreement or contract of employment which provides for stand down. For further information regarding this type of stand down, please refer to our 23 March 2020 circular.

Eligible employers will also have the power to direct employees to change the job they are performing by:

- undertaking any duties for a period of time that are within their skill and competency (section 789GE); and
- undertaking their normal or other duties within their skill and competency at a different location (section 789GF).

The enforceability of any such directive is subject to:

- the employer's reasonable belief that the direction is necessary to continue the employment of one or more employees;
- the employer:
 - having first consulted with the employee about the change – which includes allowing the employee to comment on the change and the employer genuinely considering such comments; and
 - giving the employee written notice of the change at least three days prior to it coming into force; and
- the direction being safe and reasonable in all of the circumstances (noting that the impact of the direction on any caring responsibilities the employee may have will be relevant).

Disputes in respect of any JobKeeper directive can be referred to the Fair Work Commission upon application by either party.

Additional changes to the FW Act

The new FW Act provisions also contemplate that changes can be made to the day or days on which an eligible employee ordinarily works, or the time at which they ordinarily work, while they are receiving JobKeeper payments. However:

- these changes may only occur by agreement, rather than unilateral direction;
- any agreement must not reduce the employee's ordinary hours of work; and
- an employee must not unreasonably refuse an employer's request to change their working days.

The amendments also permit an eligible employer and eligible employee to agree in writing to the employee taking twice as much paid annual leave at half the employee's rate of pay, for a period in which the employee is receiving payments for the employee (ensuring that all Award-free employees are also able to access this arrangement).

Whilst eligible employers can *request* eligible employees to take annual leave, so long as complying with the request will not result in the employee having a balance of paid annual leave of fewer than 2 weeks, the FW Act amendments do not permit the employer to direct an eligible employee to take annual leave beyond the ordinary capacity to do so – for example where an employee has an 'excessive' annual leave accrual and as otherwise set out in an applicable Award or enterprise agreement.

What payments need to be made to employees under the JobKeeper scheme?

Under the new FW Act provisions:

- a "minimum payment guarantee" applies even if an eligible employee would otherwise earn less than the amount of the JobKeeper payment (ie. \$1,500 gross p/fortnight);
- under what is called the "hourly rate of pay guarantee", the employer must ensure that there is no reduction in the employee's base rate of pay, calculated on an hourly basis;

hence many eligible casual and part-time employees will receive more than they would previously have been earning.

If an eligible employee's wage for work they are performing (or paid leave they are accessing) exceeds the JobKeeper payment, the excess of their wage must continue to be paid. 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.

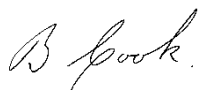
The employer could only pay a lesser amount than they usually pay the employee if the employer and employee agree to reduce the employee's hours of work, or the employer is authorised to stand the employee down under one of the provisions discussed below.

Employers are required to continue to pay superannuation on any 'ordinary time earnings' however Treasury has indicated that superannuation guarantee payments are not required to be paid on any additional payment made because of the JobKeeper arrangements - though an employer may choose to make super contributions on the entire amount if they wish to do so.

Misuse of the JobKeeper enabling directions - whether failure to comply with the conditions of stand down or unilateral variations, or failure to pass on JobKeeper payments to affected staff - will expose employers to significant civil penalties of up to \$126,000 per breach.

Therefore, to ensure compliance with the provisions we strongly recommend that businesses seek specific advice as to the circumstances upon which they may propose to utilise the above provisions before moving to stand down, or unilaterally vary the working hours, locations or duties, of staff.

The Information provided in this e-mail is generic advice. For advice in respect of your specific situation, please contact the SIAG National Advisory Service on 03 9644 1400 or 1300 742 447.



BRIAN COOK
Managing Director
SIAG



LEON WIEGARD
CCV President
Community Clubs Victoria

Disclaimer:

By agreeing to use this summary of information, the user agrees that siag does not give any guarantee, undertaking or warranty whatsoever in relation to the summary, including in relation to the accuracy, completeness or currency of the summary; and to indemnify and hold harmless siag from and against any loss or liability suffered by a user or a third party, arising out of the provision of the information, howsoever caused, including due to negligence of siag.