

# NEW POWERS FOR EMPLOYERS COVERED BY THE JOBKEEPER SCHEME

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The Federal Parliament has complemented the JobKeeper scheme by amending the Fair Work Act to give new powers to employers covered by the scheme. They include new options for workforce flexibility and reducing workforce costs, such as reducing working hours and having employees take annual leave. You need to qualify for the JobKeeper scheme to be able to access the new powers. In this article we set out how the new arrangements work.

## Which businesses qualify?

The new powers only apply to employers who qualify for the JobKeeper scheme. The JobKeeper scheme applies to businesses who have experienced a significant decline in revenue due to the impact of COVID-19. The following general guidelines apply:

- If a business has turnover of more than \$1 billion, they must have experienced a decline in turnover of 50% relative to a comparable period a year ago; or
- If a business has turnover of less than \$1 billion, they must have experienced a decline in turnover of 30% relative to a comparable period a year ago.

For more information about whether your business qualifies for the JobKeeper scheme, please see our [JobKeeper Payment Guide](#).

## What if my business doesn't qualify for the JobKeeper scheme?

If a business doesn't qualify for the JobKeeper scheme, they won't get the benefit of the new provisions. They will need to work within the existing legal framework for managing their workforce. For more on this, see our guides to [Workforce Reduction Options](#) and [Standing Down Employees](#).

This article applies to employers who do qualify for the JobKeeper scheme.

## JobKeeper directions to stand down, change duties or change location of work

Employers have been given the ability to direct employees to stand down (which includes reducing their hours), change the duties they perform or change their location of work. These are known as **JobKeeper directions**. We will go into each of these in more detail below.

## **Minimum requirements**

Before a JobKeeper direction can be given, employers must meet some minimum requirements.

### *Requirement to be receiving JobKeeper payments*

A JobKeeper direction can only be made in relation to employees covered by the JobKeeper scheme. Therefore, during the period that the direction applies:

- The employer must qualify for the JobKeeper scheme; and
- The employer must be entitled to one or more JobKeeper payments for the employee for a period that consists of or includes the period that the direction applies for (or periods that, when considered together, consist of or include the period that the direction applies for).

If either of these does not apply the direction will not be authorised.

### *Allowing for the continuing employment of employees*

A JobKeeper direction can only be made for the purpose of allowing employees to continue in employment. Therefore, a JobKeeper direction will have no effect unless the employer has information before them that leads them to reasonably believe that the direction is necessary to continue the employment of one or more employees or the employer.

It is immaterial to this requirement that a similar direction could have been given by the employer to an employee other than the relevant employee.

### *Reasonableness requirement*

A JobKeeper direction will not be permitted if the direction is unreasonable in all of the circumstances. A JobKeeper direction may be unreasonable by reason of the impact of the direction on any caring responsibilities the employee has.

### *Consultation requirements*

Employers must consult with employees before making a JobKeeper direction. A JobKeeper direction will have no effect unless:

- The employer gave the employee written notice of the employer's intention to give the direction at least three days before the direction was given (or a lesser time if genuinely agreed with the employee);
- Before giving the direction, the employer consulted with the employee (or a representative of the employee) about the direction.

An employer must keep a written record of the consultation.

### **JobKeeper direction to stand down (including reducing hours of work)**

Previously an employer could only reduce an employee's hours of work by agreement with the employee. Now an employer can give an employee a direction in writing to stand down by:

- not working on a day or days on which the employee would usually work;
- working for a lesser period than the period which the employee would ordinarily work on a particular day or days; or
- working a reduced number of hours compared with the employee's ordinary hours of work, which may be nil.

An employer can only do this if:

- the employee cannot be usefully employed for the employee's normal days or hours during the stand down period because of changes to the business attributable to the COVID-19 pandemic or government initiatives to slow the transmission of COVID-19;
- the implementation of the stand down direction is safe, including having regard to the nature and spread of COVID-19.

An employer does not need to pay an employee for a period of stand down. However, the employer still needs to meet the requirement to pay the \$1,500 per fortnight JobKeeper payment to the employee.

These provisions do not permit employers to reduce the rate of pay paid to employees. It only allows employers to reduce the number of hours worked. Employers must ensure that an employee's base rate of pay (worked out on an hourly basis) is not less than the base rate of pay (worked out on an hourly basis) that would have been applicable to the employee if the direction to stand down had not been given.

A stand down will not apply during any period when the employee is taking paid or unpaid leave authorised by the employer, or is otherwise authorised to be absent from the employee's employment (such as during public holidays)

If an employee has been given a JobKeeper direction to stand down, the employee can make a request to the employer to engage in reasonable secondary employment, training or professional development. If an employee makes such a request, the employer must consider the request and must not unreasonably refuse the request.

### **JobKeeper direction to change an employee's duties**

An employer can direct an employee in writing to perform any duties during a period that are within the employee's skill and competency.

An employer can only do this if:

- the duties are safe, including having regard to the nature and spread of COVID-19;
- if the employee is required to have a licence or qualification in order to perform those duties – the employee has the licence or qualification;
- the duties are reasonably within the scope of the employer’s business operations.

An employer must ensure that the employee’s base rate of pay (worked out on an hourly basis) is not less than the greater of the following:

- the base rate of pay that would have been applicable to the employee if the direction had not been given to the employee;
- the base rate of pay that is applicable to the duties the employee is performing.

### **JobKeeper direction to change an employee’s location of work**

An employer can direct an employee in writing to perform duties during a period at a place that is different from the employee’s normal place of work, including at the employee’s home.

An employer can only do this if:

- the place is suitable for the employee’s duties;
- if the place is not the employee’s home – the place does not require the employee to travel a distance that is unreasonable in all the circumstances (including circumstances surrounding the COVID-19 pandemic);
- the performance of duties at the place is safe, including having regard to the nature and spread of COVID-19;
- the performance of the duties at the place is within the scope of the employer’s business operations.

### **Duration of JobKeeper directions**

A JobKeeper direction will continue in effect until:

- it is withdrawn or revoked by the employer;
- it is replaced by a new direction given by the employer; or
- the end date of 28 September 2020.

### **Agreeing to change days or times of work**

An employer can also request an employee to agree to perform duties during a period on different days or at different times compared to their ordinary days or times of work. If an employer does so, the employee must consider the request and must not unreasonably refuse the request.

An employer can only do this if:

- performance of the employee's duties on those days or at those times is safe, including having regard to the nature and spread of COVID-19;
- performance of the employee's duties on those days or at those times is reasonably within the scope of the employer's business operations;
- the agreement does not have the effect of reducing the employee's number of hours or work compared with their ordinary hours of work.

### **Taking paid annual leave**

An employer can request an employee to take paid annual leave, provided that complying with the request will not result in the employee having a paid annual leave balance of less than two weeks. If an employer does so, the employee must consider the request and must not unreasonably refuse the request.

An employer and employee can also agree in writing to the employee taking twice as much paid annual leave for a period at half the rate of pay.

Accrual of entitlements during a period of leave at half pay will continue as if the agreement had not been made.

### **Minimum wage condition**

Under the JobKeeper scheme an employer who is entitled to a JobKeeper payment for an employee in fortnight must pay at least \$1,500 to the employee for that fortnight. This can include making salary sacrifice super contributions or withholding tax amounts. The new provisions place a positive obligation on employers to satisfy this obligation by the end of the fortnight. Civil penalties apply for failure to comply with this requirement.

Employers are still required to comply with this requirement if they have given an employee a JobKeeper direction to stand down (including by reducing hours).

### **Minimum payment guarantee**

If a JobKeeper payment is payable to an employer for an employee for a fortnight, the employer must ensure that the total amount payable to the employee in respect of the fortnight is either:

- the amount of JobKeeper payment payable to the employer for the employee for the fortnight (\$1,500);
- if a greater amount is payable to the employee for the performance of work during the fortnight, that amount (in full). This includes incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and leave payments.

If an employer has given an employee a JobKeeper direction to stand down, including by reducing their hours of work, the amount payable to the employee for performance of work during the fortnight would be the amount payable for the new hours of work if it exceeds \$1500.

The new provisions place a positive obligation on employers to satisfy this obligation with civil penalties applying for failure to comply.

### **Dealing with disputes in the Fair Work Commission**

An employer or employee can apply to the Fair Work Commission to deal with a dispute about any of these new provisions. The dispute can be dealt with by mediation, conciliation, making recommendations, expressing an opinion or arbitration.

In dealing with a dispute, the Commission must take into account fairness between the parties concerned.

The Commission can make an order that it considers desirable to give effect to a JobKeeper direction, set aside a JobKeeper direction or substitute a different JobKeeper direction. Any order by the Commission will cease to have effect on 28 September 2020.

### **Misusing the new provisions**

An employer must not give a direction to stand down, change an employee's duties or change their location of work if it is not authorised by these new provisions and the employer knows it is not authorised by the new provisions. An employer could have to pay a civil penalty if they do so.

### **Need help?**

We are able to help you manage your workforce during this difficult time. Contact [Sean Melbourne](#) if your business needs legal or HR assistance.

Check out other COVID-19 resources on the Source website:  
<https://www.sourcelegal.com.au/covid-19-response/>