

Alert

EMPLOYMENT LAW



COVID-19: Flexibility Comes to the Fair Work Act

For JobKeeper employers who continue to operate with reduced work

By Ben Duggan

At special sittings last week, the Federal Parliament passed the JobKeeper laws, which deliver a \$130 billion wage subsidy scheme to support businesses and keep a large proportion of the Australian workforce employed. JobKeeper employers¹ (**Employers**) will be able to access the wage subsidy scheme and use it to re-engage and continue to employ their workforce.

A flat fortnightly wage subsidy of \$1,500 (before tax) will be made available to Employers from the first week of May to pass on to each of their eligible employees². Employers should note that they will need to pay eligible employees in advance of payment of the subsidy, which will be paid monthly in arrears by the ATO.

The JobKeeper laws include amendments to introduce temporary measures to the *Fair Work Act* 2009, which will assist Employers in managing their workforce in response to a reduction in work due to the effect of the COVID-19 pandemic. Under these temporary measures, Employers have greater

flexibility to make changes to five key terms and conditions (outlined below) of employment³ for eligible employees who continue to work in their business. The laws override all current workplace arrangements that might prevent the introduction of these greater flexibilities. Employers will have the ability to take advantage of these flexibilities for six months.

The new JobKeeper flexibilities under the Fair Work Act

The requirements introduced by Federal and State Governments to control the spread of COVID-19, including social distancing, have had a dramatic impact on the amount and nature of work available in large sections of the private sector.

An Employer now has greater flexibility to make changes to the following five key terms and conditions of those eligible employees' employment. Refer to appendix 1.

An Employer has four different options - under these greater flexibilities - to make changes to these five key terms and conditions of employment:

- i. An agreement between an Employer and an eligible employee.
- ii. A JobKeeper request made to an eligible employee.
- iii. A JobKeeper general direction issued to an eligible employee.
- iv. A JobKeeper stand-down direction issued to an eligible employee.

All other terms and conditions of an eligible employee's employment shall remain the same.

I. An agreement between an Employer and an eligible employee

The first option for an Employer seeking to use these new flexibilities to make changes to terms and conditions of employment is to reach an agreement with an eligible employee.

Days of work/time of work

An Employer and an eligible employee can:

1. **reach an agreement** to change an employee's days of work (Flexible Term 1); and/or

¹ See the definition of Job Keeper Employer in our earlier article dated 2 April 2020.

² See the definition of eligible worker / employee for Job Keeper purposes in our earlier article dated 2 April 2020.

³ which include work location and hours of work.

continued overleaf...

2. *each an agreement* to change an employee's time of work (Flexible Term 2).

An agreement that an Employer reaches with an eligible employee to change their days and/or times of work must be in writing. The other conditions of the agreement are that:

- the performance of the duties on different days or at different times is safe;
- the duties are reasonably within the business operations of the Employer; and
- the change in the performance of the duties does *not* reduce the number of hours.⁴

The ability to reach an agreement about days/times of work is facilitated by complementary flexibilities that have been introduced by recent variations to modern awards, including the *Clerks Private Sector Modern Award (Clerks Modern Award)*, which we released an [alert](#) about last week.

Under the Clerks Modern Award, to provide greater flexibility for working from home, an agreement may now be reached with a day employee to change the span of their ordinary hours of work to:

- 6am and 11pm, Monday to Friday.
- 7am and 12.30pm, Saturday.

The increased span of hours for day employees will enable ordinary hours of work to be performed over a greater span, including later at night.

Employers who are still operating their business may take advantage of this flexibility, particularly where their eligible employees are parents

that will need to manage the homeschooling of their children when schools implement this measure next term in South Australia.

Annual leave

An Employer may reach a written agreement with an eligible employee concerning the arrangements for the taking of their paid annual leave. Employers that still have sufficient cash flow may find this flexibility an attractive option if an eligible employee is unable to be fully utilized due to the requirements introduced by Governments to control the spread of COVID-19.

The new flexibilities also facilitate an agreement under which an eligible employee is able to be paid annual leave at half of their normal rate of pay. An arrangement of this type would facilitate an eligible employee's annual leave being paid as a 'top-up' to any wage payment that was received through JobKeeper.⁵

II. A JobKeeper request made to an eligible employee by an Employer

The second option for an Employer seeking to use these new flexibilities to make changes to terms and conditions of employment is to provide a *request* to an eligible employee.

Days of work/time of work

There are restrictions on an Employers ability to change the terms and conditions of employment for an eligible employee as a consequence of:

1. a *request* about a change to an employee's days of work (Flexible Term 1); and/or

2. a *request* about a change to an employee's time of work (Flexible Term 2).

An Employer may provide a request about proposed changes to days and/or time of work to an eligible employee. Upon receipt of such a request, the eligible employee must consider it and must not unreasonably refuse the request.

Annual leave

An Employer has the option to provide a *request* to an eligible employee that they consider taking a period of paid annual leave. Upon receipt of such a request, the eligible employee must consider it and must not unreasonably refuse the request. If the eligible employee accepts the request, they must not be left with a balance of annual leave that is fewer than two weeks.

III. A JobKeeper general direction issued to an eligible employee by an Employer

The third option for an Employer seeking to use these new flexibilities to make changes to terms and conditions of employment is to provide a *general direction* to an eligible employee.

A JobKeeper general direction is a *direction* made to an eligible employee which enables a unilateral change to an eligible employee's employment as a consequence of:

1. a change to an employee's duties of work (Flexible Term 3); and/or
2. a change to an employee's location of work (Flexible Term 4).

⁴ which can only be done unilaterally by way of a direction as discussed later.

⁵ For example where the eligible employee is a full time permanent employee who is working part time hours because of COVID-19.

Duties of work

An Employer may, in recognition of the changing nature of workloads due to requirements introduced by Governments to control the spread of COVID-19, issue a written direction, following consultation, which requires an eligible employee to perform different duties after a notice period of three days.

The conditions of the JobKeeper direction are that:

- the different duties are safe for the eligible employee to perform;
- the eligible employee is licensed and qualified to perform such duties; and
- the duties are within the scope of the Employers business operations.

An eligible employee is only able to refuse to comply with a general direction about doing different duties of work where it is 'unreasonable in all the circumstances.'

Location of work

In recognition of an Employers need to be flexible about the location of work, including the possibility that working from home may be required, a written direction, following consultation, may be provided requiring an eligible employee to work at a different location after a notice period of three days.

The conditions of a JobKeeper direction requiring an eligible employee to work at another location are that:

- the alternative location where the eligible employee is to perform the work is suitable;

- no unreasonable travel is required by the eligible employee to the alternative location;
- the performance of the eligible employee's duties can be done safely; and
- the duties are reasonably within the scope of the Employers business operations.

An eligible employee is only able to refuse to comply with a general direction about doing duties at a different location where it is 'unreasonable in all the circumstances.'

IV. A JobKeeper stand-down direction issued to an eligible employee by an Employer

The fourth and final option for an Employer seeking to use these new flexibilities to make changes to terms and conditions of employment is to provide a **stand-down direction** to an eligible employee.

A JobKeeper stand-down direction is a **direction** made to an eligible employee which enables a unilateral change to an eligible employee's employment as a consequence of:

1. a change to an employee's duties of work (Flexible Term 3);
2. a change to an employee's location of work (Flexible Term 4); and/or
3. a change to an employee's hours of work (Flexible Term 5).

The legal basis for a JobKeeper stand-down direction is similar to the general right of an employer to stand-down under section 524(1) of the *Fair Work Act*.

A JobKeeper stand-down direction may only be provided **"where an employee cannot be usefully employed for their normal days and/or hours due to the requirements introduced by Governments to control the spread of COVID-19"**.⁶

Days of Work/Time of Work/Hours of work

Employers, particularly those who are severely impacted by Government requirements to control the spread of COVID-19, may take advantage of the flexibilities provided under a JobKeeper stand-down direction.

An Employer is able to provide a written stand-down direction to eligible employees with three days' notice. The other conditions for a JobKeeper stand-down direction include:

- that the Employer must consult with the employee (or their representative. i.e. union) before giving the direction;
- that the safeguards (in particular the JobKeeper payment obligations to satisfy the wage condition) under the new flexibilities continue to apply; and
- that a direction must not be unreasonable in all of the circumstances.

The safeguards that an Employer must also comply with when providing a written stand-down direction include:

- that the Employer is required by the **wage condition obligation** to make a minimum payment of \$1,500⁷ in wages to an eligible employee;

⁶ Or COVID-19.
⁷ Per fortnight.

- that the Employer is required by the **minimum payment guarantee** to not decrease the base rate of pay (which includes loadings, penalty rates, allowances and bonuses) worked out on an hourly basis under the stand-down direction; and
- that the Employer is required by the **hourly rate of pay obligation** not to decrease the hourly rate of pay under the stand-down direction.

Interestingly the **wage condition obligation** applies to all eligible employees. This means that some eligible employees, including more junior employees and part-time employees, will obtain a pay rise which could be significant if they earned substantially less than \$1,500 per fortnight before the stand-down direction.

For eligible employees who earn more than \$1,500 per fortnight, an Employer is **not** able to reduce their normal hourly rate of pay because of the **minimum payment guarantee** and the **hourly rate of pay obligation**. The only option for an Employer, under these new flexibilities, to reduce the pay of an eligible employee who earns more than \$1,500 per fortnight, is to provide them with a stand-down direction which contains a direction that reduces their hours of work.

A JobKeeper stand-down direction, as with general directions discussed earlier, must not be 'unreasonable in all of the circumstances.'

Conclusion

The aim of the amendments to the **Fair Work Act**, which introduce these temporary flexibilities, is to support the practical operation of the JobKeeper scheme. Greater flexibility will be introduced into the current workplace system under these new measures for Employers to manage their employees who continue to work in the business.

The new flexibilities complement rather than replace existing flexibilities that already exist under existing workplace arrangements, including where similar types of flexibilities have been introduced by recent variations to Modern Awards to respond to the COVID-19 situation.⁸

An Employer is able, under the most significant of these new flexibilities, to provide **directions** that can change an eligible employee's duties, location of work, days of work, times of work or hours of work.

The JobKeeper **stand-down** direction which permits a direction that changes the hours of work of an eligible employee is the only option, under these new flexibilities, to reduce the overall wage costs of a business.

Safeguards apply to a JobKeeper stand-down, including that the direction has been provided as a consequence of the eligible employee not being able to be usefully employed for their

normal hours of work due to the requirements introduced by Governments to control the spread of COVID-19.

The Fair Work Commission has been empowered to deal with disputes relating to the operation of these new flexibilities. It must, in doing so, take into account 'fairness between the parties concerned.'

Further clarification as to the operation of JobKeeper is expected through the release of other material, including the payment rules, which are expected to be released shortly.

Should you wish to discuss how your business can take advantage of these temporary flexibilities, please contact our Employment Law expert [Ben Duggan](#).



MORE INFO

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⁸ In particular the Hospitality Industry Modern Award, the Restaurant Industry Modern Award and the Clerks Modern Award.

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Appendix 1 - 5 key terms and conditions of those eligible employee's employment

Days of Work
(Flexible Term 1)

Times of Work
(Flexible Term 2)

Duties of Work
(Flexible Term 3)

Location of Work
(Flexible Term 4)

Hours of Work
(Flexible Term 5)