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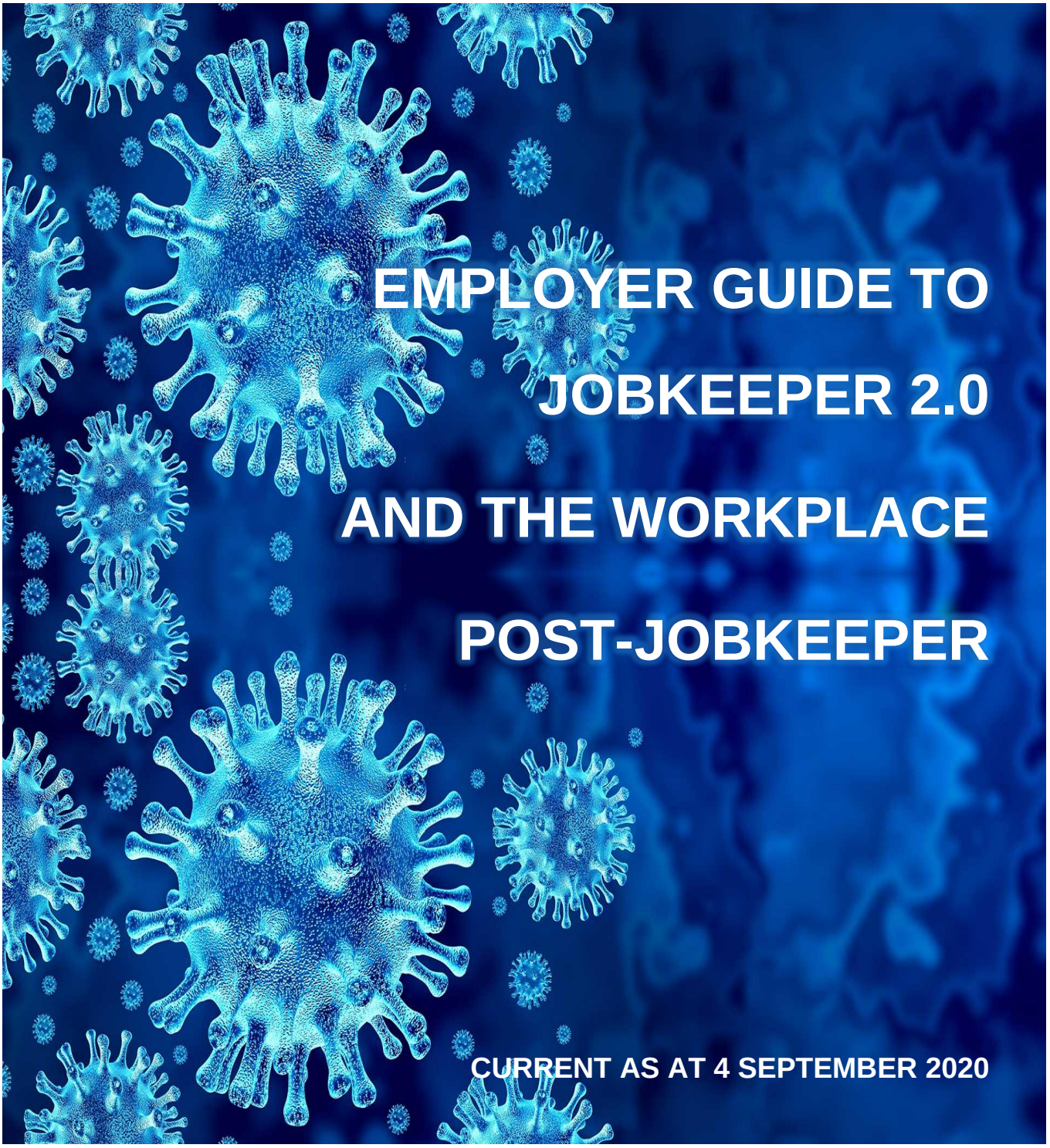

EMPLOYER GUIDE TO JOBKEEPER 2.0 AND THE WORKPLACE POST-JOBKEEPER

CURRENT AS AT 4 SEPTEMBER 2020

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OVERVIEW

This Jobkeeper Guide has been prepared by the Employment Relations Department for Members of the Motor Traders' Association of New South Wales (MTA NSW) to provide support to Members with the implementation of recent legislative changes to the Jobkeeper scheme. This Guide is also intended to provide advice and guidance to Members with managing their workplace after they cease being eligible for Jobkeeper.

On 1 September 2020, the Coronavirus Economic Response Package (Jobkeeper Payments) Amendment Bill 2020 (**the Bill**) passed the Federal Parliament, which extends the Jobkeeper payment scheme and the temporary Jobkeeper provisions of the Fair Work Act 2009 (Cth.) until 28 March 2021.

The extension to the Jobkeeper scheme is here-in referred to as Jobkeeper 2.0.

This Jobkeeper Guide provides advice on current legislation, including the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (**the Rules**), which provides eligible businesses with a wage subsidy for eligible employees and the Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020 (**the Act**), which provides eligible businesses with flexibility in the form of a Jobkeeper Enabling Direction.

For Members that may no longer be eligible for Jobkeeper payment after 27 September 2020, this guide will provide advice on how to utilise the flexibilities under the Act that has been extended to certain legacy employers. This guide will also include information on managing your workplace and employees post-Jobkeeper; including advice on ceasing Jobkeeper enabling directions, changing employment conditions and redundancies.

The content of this Guide has been prepared based on available material to date (up to 4 September 2020). This Guide has been prepared for information purposes only for Members of MTA NSW. It does not purport to be comprehensive or to tender legal or financial advice. Members should consult with their legal and financial advisors for advice of this nature. It may not be reproduced without the express written permission of MTA NSW.

THE NEW ELIGIBLITY TEST FOR JOBKEEPER PAYMENTS

On 14 August 2020, the Government released the Coronavirus Economic Response Package (Payments and Benefits) Amended Rules (No.7) 2020 (**Amended Rules**), which amended changes to the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (**Jobkeeper Rules**). The Amended Rules expanded the eligibility test and provided for an additional test of 1 July 2020, in addition to the 1 March 2020 test.

The 1 July eligibility test means that employers may be able to claim the Jobkeeper payment for employees that did not previously meet the eligibility requirements under the 1 March test. This may include employees that:

- were newly hired after 1 March and before 1 July;
- were already employed as at 1 July but ceased employment and have been re-hired prior to 3 August;
- were not considered long-term casuals as at 1 March but have been employed on a regular and systematic basis for a 12 month period as at 1 July;
- turned 16 years old between 1 March and 1 July and meet the eligibility requirements for those aged 16 or 17; or
- turned 18 years old between 1 March and 1 July where they did not previously meet the eligibility requirements for those aged 16 or 17.

For abundant clarity, an employee who qualified as of 1 March 2020 does not need to re-qualify under the 1 July test.

Who is an eligible employee under the 1 July eligibility test?

An employee is an eligible employee under the 1 July eligibility test if the employee is employed by the employer (including those stood down or re-hired) at any time in the fortnight and the employee satisfies the following requirements on 1 July 2020.

The employee on 1 July 2020:

a) was employed by the employer on either
   i. a non-casual basis (either full time or part time basis); **or**
   ii. as a long term casual employee who had been engaged by the business on a regular and systematic basis during the 12 month period immediately prior 1 July 2020 and, at the time of providing the nomination notice, the employee was not a permanent employee of any other employer; **and**

b) was 16 years of age or older; **and**

c) if the employee was 16 or 17 years,

   i. was independent within the meaning of section 1067A of the Social Security Act 1991, **or**

   ii. not undertaking full-time study (within the meaning of the Social Security Act 1991); **and**

d) was either:

   i. a resident of Australia for the purposes of the Income Tax Assessment Act 1936 and was the holder of a special category visa referred to in the regulations under the Migration Act 1958 as a Subclass 444 (Special Category) visa; **or**

   ii. an Australian resident (within the meaning of section 7 of the Social Security Act 1991).

The employee must also agree to be nominated by the employer and return a *nomination notice* in the prescribed form.

When is an employee excluded from being an eligible employee?

The employee is excluded from being an eligible employee of the employer for the fortnight if the employee is in receipt of:

- Government Paid Parental Leave and this payment overlaps with or includes the fortnight;
- Dad and Partner Pay at any time during the fortnight; or
  a payment in accordance with Australian workers' compensation law and the employee is totally incapacitated for work during the fortnight and the payment overlaps with or includes the fortnight.

A long-term casual employee is also excluded from being an eligible employee if they are also employed in a permanent position with another employer. In these circumstances, the employee can only nominate their permanent employer for the Jobkeeper scheme. The employee cannot nominate their casual employer, even if their permanent employer does not qualify or elects not to participate in the Jobkeeper scheme.

What do I need to do to claim the Jobkeeper payment for my 1 July eligible employees?

If a business is enrolled as an employer to participate in the Jobkeeper scheme, they must:

1. provide written notice to their 1 July eligible employees that the employer has elected to participate in the Jobkeeper scheme (if this hasn't already been provided); and
2. provide a *nomination notice* to their new 1 July eligible employees; and
3. state that the employee must give the employer the nomination notice if they agree to be nominated as an eligible employee; and
4. include information about the steps the employee can take to give the business with the *nomination notice*.

The nomination notice can be downloaded from the ATO website here. Please ensure that a copy of the completed *nomination notice* is retained for at least seven (7) years.

In addition to the above, to meet the wage condition to be able to claim the Jobkeeper payments for the Jobkeeper fortnights, employers must pay their eligible employees at least the minimum amount of $1,500 (gross) for each Jobkeeper fortnight they claim for. The Jobkeeper payment of $1,500 (gross) will reduce from 28 September 2020 (see Jobkeeper 2.0 of this guide for more information).

How does this impact my employees that I am already claiming the Jobkeeper payments for?

These changes do not impact employees that were already considered eligible employees based on the 1 March requirements and who remain eligible under the Rules 2020.

Employers are not required to provide these employees with a new *nomination notice* if they have remained employed with the same employers since 1 March 2020.

However, where an employee:

a) was a 1 March 2020 employee of the employer (i.e. meaning they previously met the 1 March 2020 eligibility test and were considered an 'eligible employee'); and
b) before 1 July 2020 the employee stopped being an employee of the employer; and
c) after 1 July 2020 the employee became re-employed by the same employer;

then, this employee must give the employer a new *nomination notice*. This *nomination notice* must be given to the employee within 7 days of becoming re-employed and must state if the

employee has given a nomination notice to another employer. The *nomination notice* can be downloaded from the ATO website here.

Where can I access more information?

For more information on these changes and the 1 July eligibility test, visit the ATO website on the following links:

https://www.ato.gov.au/General/JobKeeper-Payment/Employers/Your-eligible-employees/

https://www.ato.gov.au/General/JobKeeper-Payment/

JOBKEEPER 2.0

On 21 July 2020, the Government announced that the Jobkeeper payment, which was due to end on 27 September 2020, will now be extended for a further six months until 28 March 2021 and will continue to be available to eligible businesses.

From 28 September 2020, there will be two extension periods:

- Extension 1 is from 28 September 2020 to 3 January 2021
- Extension 2 is from 4 January 2021 to 28 March 2021

There will also be different JobKeeper payment rates relevant to each extension period, which will further be divided in to two tiers.

Decline in turnover test

To remain eligible for the Jobkeeper payments, businesses will need to requalify for each of these two extension periods. The required decline in GST percentages will remain the same, specifically:

- 30% or more for businesses with an aggregated turnover of $1 billion or less;
- 50% or more for businesses with an aggregated turnover of more than $1 billion; or
- 15% or more for ACNC-registered charities other than universities and schools.

Extension 1 – 28 September 2020 to 3 January 2021

To qualify for the first extension period, an employer will need to demonstrate that their actual GST turnover has fallen in the September 2020 quarter (July, August, September) relative to a comparable period (generally the corresponding quarter in 2019).

There will be a Tier 1 and Tier 2 Jobkeeper payment rate applicable to eligible employees during the first extension period, as detailed below:

Tier	Tier 1	Tier 2
Jobkeeper payment rate	$1,200 (gross) per fortnight	$750 (gross) per fortnight
Who does this apply to?	eligible employees who were working 20 hours or more a week on average in the 4 weeks of pay periods, either before 1 March 2020 or 1 July 2020	All other eligible employees i.e. employees who were working less than 20 hours or more a week on average in the 4 weeks of pay periods, either before 1 March 2020 or 1 July 2020

Extension 2 – 4 January 2021 to 28 March 2021

To qualify for the second extension period, an employer will need to demonstrate that their actual GST turnover has fallen in the December 2020 quarter (October, November, December) relative to a comparable period (generally the corresponding quarter in 2019).

There will also be a Tier 1 and Tier 2 Jobkeeper payment rate applicable to eligible employees during the second extension period, as detailed below:

Tier	Tier 1	Tier 2
Jobkeeper payment rate	$1,000 (gross) per fortnight	$650 (gross) per fortnight
Who does this apply to?	eligible employees who were working 20 hours or more a week on average in the 4 weeks of pay periods, either before 1 March 2020 or 1 July 2020	All other eligible employees i.e. employees who were working less than 20 hours or more a week on average in the 4 weeks of pay periods, either before 1 March 2020 or 1 July 2020

How do I know which 4-week average of hours to use?

If the employee was an eligible employee on 1 March 2020, employers should assess the average hours in the 4 weeks of pay periods prior to 1 March 2020. If the employee was an eligible employee on 1 July 2020, employers should assess the average hours in the 4 weeks of pay periods prior to 1 July 2020.

For information about the 1 July test, refer to the new eligibility test for Jobkeeper payments of this guide. Further information about which eligibility test will apply can also be accessed via the ATO website here.

JOB KEEPER ENABLING DIRECTIONS FOR EMPLOYERS THAT CONTINUE TO QUALIFY FOR JOBKEEPER 2.0

Eligible employers under Jobkeeper 2.0 will continue to be able to utilise the Jobkeeper flexibilities under the Act which include the following:

- Jobkeeper enabling stand down directions relating to the reduction in days or hours of work;
- Jobkeeper enabling directions relating to changes to the employee's usual duties;
- Jobkeeper enabling directions relating to change to the employee's usual location of work; or
- agreements with employees to work on different days or at different times.

These flexibilities can only be applied to eligible employees under the Jobkeeper scheme.

The ability for an employer to request their employee to take annual leave or agree to take annual leave at half pay in accordance with section 789GJ of the Act will cease on 28 September 2020 and can no longer be used after this date.

However, where an employee is not an eligible employee in accordance with section 9 of the **Rules 2020**, the employer can make a request for an employee to take annual leave under Schedule I of the Vehicle Repair, Services and Retail Award 2020 provided that the request does not result in the employee retaining a balance of less than 2 weeks annual leave after the leave is taken. Schedule I of the Award will expire on 30 September 2020, unless application for an extension is successful. Any request made under Schedule I must be made a minimum of 72 hours before the date on which the annual leave is to commence and the period of annual leave must commence before 30 September 2020, but may end after this date. Refer to 'COVID Flexibilities under Schedule I of the Vehicle Award' on page 32 for more information.

In addition, Schedule X of the Vehicle Repair, Services and Retail Award 2020 also provides the ability for an employer and employee to agree to take twice as much leave on half pay. Schedule X of the Award will expire on 30 September 2020, unless application for an extension is successful. Any agreement under Schedule X must be recorded in writing, retained as an employee record and any period of leave must start before 30 September 2020 but may end after this date.

Jobkeeper enabling stand down direction to work reduced days or hours

Eligible employers remain eligible to issue their eligible employees a Jobkeeper enabling stand down direction to work reduced days or hours (which can be reduced to nil) under the Act. These provisions remain unchanged from JobKeeper 1.0 under the Act, except provisions for considering reasonableness have been amended to prevent an unfair effect on some employees compared to others.

The Jobkeeper enabling stand down direction can only be given if:

- the employee cannot be usefully employed for their ordinary days or hours because of:
    - changes or impacts to the business attributable to COVID-19; or
    - Government initiatives to reduce COVID-19 transmission; and
- the direction is safe having regard to the nature and spread of COVID-19; and
- the direction is reasonable having regard to the impact of the direction on any caring responsibilities the employee may have; and
- the direction does not have an unfair effect on an employee in a particular classification or part of business when compared with other employees in the same classification or part of the business. (e.g. you should not reduce one employee's hours and keep all other employees on the same hours. The reduction of hours should be fair across all employees in the same role or department).

Eligible employers are still required to comply with the "hourly rate of pay guarantee" and the "minimum payment guarantee" when a Jobkeeper direction has been issued to an employee. The "hourly rate of pay guarantee" means that an employee's hourly base rate of pay is not less than the hourly base rate of pay that the employee would have been paid if the direction had not been given. The "minimum payment guarantee" means that the employer must ensure that the employee receives the amount of Jobkeeper payment for the fortnight or the amount payable to the employee for work performed in the fortnight, whichever is the greater.

It is important to note that an employee will still accrue leave entitlements as normal during a period which the Jobkeeper enabling stand down direction applies. An employee will also be entitled to redundancy pay and notice in lieu entitlements as if the Jobkeeper enabling stand down direction had not been given.

A Jobkeeper enabling direction does not apply when an employee takes a period of authorised paid or unpaid leave or is otherwise authorised to be absent from their employment.

Jobkeeper enabling direction to change usual duties

Eligible employers remain eligible to direct their eligible employees to perform different duties than their usual duties of work. These provisions remain unchanged from Jobkeeper 1.0 under the Act.

A direction for an employee to perform different duties can only be given if:

a) the employee has the skills and competencies to perform the duties;
b) the employee has the required licence or qualification (if applicable) to perform the duties;
c) the duties are safe having regard to the nature and spread of COVID-19; and
d) the duties are reasonably within the scope of the employer's business operations.

Employers must ensure that they continue to comply with the "hourly rate of pay guarantee" when issuing a direction of this nature. This means that an employer must ensure that the employee's base hourly rate of pay is the greater of the following:

a) the base hourly rate of pay that would have been applicable to the employee if the direction had not been given to the employee; or
b) the base hourly rate of pay that is applicable to the duties the employee is performing.

Employers must also comply with the 'minimum payment guarantee'. The "minimum payment guarantee" means that the employer must ensure that the employee receives the amount of Jobkeeper payment for the fortnight or the amount payable to the employee for work performed in the fortnight, whichever is the greater.

Jobkeeper enabling direction to change location of work

Eligible employers can issue a direction to change their eligible employee's location of work, which can include directing the employee to work from the employee's home. These provisions remain unchanged from Jobkeeper 1.0.

A direction for an employee to perform their duties at a different location than the employee's normal place of work can only be given if:

a) the place is suitable for the employee's duties; and
b) the place does not require the employee to travel an unreasonable distance (not applicable if the place if the employee's home); and

c) the duties performed at the place are safe having regard to the nature and spread of COVID-19; and
d) the duties performed at the place are reasonably within the scope of the employer's business operations.

Employers must comply with the 'minimum payment guarantee' and the 'hourly rate of pay guarantee' described above.

Request and agreement for an employee to work different days or times

Eligible employers have the ability to request their eligible employees to perform their duties on different days or at different time compared with the employee's ordinary days or times of work. These provisions remain unchanged from Jobkeeper 1.0.

A request for an employee to perform their duties on different days or at different times can only be made if:

a) it does not result in the reduction of the employee's ordinary hours of work;
b) the performance of their duties on those days or at those times is safe having regard to the nature and spread of COVID-19; and
c) the performance of those duties on those days is reasonably within the scope employer's business operations.

The employee is required to consider the request and must not unreasonably refuse the request to alter their days or times of work.

If the employer and employee reach an agreement, this agreement must be in writing and clearly state the following:

a) the start date of the agreement;
b) the end date of the agreement (which can be when the employer will cease to qualify for Jobkeeper 2.0, or at the start of 29 March 2021, or any other date as indicated by the employer);
c) the employee's new days of work; and
d) the employee's new start and finish times of work on each day.

Consultation requirements for giving a Jobkeeper enabling direction

Before issuing a Jobkeeper enabling direction (i.e. a direction relating to the reduction of hours, change in duties or location of work), eligible employers must provide the employee

with a written notice of the intention to issue a direction 3 days prior, consult with the employee and issue the written direction (following this order only).

A detailed guide has been provided below:

1. Provide the employee **written notice** at least 3 days before the Jobkeeper enabling direction is issued, unless a shorter notice period is agreed with the employee, which explains that the employer intends on issuing a Jobkeeper enabling direction and includes:
    a) details of the direction (e.g. I intend to issue you a Jobkeeper enabling direction to reduce your hours to… change your duties to…. Change your location of work to…);
    b) that the employer invites the employee or their representative (if any) to a consultation meeting to discuss the employer's intention to issue the direction (including details of the date, time and location of the meeting);
    c) why the employer intends to issue the direction (e.g. because you can't be usefully employed for your normal days or hours because of changes to our business attributable to the coronavirus pandemic);
    d) if the direction relates to the reduction of hours, what the employee will be paid as a result of the intended direction (e.g. you will continue to be paid your gross base hourly rate of $... for all ordinary hours worked); and
    e) if the direction relates to the reduction of hours, that the employee is entitled to make a request for secondary employment, training or professional development during the intended stand down period.
2. Hold a consultation meeting with the employee or their representative (if any) and:
    a) maintains a written record of the consultation meeting (this can be in the form of written minutes);
    b) provide the employee or their representative information on the proposed Jobkeeper enabling direction (e.g. details of the direction, when the direction will take effect, and the expected effects of the direction on the employee); and
    c) invite the employee or their representative to give their views about the impact of the proposed direction on the employee (e.g. any impact on the employee's family or caring responsibilities).
3. Consider the views raised by the employee or their representative within the 3 day period before the direction is given and whether this alters the initial proposed Jobkeeper enabling direction; and finally

4. Provide the employee the written Jobkeeper enabling direction which must be after the 3 day period (unless a shorter notice period is agreed with the employee) which includes details of:
    a) the start date of the direction;
    b) the direction being issued (e.g. I am directing you to work reduced hours of… to perform the duties of…. to perform your duties at the location of….);
    c) whether the direction is different to that discussed in the consultation meeting because the employer has considered the views raised by the employee or their representative in the meeting (e.g. this direction is different to that discussed with you on <insert date>. In reaching the decision to issue this direction, I considered your views as expressed in our earlier discussion.);
    d) if the direction relates to the reduction of hours, what the employee will be paid as a result of the intended direction (e.g. you will continue to be paid your gross base hourly rate of $... for all ordinary hours worked); and
    e) if the direction relates to the reduction of hours, that the employee is entitled to make a request for secondary employment, training or professional development during the intended stand down period.

The MTA NSW Employment Relations Department provided templates to Members in an EDM dated 21 April 2020. Please email eradvice@mtansw.com.au to request a copy of these template letters.

What happens to any Jobkeeper enabling directions or agreements that currently apply to my employees?

Any Jobkeeper enabling directions or agreements made by an eligible employer with their eligible employees before 28 September 2020 will continue to apply unless:

- the employer ceases to be eligible for Jobkeeper 2.0 from 28 September 2020 at which the direction or agreement will cease on 28 September 2020;
- the employee ceases to be an eligible employee under the Jobkeeper scheme;
- it is replaced with a new Jobkeeper enabling direction or agreement given by the employer to the employee;
- it is withdrawn or revoked by the employer; or
- it ends at the start of 29 March 2021.

LEGACY EMPLOYERS

Those employers that were eligible employers under the original Jobkeeper scheme but no longer meet the decline in turnover test to qualify for the extension of the Jobkeeper payments from 28 September 2020 may still be able to access some of the modified flexibilities under the Act. These employers are referred to as “legacy employers”.

What is a legacy employer?

A legacy employer is an employer that:

- previously qualified for the Jobkeeper payments but is no longer eligible from 28 September 2020; and
- has a certificate from an eligible financial service provider, or a statutory declaration (applicable to small businesses with less than 15 employees), demonstrating at least a 10% decline in turnover for the designated quarter.

10% decline in turnover test for legacy employers

To continue to utilise the modified Jobkeeper enabling directions under the Act from 28 September 2020, legacy employers will need to demonstrate that they have suffered a 10% decline in turnover for a designated quarter using the current GST turnover (instead of the projected GST turnover).

The designated quarter used for the 10% decline in turnover test will change during different time periods as follows:

Time period	Designated quarter to be used for determining if 10% decline in turnover is met
Between 28 September 2020 to 27 October 2020 (inclusive)	June 2020 quarter (April, May and June 2020) compared to the June 2019 quarter
Between 28 October 2020 to 27 February 2021 (inclusive)	September 2020 quarter (July, August and September 2020) compared to the September 2019 quarter
Between 28 February 2021 to 28 March 2021 (inclusive)	December 2020 quarter (October, November and December 2020) compared to the December 2019 quarter

10% decline in turnover certificate

The 10% decline in turnover certificate must be issued by an "eligible financial service provider" and state that, in the opinion of the eligible financial service provider, the employer satisfied the 10% decline in turnover test for the designated quarter applicable to the time period.

An “eligible financial service provider” is:

- a registered company auditor; or
- a registered tax agent, BAS agent or tax (financial) adviser; or
- a qualified accountant;

and must not be:

- a director or employee of the employer; or
- an associated entity of the employer; or
- a director or employee of an associated entity of the employer.

Small business employers with less than 15 employees have the option of making a statutory declaration stating that the employer satisfied the 10% decline in turnover test for the designated quarter applicable to the time period. The individual making the statutory declaration must:

- be the employer or an authorised individual of the employer; and
- have knowledge of the financial affairs of the employer.

For guidance on completing a statutory declaration and for a downloadable template, visit the Attorney-General’s website here.

Employers must take care to not make a false statement in a statutory declaration. False statutory declarations are an offence and can result in imprisonment.

Similarly, knowingly providing false or misleading information (or failing to provide information) to a financial service provider when trying to obtain a 10% decline in turnover test certificate is an offense and carries serious penalties.

Flexibility provisions for legacy employers

Under the extended provisions, legacy employers can apply certain Jobkeeper enabling directions to their previously eligible employees. This means that such Jobkeeper enabling directions will only apply to employees that:

- the employer was previously receiving Jobkeeper payments for; and
- the Jobkeeper payments were for a fortnight that ended before 28 September 2020.

It is important to note that employers do not have had to received Jobkeeper payments for the employee for every fortnight. The requirement is that an employee received the Jobkeeper payment for at least a fortnight at any time prior to the end of the original Jobkeeper scheme on 28 September 2020.

The amended flexibility provisions that legacy employers will be able to utilise are:

- Jobkeeper enabling stand down directions relating to the reduction in days or hours of work;
- Jobkeeper enabling directions relating to changes to the employee's usual duties;
- Jobkeeper enabling directions relating to change to the employee's usual location of work; or
- make agreements with employees to work on different days or at different times.

There are no longer provisions which allow employers to request their employees to take annual leave, or agree to take annual leave at half pay under the Act.

However, where an employee is not an eligible employee in accordance with section 9 of the **Rules 2020**, the employer can request for an employee to take annual leave under Schedule I of the Vehicle Repair, Services and Retail Award 2020 provided that the request does not result in the employee retaining a balance of less than 2 weeks annual leave after the leave is taken. Schedule I of the Award will expire on 30 September 2020, unless application for an extension is successful. Any request made under Schedule I must be made a minimum of 72 hours before the date on which the annual leave is to commence and the period of annual leave must commence before 30 September 2020, but may end after this date. Refer to 'COVID Flexibilities under Schedule I of the Vehicle Award' on page 32 for more information.

Schedule X of the Vehicle Repair, Services and Retail Award 2020 also provides the ability for an employer and employee to agree to take twice as much leave on half pay. Schedule X of the Award will expire on 30 September 2020, unless application for an extension is successful. Any agreement under Schedule X must be recorded in writing, retained as an employee record and any period of leave must start before 30 September 2020 but may end after this date.

Jobkeeper enabling stand down direction to work reduced days or hours

Legacy employers can issue their employees a Jobkeeper enabling stand down direction to work reduced hours or days. However, the provisions for Jobkeeper enabling stand down directions are not the same as the original Jobkeeper scheme and have been amended for legacy employers.

Legacy employers can direct their employees to:

a) work a reduced number of days or hours which cannot be less than 60% of the employee's ordinary hours as at 1 March 2020 (see below for more detail); and
b) cannot result in the employee working less than 2 hours in a day.

In assessing an employee's "ordinary hours as at 1 March 2020," employers should not rely on the hours the employee did or did not work on 1 March 2020, but instead refer to their contracted hours pursuant to their employment contract as at 1 March 2020.

It is important to note that an employee will still accrue leave entitlements as normal during a period which the Jobkeeper enabling stand down direction applies. An employee will also be entitled to redundancy pay and notice in lieu entitlements as if the Jobkeeper enabling stand down direction had not been given.

The Jobkeeper enabling stand down direction can only be given if:

a) the employee cannot be usefully employed for their ordinary days or hours because of:
    i. changes or impacts to the business attributable to COVID-19; or
    ii. Government initiatives to reduce COVID-19 transmission; and
b) the direction is safe having regard to the nature and spread of COVID-19;
c) the direction is reasonable having regard to the impact of the direction on any caring responsibilities the employee may have;
d) the direction does not have an unfair effect on an employee in a particular classification or part of business when compared with other employees in the same classification or part of the business. (e.g. an employer should not reduce one employee's hours and keep all other employees on the same hours. The reduction of hours should be fair across all employees in the same role or department).

A Legacy employer is still required to comply with the "hourly rate of pay guarantee" when a Jobkeeper direction has been issued to an employee. The "hourly rate of pay guarantee" means that an employee's hourly base rate of pay is not less than the hourly base rate of pay that the employee would have been paid if the direction had not been given.

A Jobkeeper enabling direction does not apply when an employee takes a period of authorised paid or unpaid leave or is otherwise authorised to be absent from their employment.

Jobkeeper enabling direction to change usual duties

Legacy employers can direct their employees to perform different duties than their usual duties of work.

A direction for an employee to perform different duties can only be given if:

a) the employee has the skills and competencies to perform the duties;
b) the employee has the required licence or qualification (if applicable) to perform the duties;
c) the duties are safe having regard to the nature and spread of COVID-19;
d) the period begins on or after 28 September 2020; and
e) the duties are reasonably within the scope of the employer's business operations.

An employer must ensure that they comply with the "hourly rate of pay guarantee" when issuing a direction of this nature. This means that the employee's base hourly rate of pay is the greater of the following:

c) the base hourly rate of pay that would have been applicable to the employee if the direction had not been given to the employee; or
d) the base hourly rate of pay that is applicable to the duties the employee is performing.

Jobkeeper enabling direction to change location of work

Legacy employers can issue a direction to change their employee's location of work, which can include directing the employee to work from the employee's home.

A direction for an employee to perform their duties at a different location than the employee's normal place of work can only be given if:

a) the place is suitable for the employee's duties;
b) the place does not require the employee to travel an unreasonable distance (not applicable if the place if the employee's home);
c) the duties performed at the place are safe having regard to the nature and spread of COVID-19;

d) the duties performed at the place are reasonably within the scope of the employer's business operations.

Request and agreement for an employee to work different days or times

Legacy employers have the ability to **request** their employees to perform their duties on different days or at different time compared with the employee's ordinary days or times of work.

A request for an employee to perform their duties on different days or at different times can only be made if:

a) the request relates to a period on or after 28 September 2020;
b) it does not result in the reduction of the employee's ordinary hours of work;
c) it does not result in the employee working less than 2 hours in a day;
d) the performance of their duties on those days or at those times is safe having regard to the nature and spread of COVID-19; and
e) the performance of those duties on those days is reasonably within the scope employer's business operations.

The employee is required to consider the request and must not unreasonably refuse the request.

If the employer and employee reach an agreement, this agreement must be in writing and clearly state the following:

e) the start date of the agreement;
f) the end date of the agreement (this cannot be after the "test time" – refer to the below for the meaning of test time);
g) the employee's new days of work;
h) the employee's new start and finish times of work on each day;
i) the duration and commencement of meal breaks; and
j) that the agreement can be terminated by either party at any time.

Termination of a direction or agreement if a legacy employer ceases to satisfy the 10% decline in turnover test

If a legacy employer has issued a Jobkeeper enabling direction under the legacy provisions (i.e. direction relating to the reduction of hours, change in duties or location of work) to their

employee or has made an agreement with an employee to change their days or times of work, and the employer will:

- no longer been able to satisfy the 10% decline in turnover test; and
- no longer hold a 10% decline in turnover certificate

then the Jobkeeper enabling direction or the agreement will cease to have effect immediately at the "test time". This means at the test time the employee will revert back to their usual employment conditions before any direction was issued or agreement was made.

The "test time" means:

- the start of 28 October 2020; or
- the start of 28 February 2021.

If an employer will no longer satisfy the 10% decline in turnover test, they are required to provide their employees a written notice before the test time (i.e. before 28 October 2020 or before 28 February 2021) which explains:

- that the Jobkeeper enabling direction or the agreement will cease to have effect; and
- when this will cease.

It is also recommended that this written notice explains that the employee will revert back to the employment conditions prior to the Jobkeeper enabling direction or the agreement.

The MTA NSW Employment Relations Department have templates for the above requirements available for Members to utilise. Please email eradvice@mtansw.com.au to request a copy of these template letters.

Continuing a direction or agreement if a legacy employer continues to satisfy the 10% decline in turnover test after the 'test time'

If a legacy employer has issued a Jobkeeper enabling direction (i.e. direction relating to the reduction of hours, change in duties or location of work) to their employee or has made an agreement with an employee to change their days or times of work, and the employer will:

- continue to satisfy the 10% decline in turnover test; and
- will hold a 10% decline in turnover certificate

then, the Jobkeeper enabling direction or agreement will continue after the test time (see above for the test times).

However, an employer must provide their employees with a written notice before the test time (i.e. before 28 October 2020 or before 28 February 2021) which explains that the direction or the agreement will continue and will not cease to have effect after the test time.

All Jobkeeper enabling directions or agreements under these provisions will cease at the start of 29 March 2021.

The MTA NSW Employment Relations Department have templates for the above requirements available for Members to utilise. Please email eradvice@mtansw.com.au to request a copy of these template letters.

Consultation requirements for legacy employers issuing a Jobkeeper enabling direction

Before issuing a Jobkeeper enabling direction, legacy employers must provide the employee with a written notice of the intention to issue a direction 7 days prior, consult with the employee and issue the written direction (following this order only).

A detailed guide has been provided below:

1. provide the employee with a **written notice** at least 7 days before the Jobkeeper enabling direction is issued, unless a shorter notice period is agreed with the employee, which explains that the employer intends on giving a Jobkeeper enabling direction and includes:
    a) details of the direction (e.g. I intend to issue you a Jobkeeper enabling direction to reduce your hours to… change your duties to…. Change your location of work to…);
    b) that the employer invites the employee or their representative (if any) to a consultation meeting to discuss the intention of issuing this direction (including details of the date, time and location of the meeting);
    c) the reasons the employer intends to issue the direction (e.g. because you can't be usefully employed for your normal days or hours because of changes to our business attributable to the coronavirus pandemic);
    d) if the direction relates to the reduction of hours, what the employee will be paid as a result of the intended direction (e.g. you will continue to be paid your gross base hourly rate of $... for all ordinary hours worked); and
    e) if the direction relates to the reduction of hours, that the employee is entitled to make a request for secondary employment, training or professional development during the intended stand down period.

2. hold a consultation meeting with the employee or their representative (if any) and:
    a) maintain a written record of the consultation meeting (this can be in the form of written minutes);
    b) provide the employee or their representative information on the proposed Jobkeeper enabling direction (e.g. details of the direction, when the direction will take effect, and the expected effects of the direction on the employee); and
    c) invite the employee or their representative to give their views about the impact of the proposed direction on the employee (e.g. any impact on the employee's family or caring responsibilities).
3. consider the views raised by the employee or their representative within the 7 day period before the direction is given and whether this alters the initial proposed Jobkeeper enabling direction; and finally
4. issue the employee with the **written** Jobkeeper enabling direction which must be after the 7 day period (unless a shorter notice period is agreed with the employee) which includes details of:
    a) the start date of the direction;
    b) the direction being issued (e.g. I am directing you to work reduced hours of… to perform the duties of…. to perform your duties at the location of….);
    c) whether the direction is different to that discussed in the consultation meeting because the employer considered the views raised by the employee or their representative in the meeting (e.g. this direction is different to that discussed with you on <insert date>. In reaching the decision to issue this direction, I considered your views as expressed in our earlier discussion.);
    d) if the direction relates to the reduction of hours, what the employee will be paid as a result of the intended direction (e.g. you will continue to be paid your gross base hourly rate of $... for all ordinary hours worked); and
    e) if the direction relates to the reduction of hours, that the employee is entitled to make a request for secondary employment, training or professional development during the intended stand down period.

The MTA NSW Employment Relations Department will have templates for the above consultation requirements available for Members to utilise. Please email eradvice@mtansw.com.au to request a copy of these template letters.

REDUNDANCIES

Employers that no longer qualify for the Jobkeeper payments under Jobkeeper 2.0 or that continue to be impacted by COVID-19 may find themselves under increased financial strain.

It is recommended that employers review their current operational needs and budgets against future financial forecasts and operational needs. In situations where a change needs to occur to remain operationally viable, employers may need to consider the redundancy process.

Employers need to be aware that when an employee is terminated by way of redundancy, an employee can still make an unfair dismissal claim, as well as a general protections claim where the employee may allege that they were terminated for an unlawful reason such as their age, disability or for taking a period of leave.

If the redundancy is a 'genuine redundancy' this is a complete defence against to an unfair dismissal claim and can see the matter dismissed by the Fair Work Commission. To meet the criteria for a 'genuine redundancy', employers need to:

- have a genuine operational reason for the proposed changes;
- no longer require the role to be performed;
- consult in accordance with the applicable industrial instrument, such as a modern award; and
- offer redeployment to the employee unless it would not be reasonable in all the circumstances to redeploy the employee to another available position within the company or an associated entity of the company.

It is recommended that employers currently receiving Jobkeeper payments for their employees refrain from making such employees redundant as this may not be considered a 'genuine redundancy' because the flexibilities under the Act have been provided to assist employers in maintaining their employee's employment. For example, employers can reduce their employee's hours of work to nil if they cannot be usefully employed whilst the employer is receiving Jobkeeper payments for the employee (see Jobkeeper enabling stand down direction for more information).

Similarly, the same considerations should be applied by legacy employers before seeking to make their employees redundant (see Jobkeeper enabling stand down directions for legacy employers for more information).

Consultation

Where a decision has been made that due to the operational needs of the business, employees "need to be let go", then it is important that the employer consults with their employees who may be affected by the change. All modern awards and enterprise agreements provide consultation provisions, which must be adhered to, in order to provide a defence to an unfair dismissal claim. Consultation **must** occur ***before*** a role is made redundant. It is also important to note that redundancy is about the position and not the employee.. Therefore, if there are several employees performing the same role, the employer must consult with all these employees.

The Vehicle Repair, Services and Retail Award 2020 ("the Award") requires that employers consult in accordance with clause 35 of the Award. Specifically, the Award states that employers must provide in writing to the employee and their representative (if any) details on:

a) the nature of the changes;
b) the expected effects of the changes on the employees; and
c) any other matters likely to effect the employees.

In addition, employers must discuss the proposed changes with affected employees and their representatives at a consultation meeting which:

a) explains the changes and reasons for the changes;
b) explains the likely effect on the employees as a result of the changes (i.e. that their role *may* be made redundant); and
c) provides an opportunity for the employee and their representative (if any) to express their views and make suggestions on measures to avoid or reduce the adverse effects of the changes on the employees.

Employers must then give prompt consideration to any matters raised by employees or their representatives during the consultation meeting..

The Award poses an obligation to consult "*as soon as practicable after a definite decision has been made*". Therefore, employers will need to identify when a definite decision has been made and it may be that one or more definite decisions are made, which impose an obligation to consult twice, or more. Accordingly, employers should ensure that they keep a record of the consultation meetings, such as minutes of meetings.

To assist Members with the redundancy process, the MTA NSW Employment Relations Department can provide members with template consultation meeting invitation letters and template redundancy letters. Please email eradvice@mtansw.com.au to obtain a copy.

Members can also download MTA NSW's redundancy information guide here.

Redeployment

It is important for employers to understand that if there are any available positions at the time the employee is made redundant (commonly referred to as 'redeployment opportunities') then the available position(s) must be offered to the employee who is made redundant, provided it is "reasonable in all the circumstances". In other words, if there is an available position in the business, or an associated entity of the business, and the employee is qualified to perform the role and possess the suitable skills that would enable them to perform the role, then the redeployment opportunity must be made available and offered to the employee. Failure to do so, may expose the employer to an unfair dismissal claim where the termination was not a case of a 'genuine redundancy'.

Redeployment obligations extend to any available positions, including permanent and temporary positions and casual work. They also include lower paid positions or positions at a different location.

The requirement to redeploy an employee into an available position is based on whether it is 'reasonable in all the circumstances'. Considerations typically include, the skills, experience and qualifications of the employee, whether a reasonable period of re-training could enable the employee to perform the position, the willingness of the employee to be redeployed and the work environment, such as office based or on a factory floor.

An employee has the right to decline redeployment even if it is reasonable in all the circumstances.

Redundancy pay

Redundancy pay is only payable if an employer is defined as a large business, which means the employer has 15 or more employees at the time of termination, including regular and systematic casuals and any employees in any associated entity.

If an employer has issued an employee with a Jobkeeper enabling stand down direction which varies the employee's ordinary hours of work or reduced their hours of work to nil,

then the calculation of redundancy pay is calculated as if the direction had not been given. The same rule applies to notice in lieu paid on termination.

In addition, if an employee has been stood down in accordance with a Jobkeeper enabling stand down direction which varied their ordinary hours to nil, then the length of service while stood down is counted towards their length of service for the purpose of calculating weeks of continuous service.

Redundancy pay is not applicable to casual employees or employees that have less than 1 year continuous service.

Redundancy pay is paid at the employee's base rate of pay and is determined by the employee's length of continuous service as follows:

Employee's period of continuous service with the employer on termination	**Redundancy pay**
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks
At least 9 years but less than 10 years	16 weeks
At least 10 years	12 weeks

Applying to reduce redundancy pay

The Act allows employers to make an application to the Fair Work Commission to vary or reduce redundancy pay, where an employee is entitled to redundancy pay and the employer:

a) obtains other acceptable employment for the employee; or
b) cannot pay the amount.

On application by the employer, the Fair Work Commission may determine that redundancy pay is reduced or varied to nil.

Business must complete Form F45A and submit this form to the Fair Work Commission for each employee. This form can be downloaded here.

Redundancies of 15 or more employees

Where an employer makes 15 or more positions redundant, there is an obligation to notify Centrelink in writing prior to making the positions redundant, as soon as practicable after a decision is made and before the employee is terminated. The notification must include the reasons for the dismissals, the number and categories of employees likely to be affected and the time when the business intends to carry out the dismissals.

The form required to notify Centrelink can be downloaded here.

COVID FLEXIBILITIES UNDER SCHEDULE I OF THE VEHICLE AWARD

Schedule I is a temporary schedule under the Vehicle Repair, Services and Retail Award 2020 ("the Vehicle Award") that provides extra award flexibility during the impacts of the coronavirus. The Schedule applies flexibility in relation to:

- Full time and part time hours of work
- Annual leave
- Secondary jobs and training

Schedule I only applies to employees covered by the Vehicle Award who are not an eligible employee as defined under the Jobkeeper Scheme.

A direction under Schedule I will cease to have effect when it is either withdrawn, revoked or replaced by the employer, or on 30 September 2020 (unless an application for the extension of Schedule I is successful), whichever is earlier.

Any direction issued under Schedule I must:

- be in writing;
- must not be unreasonable in all the circumstances; and
- include a notification to the employees in writing that that the employer consents to a dispute arising from the direction being settled by the Fair Work Commission.

Temporary reduction to hours of work for full time and part time employees

The ability to reduce an employee's ordinary hours of work may only be reduced if an employer has already implemented a reduction in hours prior to 30 June 2020 in accordance with Schedule I.

Under Schedule I of the Vehicle Award, if an employee cannot usefully be employed as a result of the impacts of the coronavirus, an employer may:

- Direct a full-time employee to work an average of 22.8 and 38 ordinary hours per week
- Direct a part time employee to work an average of 75% to 100% of their agreed hours per week (or over the roster cycle).

The following are exceptions to the above:

- the reduced hours for a full time employee classified at Level 1 to Level 5 cannot result in the employee earning less than $1,115.70 per fortnight (not including tool, meal or leading hand allowances)
- the reduced hours for a full time trade-qualified employee classified at Tradesperson levels 1 or 2 cannot result in the employee earning less than $1,500.00 per fortnight (not including tool, meal or leading hand allowances)
- the reduced hours for a part time employee must not result in the employee earning less than $836.78 per fortnight (not including tool, meal or leading hand allowances).

Process for reducing an employee's hours in accordance with Schedule I of the Vehicle Award

Prior to reducing hours of work, an employer must consult in accordance with clause 36 of the Vehicle Award and provide as much notice as possible. The employer must also notify the relevant union of the intention to implement such changes if the affected employees are members of a union.

Impacts on employee entitlements as a result of a reduction in their hours

Where a direction is given, leave will continue to accrue as if the direction has not been given.

If a period of annual leave or personal/carer's leave is taken during a direction, the employee will be paid for leave at the ordinary hours of work prior to the direction.

By agreement with the employer, an employee can have their weekly pay increased to their normal weekly pay (prior to the direction) by using their accrued paid annual leave or any other form of accrued paid leave (other than personal/carer's leave where the employee is not entitled to take this leave).

Should the employee be made redundant after the direction has been given then redundancy pay must be calculated based on the employee's ordinary hours of work prior to the commencement of the direction.

If a public holiday falls on a day that the employee no longer works as a result of the reduction in hours, this employee will not be entitled to payment for the public holiday.

Requesting an employee to take annual leave under Schedule I of the Vehicle Award

Schedule I of the Vehicle Award provides an employer can request an employee to take paid annual leave, provided that the request:

- is not unreasonable having regard for the personal circumstances of the employee;
- is for reasons attributable to the coronavirus pandemic;
- does not leave the employee with less than two weeks of annual leave remaining; and
- a minimum of 72 hours of notice is provided to the employee.

An employee must not unreasonably refuse this request.

The period of annual leave must commence before 30 September 2020 but may end after this date.

Alternatively, an employer and employee can agree to take twice as much annual leave at half the rate of pay for any agreed period, including any close-down period. The employee will continue to accrual leave entitlements as normal despite taking annual leave at half the rate of pay.

WORK HEALTH AND SAFETY

As the likely impact of the end of the Jobkeeper scheme will result in employee's spending more time in the workplace or brought back into the workplace, the health and safety of staff should be of paramount importance, given the increased likelihood of transmission of COVID-19.

State health and safety laws impose an obligation for business owners to provide a safe workplace as well as to eliminate or minimise health and safety risks as far as is reasonably practicable. In addition, state based health and safety laws impose an obligation for business owners to consult with workers about providing a safe workplace and take practicable steps to stop the spread of COVID-19.

Safe Work Australia have provided businesses with practical tools to assist them to meet their workplace health and safety obligations, which can be located via: https://www.nsw.gov.au/covid-19/safe-workplaces/employers

Service NSW have also released a COVID Safe Check-in tool providing registered COVID-safe businesses with a safe and easy digital check-in tool to allow customers to check-in to their venues. The tool is contactless and will help businesses with being COVID safe and meeting the requirements for the collection and storage of customer contact details. Once the business is registered as a COVID Safe business on www.nsw.gov.au an email with your COVID Safe display material, including your unique QR code will be provided. More information on this can be accessed here.

Members are reminded of the Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020 which mandates that in NSW, businesses must not allow persons on the premises if the size of the premises is insufficient to ensure there is at least 4 square meters of space for each person on the premises.

Motor Trades Care (MTC), an industry specific expert provider of work health and safety and return to work services, in partnership with MTA NSW, have introduced a NSW COVID-19 Toolkit for employees and employers, to provide motor trades industry employees with strategies and best practice advice on combating the virus risk in the workplace. The COVID-19 Toolkit can be accessed here.

WORKERS INSURANCE PREMIUMS

Employers that are receiving Jobkeeper payments for their employees or that have had their payroll reduced as a result of the impacts of COVID-19, whether the reduction is temporary or permanent, may be eligible for a reduction of their Workers Insurance Premiums.

Amendments have been made as to how employers calculate their payroll and the effect that the Jobkeeper payments will have upon this calculation. These changes may have the effect of reducing payroll calculations which consequently has an effect upon the Workers Insurance Premiums.

Members can contact MTC for support and information regarding their Workers Insurance Premiums on 1300 006 826 or by emailing enquiries@motortradescare.com.au.

The below links also provide important information on the calculation on changes to the calculation of payroll for the purpose of Worker Insurance Premiums, as well as additional information regarding COVID-19 support for employers.

- icare:
  https://www.icare.nsw.gov.au/icare-coronavirus-information/icare-coronavirus-information-for-employers/

- Motor Trades Care
  https://motortradescare.com.au/your-workers-insurance-premium-renewal-demystified/
  https://motortradescare.com.au/inmotion-june-edition-your-workers-insurance-renewal-cheat-sheet/

FREQUENTLY ASKED QUESTIONS

Below are some frequently asked questions to assist Members in navigating the Jobkeeper scheme.

Are employers required to nominate the pay rate under the extension?

Yes. Employers will be required to nominate which payment rate they are claiming for each of their eligible employees on their business portal.

My employee is currently off on unpaid parental leave, but they are receiving payment from our company under our scheme and not the Federal Paid Parental Leave Act. Are they still entitled to Jobkeeper Payments?

Yes, they are still entitled to the Jobkeeper payments provided the payment for parental leave are not provided as part of the Government's Paid Parental Leave scheme.

What if an employee is receiving workers compensation payments but is still able to perform work. Are they still entitled to the Jobkeeper payments?

Yes. They are entitled to the Jobkeeper payments if they are not totally incapacitated for work.

Does annual leave cease at end of the Jobkeeper scheme for an employee who agreed to take annual leave under a Jobkeeper request to take annual leave?

Members need to be aware that they cannot force an employee to continue to agree to take annual leave made under a previous request under the Act, beyond 28 September 2020.

From 28 September 2020, Members should be mindful that employers can no longer make such requests under the Act. However, a request can be made under Schedule I of the Vehicle Repair, Services and Retail Award 2020. Schedule I of the Award will expire on 30 September 2020, unless application for an extension is successful. Any request made under Schedule I must, therefore, commence before 30 September 2020, but may end after this date.

Do I have record keeping obligations for Jobkeeper payments?

Yes. Employers are required to keep business records, including tax records, for at least 5 years and employee records, including nomination notices, consultation records and Jobkeeper directions or agreements, for at least 7 years.

In addition, the Fair Work Regulations 2009 impose an obligation for businesses to keep and maintain employee records, which consist of overtime records, pay records, leave entitlements (which includes the leave that the employee takes and balances of leave) and superannuation contributions for a period of 7 years.

Can my employee continue to work from home?

Yes. An employee can continue to work from home if the employer continues to remain an eligible employer. Where an eligible employer ceases to qualify for Jobkeeper 2.0, they should assess whether they will be considered a legacy employer and issue a Jobkeeper enabling direction for the employee to perform work from home.

Where an employer is no longer an eligible employer or a legacy employer, then any arrangement to work from home should be subject to a separate and new written agreement between the parties if the employee was previously working from home as a result of a Jobkeeper direction and the employer ceases to qualify.

It is recommended that any written agreement contains periodic reviews of the home office and that any arrangement is on a “trial” basis, to allow an employer the ability to return the employee to the premises of the employer. Any working from home arrangement should be in writing so that the terms and conditions of the arrangement is clear and not subject to dispute.

Members need to be aware that under workplace health and safety laws, the home office in effect becomes a workplace and business owners have an obligation to provide a safe workplace.

Can I stand my employees down?

Employers can only stand employees down in accordance with a Jobkeeper enabling direction after 27 September 2020 if they continue to qualify for Jobkeeper 2.0 or the meet the requirements for a legacy employer.

Employers are prohibited from standing employees down in accordance with section 524 of the Act, except in certain circumstances. Section 524 of the Act allows an employer to stand down employees, where the employee cannot be usefully employed, because of:

- industrial action;
- a breakdown of machinery or equipment; or
- a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

As the conditions of section 524 have not been met for most of our Members, it would be considered an unlawful stand down, which presents employers with the risk of unfair dismissal claims and underpayment claims, including penalties for a breach of legislation and reputational damage, should they unlawfully stand employees down.

Are there any implications for the minimum employment period if I have issued a Jobkeeper enabling stand down direction?

Yes. Section 789GR of the Act confirms that the period of service counts as service for the purpose of assessing the minimum employment period.

The minimum employment period protects an employer from an unfair dismissal claim provided that the employee is terminated within their minimum employment period.

Therefore, employers should treat the period of service the employee was stood down as service which counts towards the minimum employment period.

Businesses should be aware that the minimum employment period is different to a probationary period. The probationary period does not provide protection for an unfair dismissal claim.

Does the minimum employment period differ based on the size of the business?

Yes. Employers which employ 14 or fewer employees are considered a smaller employer and a 12 month minimum employment period will apply, whereas employers which employ 15 or more employees are considered a larger employer and a 6 month minimum employment period will apply.

When counting employees to count towards the minimum employment period, employers need to include regular and systematic casuals and any employees from an associated entity (as defined under section 50AAA of the Corporations Act 2001).

When are the Jobkeeper fortnights?

Jobkeeper Fortnight	Period relating to each Jobkeeper Fortnight
1	30 March 2020 – 12 April 2020
2	13 April 2020 – 26 April 2020
3	27 April 2020 – 10 May 2020
4	11 May 2020 – 24 May 2020
5	25 May 2020 – 7 June 2020
6	8 June 2020 – 21 June 2020
7	22 June 2020 – 5 July 2020
8	6 July 2020 – 19 July 2020
9	20 July 2020 – 2 August 2020
10	3 August 2020 – 16 August 2020
11	17 August 2020 – 30 August 2020
12	31 August 2020 – 13 September 2020
13	14 September 2020 – 27 September 2020
14	28 September 2020 – 11 October 2020
15	12 October 2020 – 25 October 2020
16	26 October 2020 – 8 November 2020
17	9 November 2020 – 22 November 2020
18	23 November 2020 – 6 December 2020
19	7 December 2020 – 20 December 2020
20	21 December 2020 – 3 January 2021
21	4 January 2021 – 17 January 2021
22	18 January 2021 – 31 January 2021
23	1 February 2021 – 14 January 2021
24	15 February 2021 – 28 February 2021
25	1 March 2020 – 14 March 2021
26	15 March 2021 – 28 March 2021

What if I cannot comply with the Public Health order of 4 square metres of space for each person?

MTA NSW recommend that you consult with your employees and keep a record of the consultation. Work health and safety legislation in NSW mandates that businesses must consult with employees regarding their health and safety. Where possible, business might want to implement a rotating roster for staff to work from home, providing that the home workplace is safe. Members should be mindful that any arrangement to work from home must be in writing, legacy employers retain the ability to direct employees to work from home and that business owners must ensure that the workplace is safe.

FURTHER INFORMATION AND ASSISTANCE

The MTA NSW Employment Relations Department is available to help Members answer any questions you may have relating to Jobkeeper 2.0, legacy employers and this guide. For assistance, please contact us on (02) 9016 9000 or by emailing eradvice@mtansw.com.au.

You can also access more information by visiting the below websites:

- Treasury
  https://treasury.gov.au/coronavirus/jobkeeper/extension

- ATO
  https://www.ato.gov.au/General/JobKeeper-Payment/
  phone: 13 28 66

- Fair Work Ombudsman
  https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/pay-and-leave-during-coronavirus/jobkeeper-wage-subsidy-scheme/extension-of-jobkeeper-provisions-in-the-fair-work-act