

JobKeeper Payment

Employer Guide

A brief employer guide to the new Federal Government JobKeeper wage subsidy

April 2020

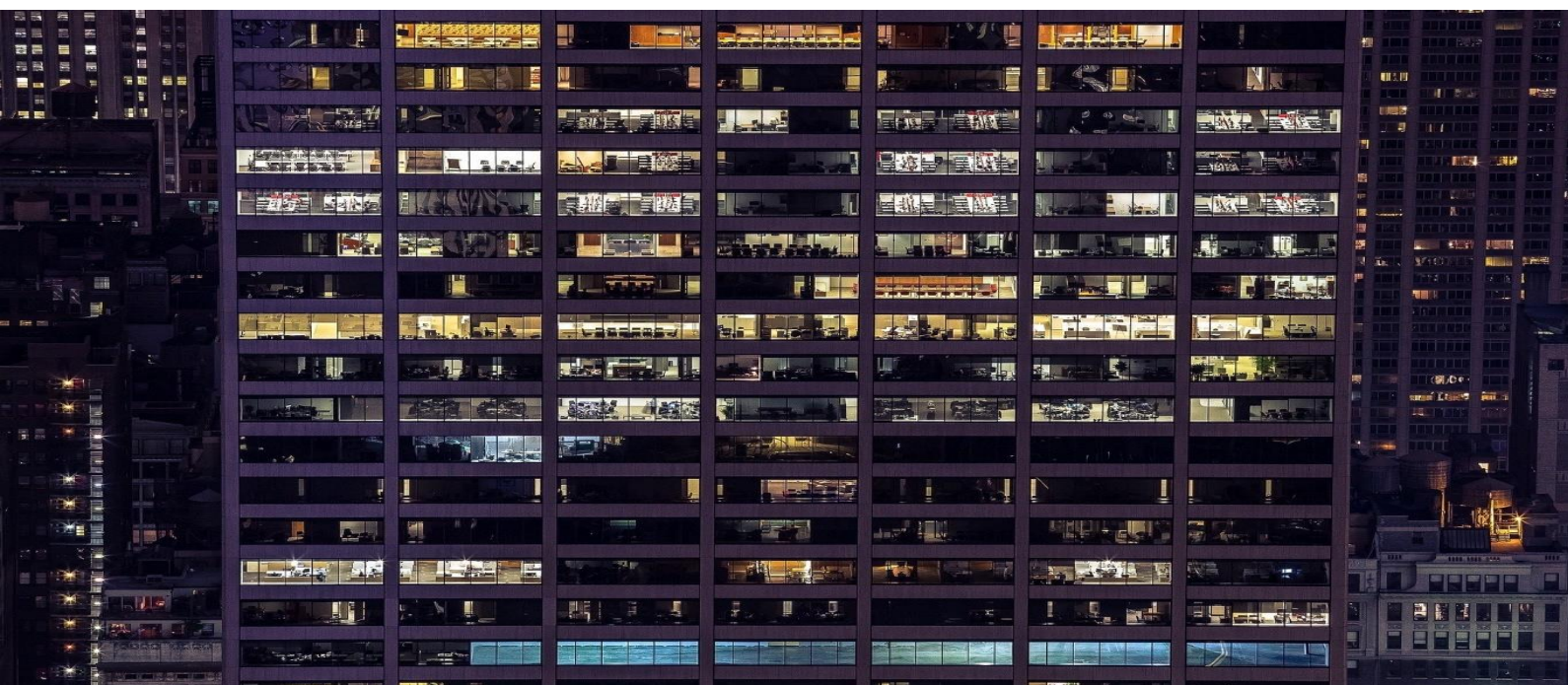


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Introduction



JobKeeper Payment

Quick Employer Guide

The novel coronavirus (COVID-19) pandemic has drastically shifted the course of life across the globe in 2020. As well as the global health crisis, each country now faces an economic one.

In Australia, the Federal Government has rolled out a suite of financial stimulus packages to buoy the Australian economy where possible and support employers, employees and those that now find themselves out of work.

The latest tranche of financial support is aimed preserving the employer-employee relationship, keeping more businesses in business and more people in jobs.

The \$1,500 per fortnight JobKeeper payment announced on Monday, March 30, will be paid directly to employers to help them keep staff on the books.

ACCI has prepared this guide on the JobKeeper payment, which seeks to explain and answer some of the more common questions employers may have around the payment scheme.

Employers should at all times be conscious of their particular legal obligations applicable under the Fair Work Act 2009, their respective State and Territory WHS legislation and workers compensation legislation, as well as enterprise agreements, awards, contracts and policies and should seek further advice where necessary.

The content of this publication has been prepared based on material available to date (8 April 2020). The material in this guide is of a general nature and should not be regarded as legal advice or relied on for assistance in any particular circumstance or situation. In any important matter, you should seek appropriate independent professional advice in relation to your own circumstances. The Australian Chamber of Commerce and Industry accepts no responsibility or liability for any damage, loss or expense incurred as a result of the reliance on information contained in this guide.

1. Eligibility criteria

JobKeeper is the new Federal Government wage subsidy payment which will enable eligible employers to access a subsidy to continue paying their employees. Legislation giving effect to the JobKeeper payment was passed by Parliament on 8 April 2020.

The JobKeeper Payment (not to be confused with JobSeeker Payment) allows eligible employers to claim a **fortnightly payment of \$1,500, before tax for each eligible employee** to subsidise their wage, from 30 March to 27 September 2020.

The full amount of the JobKeeper Payment, before tax, **must be** passed from employer to employee or the business owner will face stiff penalties.

The first JobKeeper Payment will be reimbursed by the ATO from the **first week in May** but will be **backdated to 30 March 2020**.

1.1 Employer Eligibility Criteria

In order to receive the JobKeeper Payment **both** an employer and employee must meet the eligibility criteria (set out below).

1.1.1 Am I an eligible employer for the JobKeeper Payment?

Eligible employers are businesses (including companies, partnerships, trusts, sole traders) and not for profits:

- with a turnover of **less than \$1 billion** whose turnover has fallen or will likely fall by more than 30% (of at least one month); **OR**
- with a turnover of **\$1 billion or more** whose turnover has fallen or will likely fall by more than 50% (of at least one month).

Registered charities are eligible employers if they estimate their turnover has fallen or will likely fall by **more than 15%** (of at least one month).

Big banks subject to the Major Bank Levy are **not eligible**.

1.1.2 How is 'turnover' defined?

Turnover is calculated as it is for GST purposes and is reported on Business Activity Statements (BAS). It includes all taxable supplies and all GST free supplies but not input taxed supplies.

Only Australian based sales are included and therefore, only Australian based turnover is relevant for this test. A decline in overseas operations will not be counted in the turnover test.

1.1.3 How does an employer establish a % fall in turnover (30%, 50% or 15%)?

Most businesses are expected to be able to establish that their turnover has fallen in the relevant month or three months (depending on the natural activity statement reporting period of that business) relative to their turnover a year earlier in 2019.

However where a business's turnover a year earlier is not representative of their usual or average turnover, (e.g. because there was a large interim acquisition or their turnover is typically highly variable) the Tax Commissioner will have discretion to consider additional information that the business can provide to establish that they have been significantly affected by the impacts of COVID-19.

The Tax Commissioner will also have discretion to set out alternative tests that would establish eligibility in specific circumstances (e.g. eligibility may be established as soon as a business has ceased or significantly curtailed its operations).

There will also be some tolerance where employers, in good faith, estimate a greater than 30 % (or 50%) fall in turnover but actually experience a slightly smaller fall.

1.1.4 What if my business has been trading for less than 12 months?

Where a business has not been in operation for a year and therefore will have an issue showing that turnover has fallen relative to a year earlier, the Tax Commissioner will have discretion to consider additional information that the business can provide to establish that they have been significantly affected by the impacts of COVID-19.

1.1.5 What if my turnover has not yet decreased, but I believe it will in the coming month?

Employers can apply for the JobKeeper Payment if they reasonably believe their turnover will fall by 30% (or 50%) relative to turnover in a corresponding period a year earlier.

1.1.6 What if my turnover is likely to decrease later in the year?

Businesses can apply for the JobKeeper Payment at a later time once the turnover test has been met. In this scenario, the JobKeeper Payment is paid from the date an employer becomes eligible (not backdated to the commencement of the scheme). JobKeeper Payments can be received up to 27 September 2020.

1.2 Employee Eligibility Criteria

1.2.1 If I am an eligible employer how do I identify if my employees are eligible for the JobKeeper Payment?

Once an employer determines that they are an eligible employer (see 1.1.1), the employer then needs to consider which employees they employ are eligible for the payment.

Eligible employees:

- were employed by the employer at 1 March 2020;
- are currently employed by the employer (including those stood down or re-hired);
- are full-time or part-time (including fixed term), long-term casuals (a casual employed on a regular basis for longer than 12 months as at 1 March 2020) or a sole trader;
- are at least 16 years of age;
- are an Australian citizen, the holder of a permanent visa, a protected special category visa, a non-protected special category visa who has been residing continually in Australia for 10 years or more, or a New Zealander on a special category (subclass 444) visa (all other temporary visa holders are not currently eligible); **AND**
- Are not in receipt of a JobKeeper Payment from another employer.

1.2.2 Is there an income cap for employees?

There is no income cap on eligibility for employees. Therefore, an eligible employer may receive the subsidy in respect of any eligible employees including its highest paid employees.

1.2.3 What about employees in receipt of workers compensation?

If an employee is still working (e.g. reduced hours), then they can be eligible for the JobKeeper Payment. Employees will not be eligible if they are not currently working due to incapacity and supported by a workers compensation scheme.

1.2.4 What about employees on parental leave pay?

Employees are not eligible for the JobKeeper Payment for the period they are receiving Parental Leave Pay or Dad and Partner Pay.

1.2.5 Can I unilaterally decide which eligible employees will be nominated for the JobKeeper Payment?

There are currently no announced restrictions on an employer's right to unilaterally decide which eligible employees will be nominated to receive the JobKeeper Payment.

In theory therefore, employers can freely decide which employees should be re-hired or even to refuse to nominate an eligible employee. However, employers must keep in the mind the usual laws affecting and governing employment decisions when selecting employees, or groups of employees, including by ensuring that selection of eligible employees for the JobKeeper Payment:

- Does not breach discrimination laws (e.g. basing the choice on a protected attribute such as race, sex, disability or age); and
- Would not give rise to an adverse action complaint if an employer decides not to nominate the employee to receive the JobKeeper Payment.

1.3 Apprentices and Trainees

1.3.1 Are my apprentices and trainees eligible for the JobKeeper payment?

Yes, provided that they meet all of the relevant employee eligibility requirements in 1.2.1.

1.3.2 Are employers eligible to receive both the JobKeeper Payment and the Supporting Apprentices and Trainees wage subsidy?

No. The JobKeeper Payment is considered 'equivalent' for the purposes of Supporting Apprentices and Trainees wage subsidy, as it is designed to help businesses cover the costs of their employees' wages. Therefore, an employer will not be allowed to claim both payments simultaneously. For any period where the employer elects to claim the JobKeeper Payment they will not be able to claim the Supporting Apprentices and Trainees wage subsidy.

1.3.3 As the JobKeeper Payment starts on 30 March 2020, can eligible employers claim Supporting Apprentices and Trainees wage subsidy for wages paid during the period 1 January 2020 to 31 March 2020?

Yes, where an eligible employer claims the JobKeeper Payment from 30 March 2020, they will be eligible to claim the Supporting Apprentices and Trainees wage subsidy for wages paid during the period 1 January 2020 to 31 March 2020.

1.3.4 Where an employer is not eligible for the JobKeeper payments, can they still be assessed as eligible for Supporting Apprentices and Trainees subsidy?

Yes. Employers should contact their Australian Apprenticeship Support Network Provider for assistance.

Please find more information on the Supporting Apprentices and Trainees wage subsidy [here](#) and [FAQs](#).



2. Job Keeper payment process

2.1 How do employers receive the JobKeeper Payment?

In order to receive the JobKeeper payment employers must do the following:

- Employers **must** elect to participate in the scheme.
- Employers can register their interest online now at the [ATO website](#).
- Employers will subsequently need to apply for the JobKeeper Payment through an [online application](#) (this is not yet available).
 - 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.
- The ATO will need to assess whether an employer has experienced the required turnover decline (employers will need to provide supporting information demonstrating the necessary downturn in their business).
- Once approved, ensure that each eligible employee receives at least \$1,500 per fortnight (before tax). See sections 3 to 5 for further information on this.
- **Notify** all eligible employees that you have nominated them as an eligible employee for the purposes of JobKeeper Payments.
- Provide [monthly updates](#) to the ATO on the number of eligible employees employed by the business.

2.1.1 Is the JobKeeper Payment part of Centrelink?

No, the JobKeeper payment is not a Centrelink welfare payment, it is a wage subsidy administered by the ATO.

2.1.2 When and how will the JobKeeper Payment be paid to employers?

The first JobKeeper Payment will be reimbursed by the ATO from the **first week in May** but will be **backdated to 30 March 2020**. Payments will be made to the employer monthly in arrears by the ATO.

Once an eligible employer is approved (we understand the ATO will commence approvals in the coming weeks), they can start making JobKeeper payments to their approved eligible employees. This will include any back pay to 30 March that may not have been paid to eligible employees at the time (e.g. because they were stood down and not otherwise entitled to payment at that time).

2.2.3 What happens if I don't have the cash flow to paying eligible employees once approved until I receive the payment from the ATO?

Many businesses, in particular those that have been forced to shut their doors now have little to no revenue coming in, so these employers may be unable to do not pay wages in advance of ATO payment in arrears.

The current guidance from the Government is that those businesses may want to speak to their bank to discuss their short term loan options.

ACCI understands this remains a significant issue for many employers and is engaging further with the Government to secure effective assistance for businesses in these circumstances, to enable them and their employees make use of the JobKeeper scheme. ACCI will include any updates in relation to this important issue in the next edition.

2.1.4 What are the eligible periods for reimbursement?

Employers will need to satisfy payment requirements in respect of each 14 day period covered by the scheme. The first period starts on Monday, 30 March 2020 and ends on Sunday, 12 April 2020.

Employers must pay their eligible employees a minimum of \$1,500 per fortnight in the scheme payment periods.

2.1.4 What if I pay my employees monthly?

Where an employer pays their staff monthly, the ATO will be able to reallocate payments between periods. However, overall an employee must have received the equivalent \$1,500 per fortnight.

2.1.5 How long will the JobKeeper Payments last?

For up to six months, running from 30 March 2020 to 27 September 2020. The final period will start on Monday 14 September and end on Sunday 27 September 2020.

3. JobKeeper and employee pay / sole traders

3.1 How does the JobKeeper Payment effect the amount an employer must pay their employee/s who were employed as at 1 March 2020?

3.1.1 Where an employee currently earns UNDER \$1500 a fortnight (before tax)?

They are about to get a pay rise (if they are an eligible worker).

- Once approved, eligible employers will be legally required to pass on all of the \$1,500 JobKeeper Payment they receive for an eligible employee (even where this is more than the employee currently earns).
- It will be up to the employer in this circumstance to decide if they want to pay superannuation on the additional wage earned by that employee (the additional money the employee is making from JobKeeper on top of their normal wage) because of the JobKeeper Payment.

3.1.2 Where an employee currently earns MORE THAN \$1500 a fortnight (before tax)?

- An employee's terms of employment are not changed as a result of this scheme. If an employee is paid more than \$1,500 a fortnight (under an award, enterprise agreement or contract of employment), an employer is still liable to pay that amount (unless otherwise renegotiated).
- Therefore, if an employee ordinarily receives more than \$1,500 (before tax) in income per fortnight, employers will now receive the \$1,500 JobKeeper Payment toward their salary but will need to continue paying their regular income amount.

3.2 How does the JobKeeper Payment effect the amount an employer must pay their employee/s who were hired after 1 March 2020?

In order to be eligible for the JobKeeper Payment, an employer must have been in an employment relationship with the eligible employee as at 1 March 2020, and the employee must be currently engaged.

If a new employee has or is hired after 1 March 2020 (who was not in an employment relationship with the employer on 1 March 2020) they are not eligible for the JobKeeper payment for that employee.

3.3 Are sole traders eligible for the JobKeeper payment?

The JobKeeper Payment is available businesses without employee (the self-employed including sole traders).

Businesses without employees will need to provide the following:

- an ABN for their business;
- the name and details of a nominated individual to receive the payment (the payment will be made to this person's bank account);
- the nominated individuals Tax File Number; and
- a declaration as to recent business activity.

Once qualified a self-employed person will need to provide a monthly update to the ATO to declare their continued eligibility for the payments.

EXAMPLE – SOLE TRADER

- Self-employed Kelsey is a sole trader running a florist. She does not have employees. Kelsey's business has been in operation for several years.
- The economic downturn due to COVID-19 has adversely affected Kelsey's business, and she expects that her business turnover will fall by more than 30 per cent compared to a typical month in 2019. Kelsey will be able to apply for the JobKeeper Payment and would receive \$1,500 per fortnight before tax, paid on a monthly basis





EXAMPLE – EMPLOYER WITH DIFFERENT TYPES OF EMPLOYEES ON DIFFERENT WAGES

Sarah owns a retail clothing business with four employees. The business is still operating at this stage but Sarah expects that turnover will decline by significantly more than 30 per cent in the coming months (if it hasn't already). The employees are:

- Tilly, who is a permanent full-time employee on a salary of \$2,500 per fortnight before tax who has been working for Sarah for 2 years and who continues working for the business;
- Tasha, who is a permanent part-time employee on a salary of \$1,000 per fortnight before tax who has been working for Sarah for 1 year and who continues working for the business;
- Melanie, who is a permanent part-time employee on a salary of \$1,000 per fortnight before tax who has been working for Sarah since 7 March 2020 and who continues working for the business; and
- Alex, who is a casual employee paid on average \$600 per fortnight before tax who has been working for Sarah since 1 October 2019 and who continues working for the business.

Sarah is eligible to receive the JobKeeper Payment for the following employees:

- Tilly, who was in an employment relationship with Sarah on 1 March 2020, is currently still engaged as an employee and works full-time.
- Tasha, who was in an employment relationship with Sarah on 1 March 2020, is currently still engaged as an employee and works part-time.

Sarah is not eligible to receive the JobKeeper Payment for the following employees:

- Melanie, as she wasn't in employment relationship with Sarah as at 1 March 2020, given that she was employed on 7 March 2020.
- Alex, as she is a casual employee who had not been engaged on a regular basis for longer than 12 months as at 1 March 2020.

The JobKeeper Payment would mean the following for Sarah's two eligible staff's wages:

- Sarah continues to pay Tilly her full-time salary of \$2,500 per fortnight before tax but receives \$1,500 per fortnight from the JobKeeper Payment to subsidise the cost of Tilly's salary, meaning she only needs to pay the remaining \$1,000 per fortnight before tax towards Tilly's wages with the rest covered by the JobKeeper Payment. Sarah will need to continue paying the superannuation guarantee on Tilly's \$2,500 income; and
- Sarah will receive \$1,500 per fortnight before tax from the JobKeeper Payment to subsidise Tasha's salary. As this is more than Tasha's current \$1,000 per fortnight salary Tasha will see an increase of \$500 per fortnight before tax being paid whilst Sarah is receiving the JobKeeper Payment. Sarah must continue to pay the superannuation guarantee on the \$1,000 per fortnight of wages that Tasha is earning. Sarah has the option of choosing to pay superannuation on the additional \$500 (before tax) paid to Tasha under the JobKeeper Payment.

Sarah is required to advise her employees that she has nominated them as eligible employees to receive the JobKeeper Payment.

Sarah will be required to register and apply for the JobKeeper payment and to provide information to the ATO on a monthly basis. She will receive the payment monthly in arrears.

4. Employees with multiple employers

4.1 Employees with multiple employers

Where employees have multiple employers – only one employer will be eligible to receive the payment.

The employee will need to notify their primary employer to claim the JobKeeper Payment on their behalf.

The claiming of the tax-free threshold will in most cases be sufficient notification than an employer is the employee's primary employer.



EXAMPLE – EMPLOYEE WITH MULTIPLE EMPLOYERS

- Michelle currently works two permanent part-time jobs, at an art gallery during weekdays, and at the local café on the weekend. Due to the impact of COVID-19, the gallery has closed and Michelle has been stood down without pay under the Fair Work Act.
- Michelle continues to work at the café delivering take-away orders.
- Michelle can only receive the JobKeeper Payment once, from the employer from whom she nominates as her primary employer.
- As Michelle only claims the tax free threshold from her job at the art gallery, this will be treated as her nomination of the art gallery as her primary employer.
- The art gallery is eligible for the JobKeeper Payment. The art gallery will pass the JobKeeper Payment on to Michelle, so she will receive \$1,500 per fortnight before tax.
- During the application process, the art gallery will need to notify the ATO that Michelle receives the payment from them. The art gallery is also required to advise Michelle that she has been nominated to the ATO as an eligible employee to receive the payment.
- The café is not eligible to receive the JobKeeper Payment for Michelle. The income that Michelle receives from her job at the café does not change her entitlement to the JobKeeper Payment she receives from the art gallery.

5. Fair Work Act changes for employers and employees on JobKeeper

As part of the JobKeeper Package, the government has made a number of significant temporary changes to the Fair Work Act for employers and employees who have access to the JobKeeper wage subsidy.

Note: these changes ONLY apply to employers and employees receiving JobKeeper.

These temporary changes override ANY:

- Employment contract;
- Modern award; or
- Enterprise agreement.

5.1 JobKeeper directions

Under the temporary Fair Work Act changes employers and employees who qualify for and receive JobKeeper are allowed to do the following:

- A. **Issue directions** (known as JobKeeper enabling directions) changing current employment arrangements which require an employee to:
 - Work reduced hours or days (a JobKeeper enabling stand down direction) for any period that they cannot be usefully employed.
 - Undertake alternative duties; or
 - Work at an alternative location.
- B. Make the following **requests** of an employee which cannot be unreasonably refused:
 - To work different days/times to their ordinary hours/days
 - To take accrued annual leave.
- C. **Agree** with employees for double annual leave to be taken at half pay.

5.1.1 Does an employer have to give an employee notice of a JobKeeper direction?

Yes, an employer must give an employee **at least 3 days written notice** before they give a JobKeeper direction (or a lesser period if agreed with the employee).

Employers must also consult with the employee (or their representative) about the JobKeeper direction, and keep a written record of the consultation.

5.1.2 How must an employer give an employee a JobKeeper direction?

A JobKeeper direction must be given to an employee in writing (this could include by electronic means) and in a form set out in the regulations (note this is not yet published).

5.1.3 How long does a JobKeeper direction given by an employer last?

A JobKeeper direction given by an employer operates and has effect until one of the following occurs:

- It is withdrawn or revoked by the employer.
- It is replaced by a new employer direction.
- An order of the Fair Work Commission requires it.
- There are no further JobKeeper Payments.

5.1.4 Does an employee have to follow a JobKeeper direction given by an employer?

Yes, employees must comply with a JobKeeper employer direction unless the direction is unreasonable in all the circumstances (this could for example, depend on its impact on an employee's caring responsibilities).

Where a direction is unreasonable it does not apply to an employee.

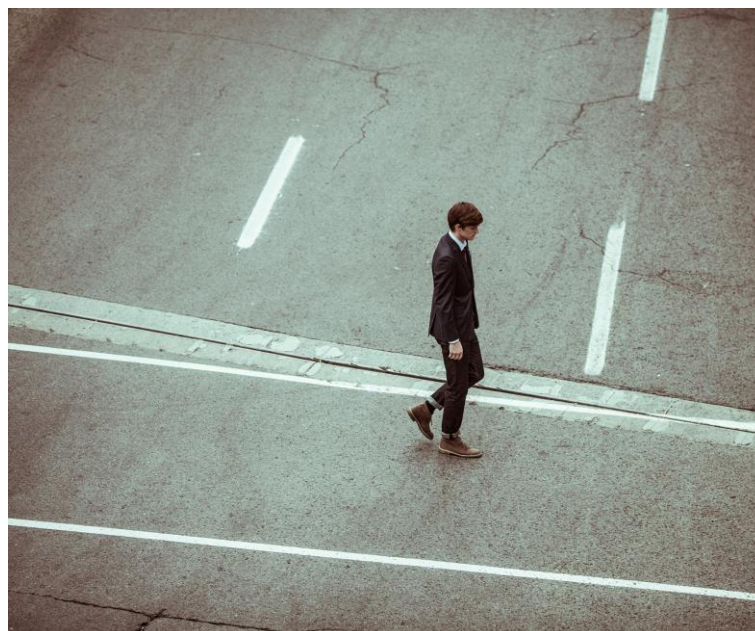
5.1.6 Can an employer give a JobKeeper direction which has the effect of making an employee **redundant**?

No, a JobKeeper direction cannot amount to redundancy.

5.1.7 What penalties are there for employers who **misuse** a JobKeeper direction?

Employers must not knowingly give a JobKeeper direction which is not authorized by law.

The penalty for doing so is up to **\$126,000** for an individual and **\$630,000** for a business.



5.2 Work reduced hours/days (JobKeeper stand down)

5.2.1 What are the new stand down provisions that apply to employers and employees on JobKeeper?

The new stand down provisions which apply to employers and employee on JobKeeper allow an employer to give a **direction** (called a JobKeeper enabling stand down direction) to an employee to:

- Not work on a day or days on which the employee would usually work.
- Work for a lesser period than the period which the employee would ordinarily work on a particular day or days.
- Work a reduced number of hours (compared with the employee's ordinary hours of work),

and **not be paid** for the period that work is not performed.

An employer can give this direction so long as:

- For the period of the stand down the employee cannot be **"usefully employed"** for the employee's normal days or hours because of changes to business attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 (explained at 5.2.2)
- The implementation of the stand down direction is safe and specifically safe having regard to the nature and spread of COVID-19.
- The **"wage condition"** is satisfied. This just requires all employees to be paid at a minimum \$1,500 per fortnight before tax.
- The **minimum payment guarantee** is met (explained at 5.2.3).
- The **hourly rate of pay guarantee** is met (explained at 5.2.4).

5.2.2 How does an employer know if an employee cannot be "usefully employed"?

This situation arises when an employee has no **useful work** available to perform because of the COVID-19 pandemic or because of the Public Health Orders and Directions (however described in each State and Territory) imposing restrictions on individuals and businesses.

Useful work does not have to be the work that the employee ordinarily performs but needs to be genuine productive work that provides a "net benefit" to the employer. Employers should be able to demonstrate that the impacts of the virus or the Government's measures to deal with it have caused the fact that there is no useful work available for the period the employee is stood down.

5.2.3 What is the "minimum pay guarantee" and how does an employee ensure that the minimum payment guarantee is met?

An employer must ensure that the amount payable to a particular employee each fortnight is the greater of:

- The \$1,500 JobKeeper amount; or
- The total amount owed to the employee for the performance of work during the fortnight (in full).

The "total amount" includes any of the following that may have become payable during the fortnight:

- Incentive-based payments and bonuses.
- Loadings.
- Monetary allowances.
- Overtime or penalty rates.
- Leave payments.

5.2.3 What is the "hourly rate of pay guarantee" and how does an employee ensure that the hourly rate of pay guarantee is met?

Reducing the hours/days an employee works (via a JobKeeper enabling stand down) **cannot** reduce an employee's "hourly base rate of pay" (the hourly rate the employee earned before the reduction in hours/days).

An employee **must** still be paid their "hourly base rate" for any work they perform during the fortnight.

An employee's "hourly base rate" does not include any additional allowances, loadings or penalties added.

Calculating an employee hourly base rate

If an employee is not paid hourly, the hourly base rate of pay will generally be determined by:

- The provisions of any applicable industrial instrument (e.g. a modern award or enterprise agreement).
- Where no industrial instrument applies, dividing the payment made in each pay cycle by the number of ordinary hours in the period (again, minus any additional allowances, loadings or penalties added).

Further advice should be sought regarding this issue where unique payment arrangements exist with varying numbers of ordinary hours in each pay cycle.



Employee performing different duties

For an employee performing new duties (see section 5.3) their hourly base rate is either:

- The employee's new hourly rate for the new duties being performed if they attract a higher rate of pay OR
- The employee's old hourly rate if the new hourly rate for the new duties is lower than the old rate (prior to the direction to change duties)

5.2.4 Can a stand down direction issued by an employer apply when an employee is on leave (annual, personal etc.)?

No, a stand down direction does not apply to an employee during a period when the employee is taking paid or unpaid leave.

This means that when an employee is stood down (partial or full) and they subsequently go on leave, their rate of pay will return to what it was prior to the direction to stand down.

5.2.5 If an employee is stood down as a result of JobKeeper direction from an employer what happens to the accrual of their leave entitlements?

The employee accrues leave entitlements as if the direction to stand down had not been given.

5.2.6 Does the period when an employee is stood down count towards continuity of service?

Yes, it counts for the purpose of continuity of service.

5.2.7 What requests can an employee make while stood down (in whole or in part) as a result of a JobKeeper direction?

An employee may request for permission to engage in any of the following:

- Secondary employment
- Training; or
- Professional development.

An employer cannot unreasonably refuse such a request. Penalty for doing so - up to \$12,600 for an individual and \$63,000 for a business.

Can an employee who is stood down (in whole or in part) as a result of a JobKeeper direction get a second job?

Yes, if they make a request to do so and their employer does not unreasonably refuse the request.

Examples of a reasonable refusal might include where:

- The request would involve the employee working for a clear competitor
- The secondary employment would lead to a disclosure of confidential information belonging to the employer
- It would pose a risk to the employee's health and safety.



5.3 Duties of work

5.3.1 When can an employer alter an employee on JobKeeper's duties of work?

An employer can **direct** an employee who qualifies for JobKeeper and is entitled to payments to perform different duties to normal provided that:

- The duties are within the employee's skill and competence.
- The duties to be performed are generally safe and specifically safe having regard to the nature and spread of COVID-19.
- The employee holds any necessary license or qualification required to perform the duties.
- The duties are reasonably within the scope of the employer's business operations.

AND the employer has information before them that leads them to reasonably believe that this JobKeeper direction with respect to the employee performing different duties is necessary to maintain the employment of the employee.

"**Necessary**" is best thought of as more than desirable or preferred but "necessary". We suggest in determining this for employers to apply the following test to their thinking:

= "But for" directing the employee to perform different duties the employee would be made redundant.

5.4 Location of work

5.4.1 When can an employer alter an employee on JobKeeper's location of work?

An employer can **direct** an employee who qualifies for JobKeeper and is entitled to payments to perform their duties at a place different to their normal workplace including the employee's home provided that:

- The place is suitable for the employee's duties
- The performance of the duties at that place is generally safe and specifically safe having regard to the nature and spread of COVID-19.
- The performance of the duties at that place is reasonably within the scope of the employer's business operations.

AND the employer has information before them that leads them to reasonably believe that this JobKeeper direction with respect to location of work is necessary to maintain the employment of the employee.

"**Necessary**" is best thought of as more than desirable or preferred but "necessary". We suggest in determining this for employers to apply the following test to their thinking:

= "But for" directing the employee to a different work location the employee would be made redundant.

5.5 Days / times of work

5.1.1 When can an employer alter an employee who qualifies for JobKeeper's days and time of work?

An employer can **request** an employee who qualifies for JobKeeper and is entitled to payments to perform their duties on different days and/or at different times compared to the employee's normal ordinary days /hours of work provided that:

- the performance of the duties on those days is generally safe and specifically safe having regard to the nature and spread of COVID-19
- the performance of the duties on those days is reasonably within the scope of the employer's business operations.

An employee **cannot unreasonably** refuse such a request.

For example, an employee who usually works weekends could reasonably be required to work on weekdays in a situation where their employer's business can no longer trade on weekends as a result of the COVID-19 pandemic.

If an employee does not agree to such a request, the Fair Work Commission could settle a dispute about this by arbitration (see 5.7 Disputes).

5.6 Annual Leave

5.6.1 When can an employer direct an employee to take paid annual leave?

An employer can **request** an employee who qualifies for JobKeeper and is entitled to payments to take paid annual leave provided that:

- The employee will maintain a paid annual leave balance of at least two weeks.

An employee **cannot unreasonably** refuse such a request.

If an employee does not agree to such a request, the Fair Work Commission could settle a dispute about this by arbitration (see 5.7 Disputes).

5.6.2 What rate of pay applies when an employee is directed to take annual leave?

Payment for the annual leave is based on the rate of pay that applied to the employee before the JobKeeper legislation operated.

5.6.3 When can an employee take double leave at half pay?

An employer and employee can agree to take double the paid annual leave at half pay.

For example, an employer and employee can agree to six weeks leave being taken, but the employee only has three weeks annual leave deducted and is only paid for three weeks annual leave, the payment of which is spread across six weeks.

5.6.4 If an employee takes double annual leave at half pay what happens to their accrual of leave entitlement during that period?

The employee accrues annual leave as if the agreement for annual leave at half pay had not been made.

5.7 Disputes

The Fair Work Commission can deal with disputes between employers and employees about the JobKeeper Fair Work Act temporary changes.

The Fair Work Commission may arbitrate the dispute and will impose a decision on the employer and employee.

Arbitration – a formal process, where if the parties are not able to agree to a solution the Commission can sometimes decide for them what the solution should be. This decision would only be made after the parties have had a chance to present their evidence and arguments.

The Fair Work Commission can also mediate, conciliate, make a recommendation or express an opinion.

In dealing with the dispute, the Fair Work Commission must take into account fairness between the parties in dispute.

5.7.1 Who can bring a dispute about a JobKeeper direction to the Fair Work Commission?

An application to the Fair Work Commission to deal with a dispute may be made by:

- an employee or a union; or
- an employee or an employer organisation.

5.7.2 What orders can the Fair Work Commission make?

In making a decision about JobKeeper, the Fair Work Commission can:

- Make an order that the Commission considers desirable to give effect to a JobKeeper employer direction.
- Make an order setting aside a JobKeeper employer direction.
- Make an order substituting a different JobKeeper employer direction for the one made.
- Make any other order that the Commission considers appropriate.

5.7.3 What is the penalty for failing to follow a decision imposed by the Fair Work Commission regarding JobKeeper?

Up to **\$12,600** for an individual and **\$63,000** for a business.



6. Stand down prior to JobKeeper

6.1 Are employers who have already stood down employees without pay eligible for the JobKeeper Payment?

Yes, employers who have stood down their employees (in part or full) are still eligible for the JobKeeper Payment.

Employees who have been stood down must be paid at a minimum the \$1,500 JobKeeper Payment per fortnight, before tax for the payment periods of the JobKeeper Scheme.

It will be up to the employer in this circumstance to decide if they want to pay superannuation on the JobKeeper Payment to their employees.

6.2 What if an employee who was stood down after 1 March has since applied for income support (JobSeeker)?

Employers who nominate for JobKeeper must advise their eligible employees. A person receiving the JobKeeper Payment **cannot** also receive the JobSeeker Payment.

Employees who have already applied for JobSeeker can notify Services Australia (formerly Centrelink) to withdraw and shift to the JobKeeper Payment if their employer notifies them that they have nominated for JobKeeper.

6.3 What if my employee who was stood down after 1 March 2020 has since got another job?

Employees can **only** receive the JobKeeper payment **once**.

If an employee was stood down (after 1 March 2020) and has subsequently got another job (and have not resigned from their employer who stood them down), they are still eligible for the JobKeeper payment with their employer who has stood them down. Meaning their employer can apply and can pay them \$1,500 per fortnight before tax.

The employees' new employer will not be eligible for the JobKeeper Payment for them as they have been employed after 1 March 2020 and are therefore not an eligible employee with that employer.

If employer who stood the employee down registers and applies for the JobKeeper Payment they should notify that employee.

6.4 Can I direct my employee who's been stood down and subsequently receives JobKeeper from me to do work?

No, not while they are still stood down under section 524 of the Fair Work Act. A stand down by its very definition means that an employer's employees cannot be "usefully employed" by the employer because of a stoppage of work for which the employer cannot reasonably be held responsible.

However, if circumstances change and an employer decides that they can now "usefully employ" an employee, an employer can take an employee off stand down. An employer may then seek to utilise the new JobKeeper enabling stand down provisions, which allow more flexibility in terms of a reduction of hours (including a complete reduction to nil). The notice and consultation requirements under these new provisions should be followed (see Section 5.2).

In these circumstances, employers need to be mindful of and weigh up the risk of a potential claim that the initial stand down was unlawful (e.g. that the employee could have in fact been "usefully employed"), as they could be ordered to back pay their employees.

EXAMPLE – EMPLOYER WITH EMPLOYEES WHO HAVE BEEN STOOD DOWN

- Tim runs a gym. Ordinarily, he employs three permanent part-time gym instructors, but the government directive that gyms can no longer operate has required him to shut the business. As such he has been forced to stand down his three gym instructors without pay.
- Tim's turnover will decline by more than 30 per cent, so he is eligible to apply for the JobKeeper Payment for each employee and must pass on \$1,500 per fortnight before tax to each of his gym instructors for up to six months. Tim will maintain the connection to his employees and be in a position to quickly resume his operations.
- Tim is required to advise his employees that he has nominated them as eligible employees to receive the Payment. It is up to Tim whether he wants to pay superannuation on the additional income paid to the three employees because of the JobKeeper Payment.
- If Tim's employees have already started receiving income support Payments like the JobSeeker Payment when they receive the JobKeeper Payment, they will need to advise Services Australia as employees cannot be in receipt of both payments. If some of Tim's employees have since got other jobs after he stood them down they will still be eligible to receive the JobKeeper Payment from Tim. They will not be eligible to also receive the JobKeeper Payment from their new employer.

7. Dismissal and JobKeeper

7.1 What happens if an employer has dismissed an employee/s since 1 March?

Employees who were employed on 1 March 2020 and have subsequently been let go can now be **re-engaged by the same eligible employer** and they will be eligible to receive the \$1,500 a fortnight JobKeeper Payment.

This effectively means employees who have been laid off since 1 March 2020 can be put back on the books.

Employers should be aware that it is not yet clear whether under this re-engagement:

- Employers will have a right to claw back termination, or redundancy, payments previously paid to the employee;
- The employee has to be employed on the same terms and conditions of employment as they were on before their previous employment was terminated for the employer to receive the JobKeeper Payment; and
- The termination and re-hire will break continuous service.

7.2 What if my employee who was dismissed after 1 March 2020 has since applied for income support (JobSeeker)?

Employers who nominate for JobKeeper **must advise** their eligible employees.

A person receiving the JobKeeper Payment cannot also receive the JobSeeker Payment (formerly Newstart).

Employees who have already applied for JobSeeker can notify Services Australia (formerly Centrelink) to withdraw and shift to the JobKeeper Payment if they are re-engaged by their employer and they notify them that they have nominated for the JobSeeker Payment.

7.3 What if my employee who was dismissed after 1 March 2020 has since got another job?

Employees can **only** receive the JobKeeper payment once.

If an employee was dismissed (after 1 March 2020) and has subsequently got another job, they will not be eligible for the JobKeeper Payment with their new employer as they have been employed after 1 March 2020 and are therefore not an eligible employee with that employer.

However, if their former employer (as at 1 March 2020) decided to re-engage them then that employer will be eligible to receive the JobKeeper payment of \$1,500 per

fortnight before tax for them, even where they continue to keep their other job.

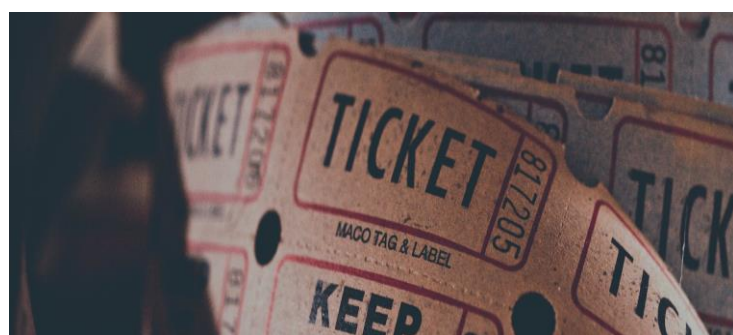
7.4 What else should employers be mindful about if they are considering re-hiring an employee/s?

Where an employer is considering a re-hire they should be mindful of the following considerations:

- Unfair dismissal laws, as it is important that an employer can still prove that the original redundancy was “genuine”; and
- Any tax concession received for a redundancy payment that has arisen as a result of a “genuine redundancy”.

EXAMPLE – EMPLOYER WHO MADE EMPLOYEES REDUNDANT AFTER 1 MARCH

- On 23 March 2020, a cinema made its five permanent part time employees redundant in response to the Government directive that cinemas close.
- In response to the announcement of the JobKeeper Payment, the cinema decides they want to re-engage the five former part-time employees, so they are well placed to resume operations once the COVID-19 restrictions are lifted.
- As the cinema is unable to open as a result of the Government directive, the five employees who choose to accept the offer to be re-hired are on stand down.
- The cinema receives \$1,500 a fortnight before tax in JobKeeper Payments for each of the five employees re-hired and passes it on to them in full.



EXAMPLE – EMPLOYER WHO DISMISSED AN EMPLOYEE AFTER 1 MARCH 2020 BUT NOW WISHES TO RE-ENGAGE THEM

Ingrid runs a café. At 1 March 2020 she employed one full time chef Scott on a salary of \$2,000 per fortnight and two casual staff Jennifer and Tammy who earn \$1,000 per fortnight and have all worked regularly for the café for longer than two years.

As the government directive required her café to only serve takeaway on 22 March Ingrid decided she had to let go of Tammy in order to be able to continue to operate.

Tammy subsequently goes out and gets a new casual job with a large supermarket stacking shelves in the evening earning \$1,000 per fortnight.

With the announcement of the JobKeeper payment Ingrid considers that she may now be able to afford to re-engage Tammy as a casual staff member again, as the JobKeeper Payment means the following for Ingrid's cafe:

- Ingrid continues to pay Scott his full-time salary of \$2,000 per fortnight before tax but receives \$1,500 per fortnight from the JobKeeper Payment to subsidise the cost of Scott's salary, meaning she only needs to pay the remaining \$500 per fortnight before tax towards Scott's wages with the rest covered by the JobKeeper Payment. Ingrid will need to continue paying the superannuation guarantee on Scott's \$2,000 income.
- Ingrid will receive \$1,500 per fortnight before tax from the JobKeeper Payment to subsidise Jennifer's salary. As this is more than Jennifer's current \$1,000 per fortnight salary Jennifer will see an increase of \$500 per fortnight before tax being paid whilst Ingrid is receiving the JobKeeper Payment. Ingrid must continue to pay the superannuation guarantee on the \$1,000 per fortnight of wages that Jennifer is earning. Ingrid has the option of choosing to pay superannuation on the additional \$500 (before tax) paid to Jennifer under the JobKeeper Payment.
- Tammy can be re-engaged by Ingrid and Ingrid will then receive \$1,500 per fortnight before tax from the JobKeeper Payment to subsidise Tammy's salary. As this is more than the \$1,000 per fortnight salary Tammy is offered to be re-engaged at, Tammy will see an increase of \$500 per fortnight before tax being paid whilst Ingrid is receiving the JobKeeper Payment. Ingrid must continue to pay the superannuation guarantee on the \$1,000 per fortnight of wages that Tammy is earning. Ingrid has the option of choosing to pay superannuation on the additional \$500 (before tax) paid to Tammy under the JobKeeper Payment.
- Tammy can also continue to remain working at the large supermarket in the evening earning \$1,000 a fortnight. Her new employer will not be eligible for the JobKeeper payment for her as she was not employed by them at 1 March 2020.





8. Where and who to contact for further information and assistance?

8.1 Key resources

The following are links to government websites and information on the JobKeeper payment.

Australian Tax Office – [JobKeeper Payment](#)

Business.gov.au – [JobKeeper Payment for employers and employees](#)

Treasury – [JobKeeper Payment](#)

8.2 Key contacts

Have a question or situation that isn't covered by this guide? The Australian Chamber of Commerce and Industry is here to help and answer any questions you might have on (03) 9668 9950

Scott Barklamb

Director Workplace Relations

Tamsin Lawrence

Deputy Director – Workplace Relations

Ingrid Fraser

Senior Advisor – Workplace Relations

A list of ACCI member organisations in each state and territory and representing major industries can also be accessed [here](#), or you can call ACCI on (03) 9668 9950 to be referred to our members.

