

As part of its Jobkeeper subsidy, parliament has [passed](#) legislation amending the *Fair Work Act 2009* (the Act). This provides rights to employers eligible for Jobkeeper payments to issue certain 'jobkeeper enabling directions' (**Directions**) to employees, and other matters discussed below.

The package stemmed from employee-union cooperation in making changes to the [Clerks Award](#) and the packages while in some ways similar, contain key differences. Further, whereas award changes apply to all persons to whom the award [applies](#), these rules only apply to Jobkeeper eligible businesses (**Eligible**). Note: at the time of writing, the eligibility rules were only in [draft](#) form and so subject to change, albeit likely to remain in terms similar to the stated [policy](#).

Scope of operation

The reforms outlined below *only* apply to Eligible businesses. It appears most of the rules discussed below (aside from some minimum payment obligations) apply irrespective of whether the employer has opted-in to receive wage subsidies. However, there is uncertainty about how the rules apply to employers who have not opted-in and been confirmed as Eligible (or whose eligibility changes over time). Specific advice should be sought before issuing any Direction.

The changes made below are operational until the end of 27 September 2020. It would require further legislative change to extend this period, with a review to occur mid-July.

As these changes have legislative force, they will override inconsistent terms of the National Employment Standards, any applicable award or agreement or contract of employment.

Note: this legislation is designed to reinforce the 'keeper' element of Jobkeeper. Accordingly, Directions are not authorised unless, at the time that the Direction is given, the Eligible employer reasonably believes that the Direction is necessary to continue to the employment of one or more employees (not necessarily the employee subject to the Direction).

Stand down

We previously discussed the uncertainty surrounding [stand down](#). The legislation clarifies some of this uncertainty by expressly permitting a Direction to not work on some (or all) days, or work fewer hours on any working day. This is still subject to the proviso that the employee cannot be usefully employed, and this must be attributable to either COVID-19 or government measures to slow its transmission and, further, that the minimum payment conditions are met (see below).

Alteration of work hours and duties

Provided that the business was (and remains) Eligible, an employer may Direct an employee to do any of the below, provided the Direction is safe, lawful and reasonably within the scope of the business' operations, and the procedures (see below) are followed:

- **Undertake alternative duties**: within reason, and provided the employee is suitably qualified, the employer has a wide discretion to direct alternative duties (note remuneration obligations may apply where performing different work, see below).
- **Work at a different location**: within reason, require employees to work at alternative locations.

- **Work on different days / or at different times:** an employee must consider and not unreasonably refuse a request to change working days or times.

An employee who refuses a Direction, would be *prima facie* engaging in [serious misconduct](#). However, many provisions use ambiguous phraseology such as ‘reasonable’ and there is an overarching reasonability requirement, so caution would need to be exercised before disciplining an employee in relation to failing to follow a Direction and specific advice should be sought.

Payment Obligations

In addition to the above issues, the legislation provides for a number of other matters:

- **Base rate of pay:** the employee must be paid for work performed at their usual [base rate](#) of pay. However, if the employee is working duties that would entitle them to a higher amount, the base rate must be at least that (e.g. higher duties, or work under a different award).
- **Minimum payment:** the legislation confirms that if a Jobkeeper amount is payable in respect of an employee, they must receive the greater of the Jobkeeper amount (\$750 per week) or the amount earned for work performed. Where work is performed, superannuation must be paid on ordinary time earnings.
- **Leave and Redundancy:** leave accruals, and in the event a redundancy occurs, during a period of a direction re based on their pre-Direction terms and conditions.
- **Workers compensation:** the legislation expressly states that it does not impact on workers compensation legislation. Specific advice should be sought in relation to those cases.

Requests to take annual leave

The legislation switches the onus regarding annual leave. Whereas [ordinarily](#) the employee has the right to choose when to take leave and the employer must not unreasonably refuse, the employee must now consider and not unreasonably refuse any such request from the employer.

The legislation also permits annual leave to be taken at half pay. Subject to this or where [otherwise authorised](#), leave taken during this period (whether subject to a request or not) is paid at the employee’s usual rate (i.e. prior to any Direction being issued).

Alternative employment / training

The employer must consider and not unreasonably refuse a request from an employee subject to a Direction to engage in reasonable secondary employment, training or professional development.

Implementation

In order to implement any Direction, the following must occur:

- **Reasonableness:** there is an overriding requirement that Directions are not enforceable if they are unreasonable in the circumstances. There is a specific note indicating that the impact on caring responsibilities is to be taken into account.

- **Consultation:** the employer must give at least three (3) clear days before issuing the Direction* and consult with the employee prior to issuing the Direction. Consultation may not be required if the issues have been properly canvassed in consultations regarding an earlier Direction. The employer *must* keep a written record of the consultation.
- **Written Direction:** the Direction must be in writing*.
 - * The regulations will likely prescribe a form (or at least the substance required) for these purposes although that is not available at the time of writing.
- **Service:** the employee's [service](#) (and service-based credits, such as annual leave) accrue throughout the period of the Direction, at their pre-Direction rate.

Oversight

The Fair Work Commission has broad powers of oversight in relation to dealing with disputes, including being able to set aside and substitute a disputed Direction, taking into account “fairness between the parties concerned”. This is a very broad discretion and employers, particularly with large workforces, should be cautious about implementing Directions without advice.

The various rights of employees are expressly defined as [workplace rights](#), meaning that [adverse action protections](#) apply.

Knowingly misusing a Direction is a serious contravention, with maximum penalties well in excess of \$500,000 for a corporation.

Changes over time

Directions will cease automatically at the start of 28 September 2020 (absent legislative extension). They will otherwise apply by default unless withdrawn or replaced.

However, under the draft rules, Eligibility appears to require the employer to continue to meet the turnover criteria. If an employer exceeds the turnover criteria, Directions regarding stand down, duties, locations and days of work may cease to be valid. Employers close to the Eligibility threshold should seek specific advice and monitor this actively.

Existing arrangements and/or alternative options

The above options apply only to Eligible employers. They do not otherwise modify or limit an employer's obligations under any award or agreement, or generally at law, to seek to modify or make unilateral changes to employee conditions.

For employers who have already implemented changes by agreement with employees, those changes would continue to apply. These provisions relate to ‘directions’ by employers (i.e. unilateral steps) and not to matters by agreement. Any agreed matter must be otherwise compliant with legal obligations (e.g. awards/agreements etc.).

For employers who are not Eligible but still wish or need to take action, they will need to consider alternative methods (most commonly via common law agreement or unilateral options such as stand down, redundancy etc.). Specific advice should be sought in relation to those



circumstances.

Fair Work Commission Award changes

For all employers, including employers who are not Eligible, the Fair Work Commission has today made [changes](#) to a wide variety of Awards to include the ability to take annual leave at half pay and unpaid pandemic leave. Although around two-thirds of all awards have been varied, most construction awards are not included in this group.

It is likely that there will be other changes to awards, either a wider range of awards or more provisions. These are in addition to changes made to the [Clerks Award](#), [Hospitality Award](#) and [Restaurant Award](#).

These changes only relate to employees to whom the award applies. Employees engaged under enterprise agreements would not be covered. A variation of the enterprise would be required to enable such changes to take place. The Commission has advised that it may [fast-track](#) such applications but advice should be sought. Agreement variations would need to pass the [better off overall](#) test unless there are [exceptional](#) circumstances. The Commission has not yet ruled on the nature or extent of exception circumstances for such applications.

Need more information

If you would like further information about the changes to the *Fair Work Act 2009*, or otherwise in relation to managing employee terms and conditions during the COVID-19 pandemic, please contact the team at Fair Work Lawyers.



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