



COVID-19 (Coronavirus) Workplace Relations and WHS Guide.

JobKeeper and Amendments to the Fair Work Act

The Government announced the JobKeeper scheme on the 30th March 2020, wherein businesses significantly impacted by the coronavirus outbreak will be able to access a subsidy to continue paying their employees. This assistance will help businesses to keep people in their jobs and re-start when the crisis is over.

For employees, this means they can keep their job and earn an income – even if their hours have been cut. The JobKeeper Payment will also be available to independent contractors and the self-employed. The Government will provide \$1,500 per fortnight per eligible employee for up to 6 months.

The JobKeeper Scheme was approved and legislated on the 8th of April 2020.

The Australian Taxation Office (ATO) is the government body responsible for administering and managing the scheme. Comprehensive information relating to the scheme, including eligibility requirements and the steps employers need to follow to access the scheme are available at: <https://www.ato.gov.au/General/JobKeeper-Payment/>.

From a workplace (industrial) relations perspective, employers who believe they will be eligible for the scheme and intend to participate should take the following steps:

- Visit the ATO website to enrol for the JobKeeper payment* (<https://www.ato.gov.au/General/JobKeeper-Payment/Employers/Enrol-for-the-JobKeeper-payment/>)
- Notify eligible employees that they intend to claim the JobKeeper payment on their behalf
- Request eligible employees complete and return the *JobKeeper employee nomination notice* to certify that they have agreed that they wish to receive the JobKeeper payment from your business
- Begin paying eligible employees the full \$1500 (before tax) per fortnight
 - Please note: In order to be eligible for the scheme, an employer must pay all eligible employees the full \$1500 (before tax) per fortnight even if they would ordinarily earn less than this amount. An employer cannot pay their employees less than \$1500 per fortnight and keep the difference.

*The ATO website provides information about the appropriate step by step enrolment processes for businesses to follow depending on their individual circumstances. The appropriate processes for a business to follow depend primarily on tax/accounting regulations and obligations. As such, for comprehensive advice, we recommend employers contact their bookkeeper, accountant or the ATO directly.

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If an employer intends to participate in the JobKeeper scheme, they must nominate all eligible employees.** They cannot choose to nominate only some employees. However, individual eligible employees can choose not to participate.

If employees have multiple employers, they will generally be allowed to select the employer from whom they would like to receive JobKeeper. However, if an employee is employed with one employer on a casual basis and has permanent employment elsewhere, they **must** choose their permanent employer. It is important to clarify that employees are not receiving JobKeeper from another employer as they cannot be nominated for the scheme by more than one employer.

**The only exception to this rule relates to employees whose employment had already been terminated (e.g. an employee whose position was made redundant) prior to the announcement of the JobKeeper scheme. While employers can choose to re-engage these employees and nominate them for JobKeeper, they are not under any obligation to do so.

The Government provides further information on the JobKeeper scheme at the following addresses:

- Treasury: <https://treasury.gov.au/coronavirus/jobkeeper>
- Business Australia: <https://www.business.gov.au/risk-management/emergency-management/coronavirus-information-and-support-for-business/jobkeeper-payment>.

To support the introduction and operation of the JobKeeper scheme, amendments to the Fair Work Act were approved on the 9th of April 2020. At this time, the Fair Work Ombudsman have advised that the amendments to the Act will operate until the 28th of September 2020.

Please note: The amendments to the Act only apply to eligible employers who have qualified for the JobKeeper scheme and the workplace arrangements they make with their eligible employees from the 9th of April onwards.

The amendments allow employers who have qualified for the JobKeeper scheme to:

- Temporarily stand down (or partially stand down) employees in certain situations
- Alter employees' usual duties and locations of work in certain situations
- Agree with employees to make changes to days and/or hours of work in certain situations
- Agree with employees to take a period of annual leave subject to specific criteria

Direction to reduce hours or days of work (temporary and partial stand downs)

These provisions, known as 'JobKeeper enabling stand down directions', allow eligible employers to direct eligible employees that their hours are being reduced (including to 0 hours).

In order to enact these provisions in a legally compliant manner, employers must be able to show that their employee/s cannot be usefully employed for their normal days or hours because of changes to business occurring as a result of:

- The COVID-19 pandemic
- A Government initiative introduced to slow the transmission of COVID-19

OR

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Employers also need to:

- Make sure the direction is reasonable, taking into account employees' personal circumstances e.g. family or caring responsibilities
- Notify employees and their representatives (if any) at least 3 days before issuing the direction (unless the employee agrees to a shorter period of notice)
- Keep a written record of the consultation
- Confirm the Job Keeper enabling stand down direction in writing

AND

Changes to duties/locations of work

These provisions, known as 'JobKeeper enabling directions', allow an eligible employer to direct their employee to change their responsibilities/duties and their place of work (including to work from home or at another location).

In order to enact these provisions in a legally compliant manner, employers need to:

- Make sure the direction is reasonable, taking into account employees' personal circumstances e.g. family/caring responsibilities
- The employee has the necessary skills, competencies, licenses and/or qualifications to perform the new duties
- The new duties and location are safe (including with regard to the spread of COVID-19)
- The location is suitable for the employee's duties
- The employee is not required to travel an unreasonable distance
- The duties and location are reasonably within the scope of the employer's operations
- Notify employees and their representatives (if any) at least 3 days before issuing the direction (unless the employee agrees to a shorter period of notice)
- Keep a written record of the consultation
- Confirm the direction in writing

AND

Agreement to make changes to days/hours of work

The new provisions allow an eligible employer to make an agreement with an eligible employee to work on different days or times than usual.

In order to enact these provisions in a legally compliant manner, employers need to:

- Ensure the performance of work on different days or at different times is safe and within the scope of business operations
- Ensure the employee's usual work hours aren't reduced (this would require employers to issue a JobKeeper enabling stand down direction)
- Record any agreement made in writing

Please note: An employee must genuinely consider a request of this nature and cannot unreasonably refuse such a request.

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Agreement to take annual leave

The new provisions allow an eligible employer to request an eligible employee take a period of paid annual leave provided that:

- The agreement will not result in the employee having less than 2 weeks remaining in their annual leave balance (after the period of leave has occurred)

Employees who make an agreement to take annual leave still accrue their usual leave entitlements during the period of leave. Service is considered continuous for the purposes of redundancy pay and pay in lieu of notice (i.e. it is considered as time worked).

Please note: An employee must genuinely consider a request of this nature and cannot unreasonably refuse such a request.

Any agreement to take annual leave must be recorded in writing.

Prior to enacting JobKeeper enabling directions, we would strongly recommend you contact us for advice in relation to your individual circumstances.

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Variations to Modern Awards Approved

On Wednesday, the 8th of April, the Fair Work Commission announced that changes to 99 modern awards, including the Health Professionals and Support Services Award 2010, had officially been approved to provide greater flexibility for Australian workplaces to respond to the impacts of COVID-19.

Please note that these temporary provisions will be included as part of the Award from the first full pay period commencing on or after Wednesday, the 8th of April until the 30th of June 2020.

The new provisions are as follows:

1. 2 weeks' unpaid pandemic leave

This provision will allow employees:

- Required by the Government or medical authorities or acting on other medical advice, to self-isolate
- Otherwise prevented from working due to measures taken by the Government or medical authorities in response to the COVID-19 pandemic in circumstances where the employee cannot work remotely and must be in the workplace

OR

To take 2 weeks unpaid pandemic leave.

Further to this, the following criteria apply:

- The employee must give their employer notice of the taking of leave and of the reason they are required to take the leave as soon as possible (which may be at a time after the leave has started)
- An employee who notifies their employer, subject to the above conditions, of their intention to take unpaid pandemic leave must give the employer evidence, if required, that would satisfy a reasonable person that the leave is taken for an acceptable reason
- A period of unpaid pandemic leave must start before 30 June 2020, but may end after that date
- Unpaid pandemic leave does not affect any other paid or unpaid leave entitlement of the employee and counts as service for the purposes of entitlements under the applicable modern award and the National Employment Standards (NES)

AND

Furthermore, an employer and employer may agree that the employee can take more than 2 weeks' unpaid pandemic leave if necessary.

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2. Annual leave at half-pay

This provision will allow employees to take twice as much annual leave as they currently have accrued on half pay. A condition of this is that the agreement to take twice as much annual leave at half pay be recorded in writing and kept on an employee's file.

Finally, a period of leave taken using this provision must begin before the 30th June 2020 but may end after the date.

The FWC have confirmed that:

- They will update and republish the 99 awards on their website as soon as possible
- As per section 165 (3) of the Fair Work Act, the provisions won't officially take effect until the first full pay period commencing on or after the date the decision was announced (Wednesday, the 8th of April)
- At this time, the temporary provisions will operate until the 30th of June 2020

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Workplace Relations Q and A.

Can I stand my employees down (in the event I don't qualify for JobKeeper)?

Due to current economic circumstances related to the COVID 19 pandemic, many businesses are coming to us for clarification on whether they can stand down staff.

Specifically, many business owners view standing down staff as the most effective means of ensuring their business remains viable. Standing down employees is largely covered by Section 524 of the Fair Work Act 2009. As per these provisions, for a staff member to be legally stood down, it needs to be demonstrable that:

1. they are unable to be usefully employed;
2. due to a stoppage of work ...
3. for reasons which the employer cannot reasonably be held responsible.

Under the current COVID-19 circumstances, the most likely scenarios that would satisfy this criteria is:

- A. if the member's business is either ordered to cease operating by the government or
- B. can no longer operate/trade *for any other reason* for which the employer cannot reasonably be held responsible.

If the member believes their situation reflects the above - then standing down staff can be considered.

Caution: Given the relatively tight definition and historically limited application of the stand down provisions, please be advised that a decision to stand down staff does carry some risk. ie. that the Fair Work Commission may, at some later stage, deem the stand down invalid. However, we live in very unique times and under the current circumstances, this may well be a commercial risk worth bearing for the survival of the member's business.

Other options

Please consider the following four staffing options *before* considering standing down staff:

- a. Agreeing with employees to take their annual leave and/or long service leave
- b. Asking employees if they would be willing to agree to a reduction in ordinary hours – possibly for a temporary period
- c. Asking employees if they would be willing to take a period of unpaid leave by agreement
- d. Deciding to make staff redundant

These options arguably carry less risk than standing down staff, particularly if your circumstances mean a stand down may not be entirely permissible.

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What happens if my employee is required to self-isolate (including after returning from overseas)?

If an employee is required to self-isolate (including after returning from overseas), they should contact their employer immediately.

As per the new schedules inserted into modern awards, employees:

- Required by the Government or medical authorities or acting on other medical advice, to self-isolate (including as a result of having travelled overseas) **OR**
- Otherwise prevented from working due to measures taken by the Government or medical authorities in response to the COVID-19 pandemic in circumstances where the employee cannot work remotely and must be in the workplace

Can request to take 2 weeks' unpaid pandemic leave subject to the criteria mentioned above.

They may also elect to take annual leave during this period. If they are unwell or are caring for an immediate family member or a member of their household who is unwell during this period, they may take personal/carer's leave. Requests to take annual leave and personal/carer's leave will be subject to normal policies and procedures for the taking of leave.

What if an employee chooses to self-isolate but has not been directed to do so?

If an employee wants to self-isolate – but has not been directed to do so (e.g. have not arrived from overseas), they may request to work from home (if feasible), otherwise they will need to apply for annual leave or leave without pay. If the employee is unwell or is caring for someone who is unwell, they may take personal/carer's leave.

What happens if the employer directs the employee not to attend the workplace (but they were not directed to self-isolate by an authority)?

If you direct an employee not to attend the workplace to fulfill your WHS requirements (i.e. they have not been directed to self-isolate by a government authority and have not chosen to self-isolate themselves), they will be entitled to normal pay until they receive evidence from a medical practitioner or other relevant authority that they are either fit for work (and therefore return to the workplace), or not fit for work (they then go on personal/carer's leave).

What happens if an employee wants to cancel a leave request as they can no longer travel overseas?

Employers are encouraged to do everything reasonable to allow an employee to cancel their leave request in this sort of circumstance. Both parties should work together to reach an amicable agreement – e.g. employee only takes a portion of the leave etc.

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What happens if a school closure affects my employees?

If a school closure results in your employee being forced to stay home to care for their child/children, they will likely be entitled to personal/carers leave for that period if they are a permanent employee.

Can I make changes to my employees' regular rosters/hours of work? How would I do so in a compliant manner?

Making changes to an employee's roster/hours of work is a viable option for you to consider to manage the impacts of COVID-19 on your business. In order to do so in a compliant manner, you must follow the consultation provisions of the award that applies to your employees. Practically, this will involve arranging a meeting/s with employee/s who will be affected to explain the changes you intend to introduce, when you would like these changes to come into effect (e.g. from the following pay period) and to allow the employee and their representatives (if any) the chance to respond and provide any input they may have in relation to the changes. Once you have reached an agreement with your employees, all relevant details should be confirmed with the employee in writing (including an expected duration for the changes made – if they are temporary in nature).

Please note that if you are considering making changes to your employees' rosters/hours of work, we would recommend you contact us to receive advice in relation to your individual circumstances.

If we make changes to an employee's roster, meaning they no longer have ordinary hours on a day on which a public holiday falls, do we still need to pay them?

As per the National Employment Standards (NES), employees who would normally work on the day on which a public holiday falls are entitled to be paid at their base rate for the ordinary hours they would have worked if they had not been away because of the public holiday. If an employee's new roster means that they wouldn't have been working if the day were not a public holiday, you are not required to pay them as they didn't have any ordinary hours on that day. If you would like to pay your employees based on their previous roster, it is at your discretion to do so.

Please note that awards can contain additional terms that may affect your obligations to employees on public holidays. We would recommend you contact us to confirm whether any additional terms apply to your employees.

What if I need to consider redundancy due to a downturn in business related to COVID 19?

The normal redundancy provisions apply. This includes consulting with employees covered by a modern award, providing the appropriate notice period and paying the appropriate entitlements (including redundancy pay if your business has 15 or more employees).

A comprehensive redundancy guide is available to members online at www.podiatry.org.au. If you are considering redundancies, please contact the service directly via phone or email.

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WHS (OHS).

As per Work Health and Safety legislation in normal circumstances, there is an obligation for businesses to do everything reasonably practicable to ensure the health and safety of anyone who enters the workplace (this includes workers, volunteers, customers etc.). This includes limiting the spread of illness (including COVID-19) wherever reasonably possible. Preventative measures to limit the spread of the virus include*:

- Washing your hands often with soap and water before and after eating as well as after attending the toilet;
- Avoiding contact with others (including touching, kissing, hugging, and other intimate contact); and;
- Coughing or sneezing into your elbow
- Implementing social distancing measures**

**Information provided by the Department of Health*

***Information on social distancing available from the Department of Health at the following address:*

<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/how-to-protect-yourself-and-others-from-coronavirus-covid-19/social-distancing-for-coronavirus-covid-19>

You should also consider disinfecting items such as communal computers/phones, reception desks, waiting areas etc.

In determining additional appropriate measures intended to fulfil obligations under work health and safety legislation, employers should:

- Engage in consultation with workers to identify potential hazards/risks and establish protocols to follow
- Implement the agreed-upon measures and ensure there is clear communication (by multiple channels) of the established protocols to all workers
- Keep up to date with the official information released by government sources (e.g. the Fair Work Ombudsman, Safe Work Australia, Department of Health, state/territory health authority etc.)
- Ensure workers are given ongoing access to information released by government sources
- Limit individuals' access to the workplace where non-essential (e.g. consider conducting meetings with external clients by teleconference as opposed to face-to-face)
- Reconsider non-essential business travel
- Defer large staff meetings if possible
- Provide workers with access to support services to address queries or concerns, including employee assistance programs

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If an employee is experiencing symptoms that suggest they are unfit for work such as fever, cough, runny nose or shortness of breath OR if they have come in close contact with anyone with these symptoms, it would be prudent to direct them not to attend the workplace and require them to obtain medical clearance from a doctor before returning.

Working from home.

If an arrangement has been made to allow an employee or employees to work from home due to the COVID 19 outbreak, all parties must consider their WHS obligations. The APodA HR Advisory Service has working from home resources, including a Working from Home WHS Risk Analysis and Working from Home Agreement template available online at www.podiatry.org.au.

For more information on WHS and workplace relations considerations during this time, contact the APodA HR Advisory Service on 1300 620 641 or email hrhotline@podiatry.org.au.

For more health information on the coronavirus, call the Public Health Information Line on 1800 004 599 or the Coronavirus Hotline on 1800 020 080.

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