



FAQ: JOBKEEPER RULES AND CHANGES TO THE **FAIR WORK ACT 2009**

Current at 5 May 2020

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To speak to one of our workplace relations specialists

Q Do I need to have been paying my employees \$1,500 per fortnight or more?

A Yes.

The JobKeeper payment is designed to be a reimbursement to employers. As such, employers who have elected to participate in the scheme are required to pay their employees at least \$1,500 per fortnight commencing on 30 March 2020, even though the business may not receive any payments until 1 May 2020 or a later date. The consequence of this is that employers will need to find the means to pay this amount to employees until such time as they start to receive payments from the JobKeeper scheme.

Q When do I need to have made JobKeeper payments to eligible employees by?

A The Australian Tax Office (ATO) has extended to deadline to make payment for the first two JobKeeper fortnights until 8 May 2020. After this date, employees are required to be paid in full by the end of each [JobKeeper fortnight](#).

Q Can I choose which employees to make JobKeeper payments to?

A No, the scheme operates on a 'one in, all in' basis, and once an employer decides to participate it must pay all eligible employees at least \$1,500 per fortnight, including those who ordinarily earn less than this amount. An employer must notify eligible employees in writing within 7 days of applying that they have elected to participate in the scheme. The notification must also require the employee to complete a [JobKeeper Employee Nomination Notice](#) in order to be eligible.

Q How has eligibility criteria changed for 16 and 17 year old employees?

A From 11 May 2020, employees aged 16 and 17 years as at 1 March 2020 will only be eligible to participate in the JobKeeper scheme if they are either 'independent' or not undertaking full-time study. The nomination notice to be completed by employees has been updated to reflect these additional requirements. Any employees aged 16 or 17 years should be asked to complete the updated notice, even if they have already completed one previously.

If an employee turns 18 years old after 1 March 2020, they must still meet these additional eligibility criteria. The eligibility assessment occurs at 1 March 2020, and even if an employee's age or personal circumstances change after that date, their eligibility to receive a JobKeeper payment will not. This includes where an employee becomes 'independent' or ceases full-time study at a later date.

Q If I have already made JobKeeper payments 16 and 17 year old employees for the first three JobKeeper fortnights, am I still able to be reimbursed for those amounts?

A Yes.

If a JobKeeper payment has been made to 16 or 17 year old employees who are now no longer eligible, you will still be able to claim a reimbursement for the first three JobKeeper fortnights ending on 10 May 2020.

Q If a 16 or 17 year old employee is no longer eligible, do I have to pay them the JobKeeper payment for the first three JobKeeper fortnights?

A Yes.

If an employee aged 16 or 17 years was otherwise eligible to receive JobKeeper payments, but is no longer eligible after 11 May 2020, they must still be paid in full for the JobKeeper fortnights that they were eligible.

The JobKeeper Employee Nomination Notice will allow employees to specify whether they wish to nominate for JobKeeper payments before 11 May 2020, after 11 May 2020, or both.

Q When will an employee aged 16 or 17 years be ‘independent’ or not undertaking full-time study?

A The test for whether an employee is ‘independent’ or not undertaking full-time study comes from the Social Security Act 1991, and is substantially similar to the test applied by Services Australia (formerly Centrelink).

In general, an employee will be ‘independent’ where:

- they have supported themselves by working full-time or part-time (at least 15 hours per week) for the last 2 years;
- their parents cannot exercise responsibilities because they are serving a prison sentence, living in a nursing home indefinitely, or are mental incapacitated;
- they are married, or have been living in a de facto relationship for at least 12 months;
- they have a dependent child;
- they are a refugee whose parents do not live in Australia;
- they are an orphan who has not been legally adopted, or in the care of the state; or
- they are unable to live at home because of exceptional circumstances, such as where it would pose a serious risk to health, and they are not receiving continuous financial support from their parents.

The test with respect to full-time study is relatively broad, and extends beyond high school. An employee will be a ‘full time student’ where they are enrolled in a course of study at an educational institution (including TAFE or an RTO), and undertaking at least 75% of the normal full-time study requirements.

It is the responsibility of the employee completing a nomination notice to assess whether they are ‘independent’ or not undertaking full-time study. This list is not exhaustive, and employees who believe they may be eligible are able to contact [Services Australia](#) for more information.

Q If I can't afford to pay employees \$1,500 per fortnight now, can I choose to only claim JobKeeper from 1 May 2020 onwards, or do I have to claim for the full period of the scheme?

A The entitlement to receive a JobKeeper payment is assessed on a fortnightly basis. If an employer wants to be paid the Jobkeeper payment then the \$1,500 payment must be made to all eligible employees within the Jobkeeper payment period fortnight. There is an exception for making payment during the first three JobKeeper fortnights, which must be paid to employees by 8 May 2020.

The scheme does allow employers who suffer a decline in turnover in later months to claim at any time during the life of the scheme.

Q Do I have to pass JobKeeper payments on to employees?

A Yes.

If you receive a JobKeeper payment with respect to an employee, you must pay that employee the greater of:

- a. the JobKeeper payment; or
- b. the amount that the employee is entitled to be paid for the hours that they worked.

This means that even if the employee is still at work and earns less than \$1,500 per fortnight, they must be 'topped up' to \$1,500.

Failure to pass on the JobKeeper payment to an employee in full (subject to tax) is a civil penalty provision attracting fines of up to \$63,000 for a body corporate or \$12,600 for an individual, or ten times those amounts for a serious contravention.

Q Can I re-hire an employee that has been dismissed since 1 March 2020 and still claim Jobkeeper payments for them?

A Yes, an employee who was employed on 1 March 2020 and was then dismissed can be re-hired by the same eligible employer. The employer will be able to receive the \$1500 a fortnight Jobkeeper payment in respect of this employee once the employee has been re-hired, presuming that the employee is otherwise eligible. It should be noted that this does not permit an employer to claim back termination or redundancy payments previously made to the employee.

Q If an employee is still at work, can I reduce their rate of pay to \$1,500 a fortnight?

A The answer to this depends on the circumstances.

If you give an employee a direction to:

- stand down or work reduced hours under section 789GDC;
- work different duties under section 789GE; or
- work at a different location under section 789GF;

you cannot also reduce their hourly rate of pay.

If, however, you do not give any of the above directions to an employee, you can agree in writing with an employee to reduce their hourly rate of pay, provided that:

- the employee's rate of pay (including any penalty rates, allowances and loadings) is no less than what they are lawfully entitled to receive under the relevant industrial instrument (such as a modern award or enterprise agreement); and
- you otherwise comply with your obligations under the *Fair Work Act 2009*.

An employer cannot direct employees to accept a lower rate of pay, and this may only happen by agreement.

Q Can I reduce the number of hours worked by an employee to be equal to \$1,500 a fortnight?

A Yes.

This can be done in one of two ways:

- if the employee is entitled to receive JobKeeper payments from you, by written direction under section 789GDC, subject to undertaking consultation in accordance with section 789GM (**Consultation**) and complying with sections 789GDA (**Minimum payment guarantee**) and 789GDB (**Hourly rate of pay guarantee**), and the direction being reasonable in all of the circumstances; or
- otherwise, by agreement in writing with the individual employee.

If you intend to give a written direction to require employees to work reduced hours, you must first:

- give three (3) days' notice in writing of your intention to give the direction; and
- consult with employees (or their representatives, such as a union delegate) about the proposed direction.

If you enter into a written agreement with an employee to reduce their number of hours:

- for full-time employees, you will need to document the arrangement so that it complies with the requirements of part-time employment under the applicable industrial instrument, and the employee will be entitled to payment in accordance with those provisions;
- for part-time employees, you will need to document the agreement as a variation to their existing agreed hours in accordance with the relevant provisions of the applicable industrial instrument.

Q If an employee is directed to work less hours, do they get overtime if they work over that number of hours?

A The answer to this is not yet clear based on the information contained in the legislation, however the logical position would appear to be that full-time employees are not entitled to overtime merely because they work more than the reduced number of hours.

However, part-time employees are likely entitled to overtime for working more than the reduced number of hours if they work more than their originally agreed hours.

For example, if a part-time employee's agreed hours each week were 25 hours, which were then reduced by direction to 20 hours, and they end up working 27 hours, they would receive overtime for the hours above 25 hours, not 20 hours.

An industrial instrument may also provide additional circumstances where overtime is required to be paid.

Q Can an employee take annual leave during a full or partial JobKeeper enabling stand down?

A Yes. Section 789GDC(3) specifically provides for employees taking leave while on such a stand down.

Although such a period of leave is permitted, the effect of taking such leave is that the employee is not stood down under section 789GDC, and as such must be paid for that leave as though the full or partial stand down direction had never been given.

For example, if a full-time employee works 30 hours a week subject to a direction under section 789GDC, if they take annual leave during that period the direction ceases to apply and they are entitled to take annual leave on the basis of their usual 38 ordinary hours per week.

Employers and employees can, however agree to the employee taking twice as much leave at half the rate of pay they would otherwise be required to pay under section 789GJ(2).

Q Will an employee continue to accrue leave while stood down and receiving JobKeeper?

A Yes.

Section 789GS provides that employees continue to accrue leave as though the direction had never been given – that is, on their usual contracted ordinary hours of work.

Q Can I direct an employee to take annual leave during a full or partial JobKeeper enabling stand down?

A If the applicable industrial instrument permits it, then yes, subject to the requirements of that industrial instrument.

Under section 789GJ(1), you can also request that an employee take annual leave, and the employee cannot unreasonably refuse the request, provided that the request will not result in the employee's total annual leave balance being less than two weeks.

Q Can I require employees to perform alternative duties and responsibilities?

A If an employee is entitled to receive JobKeeper payments from you, section 789GE(1) allows you to direct them to perform alternative duties provided that:

- those duties are safe to perform;
- the employee has the skill and competence to perform them;
- the employee possesses any necessary qualifications or licences; and
- the duties are reasonably within the scope of your business operations.

However, if you direct the employee to perform duties that carry a rate of pay higher than what they would ordinarily be paid (“higher” duties), section 789GDB(3) requires you to pay the higher rate of pay that applies to those duties. The opposite, however, does not apply – if an employee is directed to perform “lower” duties, they must not suffer a reduction in their base rate of pay.

Further, you must ensure that:

- the direction is reasonable in all of the circumstances;
- you possess information that leads you to reasonably believe that the requirement is necessary to continue the employment of one or more of your employees; and
- you have given at least three (3) days' written notice of your intention to make the direction, and have consulted with your employees or their representatives before making the direction.

Q Can I require employees to perform work at a different location?

A Yes.

If an employee is entitled to receive JobKeeper payments from you, section 789GF(1) allows you to direct them to perform work at an alternative location, provided that:

- the place of work is suitable for the employee's duties;
- if the place is not the employee's home – the employee is not required to travel an unreasonable distance to the place; and
- the performance of duties at the place is safe, and reasonably within the employer's business operations.

Further, you must ensure that:

- the direction is reasonable in all of the circumstances; and
- you possess information that leads you to reasonably believe that the requirement is necessary to continue the employment of one or more of your employees; and
- you have given at least three (3) days' written notice of your intention to make the direction, and have consulted with your employees or their representatives before making the direction.

Q Can I require employees to perform work at a different location?

A Yes, if you are a business owner (this would include a shareholder, beneficiary or partner) that is actively engaged in the business. However, only one business owner per eligible entity can receive a Jobkeeper payment. .

Q How do I register for the Jobkeeper payment scheme?

A Employers can enrol for the Jobkeeper payment scheme through the ATO's Business Portal. This can be accessed by logging into the ATO's online services through myGov or enrolment can be performed by a registered tax or BAS agent.

Q How do I nominate an employee for the Jobkeeper payment scheme?

A In applying for JobKeeper employers will need to provide information to the ATO on the number of eligible employees engaged as at 1 March 2020 and those currently employed by the business (including those stood down or rehired). For most businesses the ATO will use Single Touch Payroll data to pre-populate the employee details for the business.

You must then notify all eligible employees that you intend to participate in the Jobkeeper payment scheme. Within 7 days of providing an eligible employee's details to the ATO an employer must ask the eligible employee if they agree to be nominated by the employer as the primary employer of the employee. The employer and employees will need to complete a [JobKeeper Employee Nomination Notice](#). This form will not need to be sent to the ATO but must be kept as part of the employee's employment records.