

# **Employment Update**

## ***Job Keeper – changes to the Fair Work Act 2009 (Cth)***

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**15 April 2020**

# What are we discussing today?

1. Latest Victorian Government directives
2. Summary of Job Keeper scheme
3. Changes to FW Act arising from Job Keeper
4. Questions

# Victorian Government Directives

- Premier Andrews' media statement 23 March 2020
  - Stage 1 shutdown included pubs, clubs and licensed venues in hotels and pubs.
- Victorian State of Emergency
  - 16 March 2020 extended to 11 May 2020 (was 13 April 2020)
- All current Vic Gov directives available online
  - <https://www.dhhs.vic.gov.au/state-emergency>

# Victorian Government Directives (cont.)

## • Directions from the Vic Deputy Chief Health Officer

### 5 Pubs, bars, clubs, nightclubs and hotels

- (1) A person who owns, controls or operates a **licensed premises** in Victoria must not operate that premises between midnight on 13 April 2020 and midnight on 11 May 2020.
- (2) A **licensed premises** means a business characterised as a pub, bar, club, nightclub or hotel that supplies alcohol under a **general licence**, an **on-premises licence** or a **club licence**.
- (3) Despite subclause (1), a person who owns, controls or operates a licensed premises may operate that premises for the purposes of:
  - (a) operating a **bottleshop**; or
  - (b) providing food or drink to be consumed off the premises; or
  - (c) providing accommodation.

### 15 Open retail facilities — density, signage and cleaning requirements

- (1) For the purpose of this clause an **open retail facility** means a **retail facility** (or part thereof) that is not prohibited from operating by these directions.

#### *Density quotient*

- (2) A person who owns, operates or controls an **open retail facility** must not allow a gathering of persons (including employees) between midnight on 13 April 2020 and midnight on 11 May 2020 in a single undivided indoor space, unless the total number of persons present in the indoor space at the same time does not exceed the **density quotient**.

### 4 Definition of density quotient

The **density quotient** of a single undivided indoor space is the number calculated by dividing the total area of the space (measured in square metres) by 4.

*Example: if an indoor space is 8.5 metres long and 4.5 metres wide, its total area is 38.25 square metres. Its density quotient is 9.56, so no more than 9 people would be permitted to be in the indoor space at the same time.*

<https://www.dhhs.vic.gov.au/sites/default/files/documents/202004/B1%20-%20Restricted%20Activity%20direction%20%28No%203%29%20%28signed%29.pdf>



# Job Keeper payments

- Legislation was passed by the Australian Government on 8 April 2020 for the Job Keeper Payment
  - Involves flat-rate payments of \$1,500 (gross) per fortnight *per eligible employee*
  - For a period of up to 6 months (30 March to 27 Sept 2020)
  - Paid to the *eligible employer* to subsidise wages (and in some cases boost payments) paid to the eligible employee
- Critical to the scheme is the need for employers to register their interest via the [ATO website](#).

# Job Keeper – Eligible Employers

- *Eligible employers* include those:
  - 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 (including a group of businesses for income tax purposes) who estimate their turnover has, or will likely, fall by at least 50%; or
  - registered charities whose estimated turnover has, or will likely, fall by at least 15%;relative to a comparable period in 2019 of at least one month

# Job Keeper – Eligible Employers

- Turnover test period:
  - a calendar month that ends after 30 March 2020 and before 1 October 2020; or
  - a quarter that starts on 1 April 2020 or 1 July 2020
- If an entity does not qualify in April 2020 because its turnover has not been sufficiently affected, it can test in later months
- Once an entity passes the reduction in turnover test for one month, no requirement to retest in later months

# Job Keeper – Eligible Employees

- Employed & at least 16 years of age as at 1 March 2020
- Australian citizens, holders of a permanent visa and Special Category (Subclass 444) Visa holders
- Full time and part time employees
- Regular and systematic casual employee (for at least the previous 12 months on 1 March 2020) and are not permanent employees of any other employer
- Employee will only be eligible for the Job Keeper Payment from one employer

# Job Keeper – Payment structure

- Club cannot select which *eligible employees* will participate in the scheme - ‘one in, all in’ rule applies
- Payments will be made by ATO in arrears no later than 14 days after the end of the relevant calendar month
- It is a condition of the Job Keeper payment that the full amount is paid to the *eligible employee* in the relevant fortnight
  - The payment is a reimbursement of the amount already paid
  - Club may need to consider its overdraft facility

# Job Keeper – Payment structure (cont.)

- If the employee's ordinary days or hours have been:
  - reduced to nil under a '*Job Keeper enabling stand down direction*', the employer must pay the employee \$1,500 per fortnight before tax.
  - reduced under a '*Job Keeper enabling stand down direction*', the employer must pay the employee an amount equivalent to those reduced hours or days worked in the fortnight by the employee – but no less than \$1,500 per fortnight before tax.

# Job Keeper – Payment structure (cont.)

- For example
  - the reduced hours or days equate to less than \$1,500 per fortnight before tax, the Club must pay the employee \$1,500 per fortnight before tax; or
  - the reduced hours or days equate to more than \$1,500 per fortnight before tax, the Club must ‘top up’ the payment to the employee for anything above \$1,500.
- *Bottom line* - employer must pay an employee in full for work undertaken / leave taken in that fortnight and cannot simply pay \$1,500 before tax.

# *Job Keeper enabling stand down direction?*

- Refer to SIAG circular 9 April 2020 for summary
- 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
  - Changes commence 9 April 2020, end 28 Sept 2020

# Traditional Stand Down

- If ***suspension of the business is due to government directive*** then, subject to applicable terms of:
  - your workplace enterprise agreement (if any)
  - contracts of employment or workplace policiesstaff who cannot be usefully employed may be stood down without pay to the extent that the stoppage of work is outside of the control of the employer.

*s.524(1)(c) of the Fair Work Act 2009 (Cth)*

## Traditional Stand Down (cont.)

- Before standing down, employers MUST consider whether staff can be (re)deployed to other useful duties - including remote working, assuming:
  - some duties remain available, and
  - it is safe for that work to continue.
- How might this apply to ‘non-venue’ staff?
  - Can businesses direct employees to perform alternative duties?
  - Can businesses unilaterally reduce hours?

## *Job Keeper enabling stand down direction*

- New section 789GDC of FW Act, allows an *eligible employer* to direct an *eligible 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.
- Key condition that the employee cannot be usefully employed on their normal days or for their normal hours during the proposed stand down period, because of changes attributable to the COVID-19 pandemic

# Job Keeper change of duties / location

- *Eligible employers* will also have the power to direct *eligible 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).

# Enforceability of Job Keeper directive

- Club must hold reasonable belief that the direction is necessary to continue the employment of employees
- Club must:
  - first consult with the employee about the change: this includes allowing the employee to comment on the change and genuinely considering their comments; and
  - give the employee written notice of the change *at least three days* prior to it coming into force; and
- Direction must be safe and reasonable in all of the circumstances

# Enforceability of Job Keeper directive

- Club must ensure that a Job Keeper directive does not result in a reduction to the employee's base rate of pay
  - This applies even if alternative duties would attract a lesser rate of pay
  - If duties attract a higher rate of pay, then this must be honoured
- Club must ensure that employee receives the greater of:
  - Wages applicable to the work/leave taken in the fortnight; or
  - \$1,500 gross per fortnight
- Directive must be given in writing

# Impact of stand down under FW Act

- Employee remains employed
- Service continues for the purpose of accrued entitlements
- Once stand down in effect leave requests DO NOT need to be approved
  - Although good practice to allow staff to access annual and/or long service leave during these periods (use leave agreement template available on SIAG portal)

# Annual leave directions

- *Eligible employers* can request (but cannot demand) that *eligible employees* take annual leave, so long as complying with the request will not result in the employee having an AL balance of less than 2 weeks
  - NB. These amendments do not permit the Club to direct an eligible employee to take annual leave beyond the ordinary capacity to do so
- Parties may also agree to the employee taking twice as much annual leave at half pay
  - also included in new Schedule X / I of RLC, SCHADS, Clerks Awards

# Questions





Thank you for attending

If in doubt please call SIAG  
on **03 9644 1400**

The information provided is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying it to specific issues.