

JobKeeper 2.0 and changes to the Fair Work Act

September 2020



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In this easy-to-download PDF we have scrutinised the recent amendments to the legislation, delivering a side-by-side analysis of each key change comparing the current position under JobKeeper 1.0 (up to 27 September 2020) and under JobKeeper 2.0 (from 28 September 2020 to 28 March 2021). This guide will serve as an essential tool in navigating the legislation and implementing the changes in your business.

If you need any advice regarding JobKeeper 2.0 and the Fair Work Act, please reach out to our Employment Advisory team.

Employment Advisory Specialists

We work alongside clients to help them build and maintain sustainable workplaces, with the necessary flexibility to meet fast changing and competitive market conditions. By leveraging our experience, we help clients anticipate, manage and resolve people and workplace issues throughout the employment lifecycle – from hiring to firing.

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JobKeeper 2.0 and changes to the Fair Work Act

	JobKeeper 1.0	JobKeeper 2.0	
Time period	1 March 2020 to 27 September 2020	28 September 2020 to 3 January 2021	4 January 2021 to 28 March 2021
Employer qualifications			
Who is a qualifying employer?	<p>A qualifying employer is:</p> <ul style="list-style-type: none"> an entity that carries on a business in Australia or was a non-for-profit body that pursued its objectives principally in Australia; and meets the basic or one of the alternative tests (only one test needs to be satisfied). 		
Which employers are excluded from JobKeeper?	<p>The following entities are not eligible to participate:</p> <ul style="list-style-type: none"> entities subject to a major bank levy and their subsidiaries; Federal and State/Territory governments and their agencies; foreign governments and their agencies; local councils/governments; a company in liquidation or provisional liquidation; or a partnership, trust or sole trader in bankruptcy. 		
What is the basic test?	<p>The basic test focusses on an employer suffering a sufficient decline in turnover.</p> <p>An employer will be eligible to participate in the JobKeeper scheme where the entity:</p> <ul style="list-style-type: none"> has an aggregated annual turnover of \$1 billion or more, turnover has fallen by 50% or more; has an aggregated annual turnover of less than \$1 billion, turnover has fallen by 30% or more; or is a registered charity (excluding non-government schools and universities), turnover has fallen by 15% or more (excluding government revenue). 		
How is the drop in turnover calculated for the basic test?	Calculations are based on projected GST turnover.	Calculations are based on actual GST turnover.	Calculations are based on actual GST turnover.
		Employers must reassess their eligibility by looking at the decline in turnover for the September 2020 quarter relative to a comparable period in 2019.	Employers must reassess their eligibility by looking at the decline in turnover for the December 2020 quarter relative to a comparable period in 2019.
		As the deadline to lodge a BAS for the September quarter or month is in late October 2020, employers will need to assess their eligibility for JobKeeper in advance of the BAS deadline in order to pay their eligible employees in advance of receiving the JobKeeper payment from the ATO.	As the deadline to lodge a BAS for the December quarter or month is in late January 2021, employers will need to assess their eligibility for JobKeeper in advance of the BAS deadline in order to pay their eligible employees in advance of receiving the JobKeeper payment from the ATO.

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Employer qualifications (con't)			
What are the alternative tests?	<p>The alternative tests apply where an entity is unable to satisfy the basic test and where there is an event or circumstance, internal or external, that is outside the usual business setting for the entity and which mean that there is not an appropriate relevant comparison period.</p> <p>Only one alternative test needs to be satisfied, even where an entity comes within more than one of the above categories.</p> <p>An alternative test will apply in various circumstances, including where an entity:</p> <ul style="list-style-type: none"> • commenced business after the relevant comparison period in 2019; • acquired or disposed of part of their business after the relevant comparison period in 2019, resulting in a change to turnover; • has restructured part or all of their business after the relevant comparison period in 2019, and that restructure has changed the entity's turnover; • has had an increase in turnover by 50% or more in the 12 months immediately before the applicable turnover test period, 25% or more in the 6 months immediately before the applicable turnover test period, or 12.5% or more in the 3 months immediately before the applicable turnover test period; • has been affected by a drought or other natural disaster in the relevant comparison period in 2019; • has an irregular turnover that is not cyclical, such as can occur in the building and construction sector; or • is a sole trader or a small partnership and the sole trader or one of the partners did not work for all or part of the relevant comparison period because they were sick, injured or on leave during the relevant comparison period and those circumstances affected the turnover. <p>Where a business uses a special purpose entity to employ staff rather than staff being directly employed by an operating entity, there is an alternate test so that the combined GST turnovers of the related entities using the services of the employer entity are used, and not simply the GST turnover of the employing entity itself.</p>		

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Employee eligibility			
Who is an eligible employee?	<p>An individual will be an eligible employee if they:</p> <ul style="list-style-type: none"> were employed by a qualifying employer as at the relevant assessment date (see below), regardless of their income level; are currently employed by a qualifying employer, including those stood down and those that are terminated but are then re-hired; are full-time, part-time, or “long-term casuals”; are at least 16 years of age – full-time students who are 17 years of age (or younger) and who are not financially independent are excluded; are an Australian citizen, the holder of a permanent visa, or a special category (subclass 444) visa holder – this includes New Zealand citizens; and are not in receipt of a JobKeeper payment from another qualifying employer. <p>The JobKeeper scheme is “one in, all in”, so that a qualifying employer cannot choose which of its eligible employees should participate.</p>		
What is the relevant date for assessing employee eligibility?	1 March 2020.	<p>1 July 2020 (with this change to take effect from 3 August 2020 and can pick up employees employed between 1 March and 1 July 2020).</p> <p>There is no need for employers to re-test the eligibility for employees that previously qualified as at 1 March 2020.</p> <p>This will increase the number of employees that are eligible to include:</p> <ul style="list-style-type: none"> casual employees who were not eligible on 1 March 2020 but have become eligible by 1 July 2020; newly employed full-time or part-time employees who were employed by 1 July 2020; and some employees who were re-hired by 1 July 2020. 	
Who is not an eligible employee?	<p>Employees that are not eligible to participate in JobKeeper include:</p> <ul style="list-style-type: none"> other visa holders, including employees employed under sponsored visa arrangements; and “short term” casual employees as at the relevant assessment date. 		
Which employees are excluded for a time?	<p>Where an employee comes within one of the following exclusions, they will not be considered an eligible employee for that period:</p> <ul style="list-style-type: none"> the employee is receiving parental leave pay pursuant to the Paid Parental Leave Act 2010 for any period of the relevant JobKeeper fortnight – those employees continue to receive their parental leave pay; the employee is receiving dad and partner pay for any period of the relevant JobKeeper fortnight – those employees continue to receive dad and partner pay; and the employee is receiving workers’ compensation in respect of their total incapacity for work (i.e. those working on reduced hours remain eligible). 		

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JobKeeper subsidy payments							
What is the amount of the JobKeeper subsidy?	A flat amount of \$1,500 before tax is paid to the qualifying employer per fortnight for each eligible employee.	<p>A tier system has been introduced with fortnightly payments to differ depending on whether an employee works more or less than 20 hours per week on average during a 4 week pay period.</p> <p>Where an employee was eligible during JobKeeper 1.0 and remains so, then the relevant period is the 4 week pay periods prior to 1 March 2020.</p> <p>Where an employee becomes eligible during JobKeeper 2.0 (such as an employee employed between 1 March and 1 July 2020), then the relevant period is the 4 week pay period prior to 1 July 2020.</p> <table border="0"> <tr> <td>• Tier 1 (20 hours or more work): \$1,200</td> <td>• Tier 1 (20 hours or more work): \$1,000</td> </tr> <tr> <td>• Tier 2 (less than 20 hours work): \$750</td> <td>• Tier 2 (less than 20 hours work): \$650</td> </tr> </table>		• Tier 1 (20 hours or more work): \$1,200	• Tier 1 (20 hours or more work): \$1,000	• Tier 2 (less than 20 hours work): \$750	• Tier 2 (less than 20 hours work): \$650
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How much should eligible employees receive?	<p>JobKeeper payments are made in arrears by the ATO to employers.</p> <p>The JobKeeper scheme requires qualifying employers to adhere to a minimum payment guarantee – this means that employers must, at a minimum, pay eligible employees the greater of the relevant JobKeeper subsidy or the amount payable to the employee under their then contractual arrangements.</p>						
Fair Work Act changes							
<p>Temporary amendments were made to the <i>Fair Work Act 2009</i> (Cth) to support the practical operations of the JobKeeper scheme. Generally these flexibilities have been extended until 28 March 2021. Directions and agreements in place under JobKeeper 1.0 will automatically carry over if the employer remains eligible to give those directions or make those agreements (a qualifying employer).</p>							
Access to JobKeeper flexibilities	Qualifying employers have access to a range of flexibilities for eligible employees.	<p>Qualifying employers are employers who remain eligible for JobKeeper payments after 28 September 2020. Qualifying employers retain access to the full range of flexibilities for eligible employees.</p> <p>Legacy employers are those who received one or more JobKeeper payments prior to 28 September 2020, but no longer qualify for a payment after 28 September 2020. Legacy employers who have a certificate stating they have experienced a 10% decline in turnover will have access to modified flexibility measures, in relation to those employees who were previously eligible for JobKeeper.</p> <p>That certificate must be issued by a financial services provider (accountant, auditor or tax agent) or be self-certified for a small business employer by way of a statutory declaration.</p> <p>Legacy employers must have a 10% decline in turnover for the June 2020 quarter, September 2020 and December 2020 quarter to remain able to utilise these flexibilities. The dates for this certification align to BAS lodgement dates. The employer must notify the relevant employees that directions and agreements will remain in effect.</p> <p>Where a legacy employer ceases to have a 10% decline, then they cease to be able to utilise these flexibilities.</p>					

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Fair Work Act changes (con't)			
JobKeeper enabling stand down directions	<p>A qualifying employer may give a JobKeeper enabling stand down direction to an eligible employee when the employee cannot be usefully employed due to the business changes associated with COVID-19 pandemic or government initiatives to slow the transmission of COVID-19.</p> <p>Directions can be made to eligible employees to:</p> <ul style="list-style-type: none"> • work a reduced number of hours, including reducing hours to nil; • work for a lesser period on a particular day or days; or • directing an eligible employee not to attend work on a day or days on which the employee would usually work. <p>For a JobKeeper enabling direction to be lawful, a qualifying employer must:</p> <ul style="list-style-type: none"> • provide eligible employees with three days' notice (or a lesser period by agreement) in writing and meet consultation obligations; • ensure the direction is not unreasonable and is necessary to continue the employment of one or more employees; and • ensure the implementation of the direction is safe, having regard to (without limitation) the nature and spread of COVID-19. <p>An employee does not have to comply with a direction if it is unreasonable in all the circumstances.</p>	<p>Qualifying employers can continue to give JobKeeper enabling stand down directions to eligible employees.</p> <p>Legacy employers cannot issue JobKeeper enabling stand down directions to:</p> <ul style="list-style-type: none"> • reduce an employee's hours of work below 60% of the employee's ordinary hours of work as at 1 March 2020 – these are the hours an employee is contracted to work; or • require an employee to work less than two consecutive hours in a day. <p>Legacy employers must provide seven days' notice in writing to employees and have expanded consultation obligations.</p> <p>The scope of when a direction which reduces hours will be unreasonable is expanded to include where it has a disparate effect on a category of employees over others subject to the same direction.</p>	

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Direction as to different duties	<p>A qualifying employer can direct an eligible employee in writing to perform different duties if:</p> <ul style="list-style-type: none"> the duties are within the employee's skill and competency; those duties are safe; the employee has any requisite licence or qualification; and those duties are reasonably within the scope of the employer's business operations. <p>An employee does not have to comply with a direction to change duties of work if it is unreasonable in all the circumstances.</p>	<p>Qualifying employers can continue to give these directions to eligible employees.</p> <p>Legacy employers can also make these directions. Legacy employers must provide seven days' notice in writing to employees and have expanded consultation obligations.</p>	
Direction as to different work location	<p>A qualifying employer can direct an eligible employee in writing to perform work from a different location (including the employee's home) if:</p> <ul style="list-style-type: none"> the place is suitable for the employee's duties; if the place is not the employee's home, it does not require the employee to travel an unreasonable distance; and the performance of the employee's duties at the place is safe, and reasonably within the scope of the employer's business operations. <p>An employee does not have to comply with a direction to change work location if it is unreasonable in all the circumstances.</p>	<p>Qualifying employers can continue to give these directions to eligible employees.</p> <p>Legacy employers can also make these directions. Legacy employers must provide seven days' notice in writing to employees and have expanded consultation obligations.</p>	

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Agreement as to different days/times of work	<p>A qualifying employer may request in writing, and an eligible employee may not unreasonably refuse, a request to perform their duties on different days and/or at different times, compared with the employee's ordinary days/times, if:</p> <ul style="list-style-type: none"> the performance of the employee's duties on those days or at those times is safe, having regard to (without limitation) the nature and spread of COVID-19, and reasonably within the scope of the employer's business operations; and the agreement does not have the effect of reducing the employee's overall number of hours of work. <p>Where the employer makes a request to an employee to make such an agreement, the employee must consider the request and not unreasonably refuse the request.</p>	<p>Qualifying employers can continue to give these directions to eligible employees.</p> <p>Legacy employers can continue to make these agreements, but not so as to require an employee to work less than two consecutive hours in a day. Legacy employers must provide seven days' notice in writing to employees and have expanded consultation obligations.</p>	
Agreement to take paid annual leave	<p>An employee must consider (and must not unreasonably refuse) their employer's request to take annual leave, provided that the leave arrangement would not result in reducing the employee's leave balance to fewer than two weeks. The employer and employee can also agree to the employee taking twice as much annual leave at half the employee's rate of pay for a period.</p>	<p>These flexibilities cease to operate on 28 September 2020.</p>	
Effect of directions and agreements	<p>A direction or agreement will each have the effect of temporarily modifying employment rights and obligations to the extent specified in the direction or agreement. All other terms and conditions of an eligible employee's employment will not be affected.</p>		
Dealing with disputes	<p>The Fair Work Commission can settle disputes about the temporary operation of the Fair Work Act, including by way of arbitration. Similarly, the Fair Work Ombudsman has the power to enforce a number of the provisions relating to the JobKeeper scheme that are about ensuring minimum wages and conditions and misuse of JobKeeper enabling directions by employers.</p>		



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