

25 September 2020

STAGE TWO OF THE JOBKEEPER SCHEME: WHAT CHANGES, WHAT REMAINS

Disclaimer: the purpose of this article is to provide you with information and ideas. It is not intended to provide you with comprehensive information about COVID-19 or relevant employment laws or to provide you with independent legal advice specific to your circumstances. Please contact me if you require independent legal advice.



When the JobKeeper Scheme ('JKS') commenced in April 2020 many of us were hopeful that that worst of the COVID-19 pandemic would have passed by the original end date of the scheme, 27 September 2020. Instead, we find ourselves having gone through a rollercoaster of experiences across Australia and that there is no end in sight to the devastating impact of the COVID-19 pandemic on many Australian employers and employees. In recognition of this reality the JKS has been extended by a further six months to 28 March 2021 and further (temporary) changes have been made to the *Fair Work Act 2009* ('FWA') and the *Fair Work Regulations 2009* ('FWR').

From 28 September 2020 (next Monday), there will be changes to some aspects of the JKS while other aspects will remain unchanged. In this article I have provided a summary of what changes and what remains, explained the recently introduced rules applying to 'legacy employers' and also provided some practical tips about what different categories of employers need to do to ensure compliance with the law.

OVERVIEW

1. Stage 1 of the JobKeeper Scheme ('JKS') ends on Sunday, 27 September 2020.
2. Stage 2 of the JKS commences on Monday, 28 September 2020.

3. The relevant date for employee eligibility to participate in the JKS is now 1 July 2020 (previously 1 March 2020) – the employee must have been employed by the employer by this date and satisfy other relevant criteria (this date change took effect on 3 August 2020).

Changes

4. From 28 September 2020 to 3 January 2021, the JobKeeper Payment ('JKP') will be reduced from \$1500 per fortnight to:
 - a. \$1200 gross per fortnight for employees working more than 20 hours per week on average in the four weeks of pay periods before either 1 March 2020 or 1 July 2020;
 - b. \$750 gross per fortnight for other eligible employees and business participants.
5. The JKP rates will reduce further on 4 January 2021 to \$1000/\$650 per fortnight.
6. The test for employer eligibility to participate in the JKS will change from 28 September 2020 to actual GST turnover (previously projected turnover).

No change

7. Employer eligibility to participate in the JKS continues to be based on a decline in turnover of 30% (for businesses with an aggregated turnover of \$1 billion or less) or 50% (for businesses with an aggregated turnover of more than \$1 billion) or 15% for Australian charities and not for profit commission registered charities, including schools and universities).
8. The JKP will continue to be paid in arrears.
9. The minimum payment guarantee continues to apply – this means that an employer must pass on the full amount of the JKP (less applicable tax) to each employee who is eligible to receive it.
10. The hourly rate of pay guarantee continues to apply – this means that the employer must pay the employer the amount which the employee is owed for the hours worked by him/her using the base rate of pay which would apply if the JED had not been given (i.e. the rate which applied prior to the JKS commencing). If this is more than the applicable JKP rate, then the employer must pay the difference to the employee.

Example A: if an employee works 60 hours in a fortnight and their payment rate is \$25 per hour, they will earn \$1500. Up until 28 September 2020 they would receive a payment inclusive of the \$1500 JKP. If their hours do not change, from 28 September 2020 to 3 January 2021 they will be entitled to a payment inclusive of the \$1200 JKP and a further amount of \$300.

Example B: if an employee works 70 hours in a fortnight and their payment rate is \$30 per hour, they will earn \$2100. Up until 28 September 2020 they would receive a payment inclusive of the \$1500 JKP and a further amount of \$600. If their hours remain unchanged, from 28 September 2020 to 3 January 2021 they will be entitled to a payment inclusive of the \$1200 JKP and a further amount of \$900.

11. An employer who becomes or remains entitled to receive a JKP for an employee may issue a JobKeeper Enabling Direction ('JED'):
 - a. to 'stand down' – to not work on a day or days on which the employee would usually work, or for a lesser period than the period they would usually work or work a reduced number of hours compared with their usual ordinary hours;
 - b. to change the duties of work;
 - c. to change the location of work.
12. The conditions which have applied to JED's remain unchanged. These include the requirements that:
 - a. the employer and employee are both eligible to participate in the JKS for the particular fortnight that a JKP is claimed and paid;
 - b. the JED is reasonable in all the circumstances;
 - c. the employer has information before it that leads it to reasonably believe that the JED is necessary to continue the employment of one or more employees of the employer;
 - d. the employer gives notice of its intention to issue a JED at least 3 days prior to issuing the JED (or a lesser period if there is genuine consent to this) and then consults with each employee to whom a JED will be issued about the proposed JED and keeps a record of the consultation – once this requirement is complied with in relation to a particular direction given under Part 6-4C of the FWA the employer is not obliged to comply with it again in the event that it gives another direction if during the consultation process the employee/their representative expressed views to the employer and the employer considered those views;

- e. in the case of a JED to stand down, the employee cannot be usefully employed for the employee's normal days or hours of work during the stand down period because of changes to the business attributable to the COVID-19 pandemic or government initiatives to slow the transmission of COVID-19;
- f. in the case of a JED to change duties, the duties must be reasonably within the scope of the employer's business;
- g. the implementation of the JED is safe have regard to (without limitation) the nature and spread of COVID-19;
- h. a JED to stand down does not have application during a period in which an employee is taking paid or unpaid leave that is authorised by the employer or is otherwise authorised to be absent from the employee's employment.

LEGACY EMPLOYERS

13. The Australian Government has recognised that there is a category of employer who was eligible to participate in the JKS until 27 September 2020 but will not be eligible beyond that date. While these 'legacy employers' will no longer receive the JobKeeper wage subsidy, they will be able to access some of the temporary flexibilities introduced into the FWA in April 2020 if they can demonstrate a at least a 10% decline in turnover.

JED to stand down

14. A legacy employer may issue an employee with a JED to stand down (not work on a day or days they would usually work, or for a lesser period than they would ordinarily work or work a reduced number of hours) if:
- a. the JED to stand down does not require them to work a reduced number of hours that is less than 60% of their ordinary hours:
 - i. if they were employed at the start of 1 March 2020, this is 60% of the ordinary hours worked as at that date;
 - ii. if they were not employed on 1 March 2020, this is 60% of either the ordinary hours of work when they started employment or, if those hours changed for non-COVID reasons, the hours most recently changed for non-COVID reasons, disregarding the effect of any JED applying to the employee;
 - iii. if the ordinary hours of work changed on or after 1 March 2020 for non-COVID reasons, this is 60% of the ordinary hours of work that most recently changed for non-COVID reasons, disregarding the effect of any JED applying to the employee; and

- b. the JED does not require the employee to work less than 2 hours in a day; and
 - c. the employee cannot be usefully employed for their normal days or hours of work during the stand down period because of changes to the business attributable to the COVID-19 pandemic or government initiatives to slow the transmission of COVID-19; and
 - d. the common rules are complied with (discussed below).
15. If a JED to stand down is given by a legacy employer and it satisfies the abovementioned requirements, the employer must comply with s.323 of the FWA (method and frequency of payment of wages) and the hourly rate of pay guarantee but is not otherwise required to make payments to an employee in relation to the stand down period referred to in the JED.
16. A JED given by a legacy employer must at the 'test time' (28 October 2020 or 28 February 2021 depending on the relevant quarter) have a 10% decline in turnover certificate for the designated quarter – if the employer does not satisfy this requirement, the JED ceases to have effect immediately after the test time and the employer must notify the employee in writing before the test time that the direction will cease to have effect and when it will cease to have effect.
17. A JED issued by a legacy employer does not apply during a period when the employee is taking paid or unpaid leave that is authorised by the employer is otherwise authorised to be absent from the employee's employment.

JED - duties of work

18. A legacy employer may issue a JED to an employee to perform any duties that are within the employee's skills and competency if the following conditions are met:
- a. in a case where the employee was required to have a licence or qualification in order to perform those duties the employee had the required licence/qualification; and
 - b. the duties are reasonably within the scope of the employer's business operations; and
 - c. the common rules are complied with (discussed below).

JED – location of work

19. A legacy employer may issue a JED to an employee to perform their duties at a place that is different from their normal place of work, including their home provided that the following conditions are met:
 - a. the place is suitable for the employee’s duties; and
 - b. if the place is not the employee’s home, it does not require the employee to travel a distance that is unreasonable in all the circumstances, including the circumstances surrounding the COVID-19 pandemic; and
 - c. the common rules are complied with (discussed below).

Common rules

20. The common rules which apply to each type of JED that a legacy employer may be entitled to issue are:
 - a. the JED must be reasonable in all the circumstances; and
 - b. compliance with the JED (e.g. performing particular duties and doing so at a particular place) 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
 - c. the employer is not entitled to one or more JKP’s for the employee for a period that consists of or includes the relevant period of the JED or for periods when considered together consist of or include the relevant period;
 - d. the relevant period of the JED begins on or after 28 September 2020; and
 - e. the employer was entitled to a JKP for the employee for a fortnight that ended before 28 September 2020; and
 - f. at the time when the direction was given the employer held a 10% decline in turnover certificate that covers the employer for the designated quarter applicable at that time;
 - g. the employer gave the employee written notice of the employer’s intention to give the JED of at least 7 days (or a lesser period if there is genuine consent) and during the 7 day period the employer complied with the following requirements:
 - i. if the employee appoints a representative for the purpose of consultation regarding the JED and advises the employer of that person’s identity, the employer recognised the representative;

- ii. the employer consulted with the employee or their representative, if any;
 - iii. the employer provided the employee/their representative with information about the direction (e.g. its nature, when it will take effect and the expected effects on the employee); and
 - iv. the employer invited the employee/their representative to give their views about the impact of the proposed direction on the employee (e.g. in relation to their family/caring responsibilities);
 - v. the employer gave prompt and genuine consideration to any views given by the employee/their representative within the 7-day period ending when the JED is given.
21. Once the requirements referred to in sub-paragraph (g) above are met in relation to a particular direction given under Part 6-4C of the FWA, the employer is not obliged to comply with them again in the event that it issues another direction if during the consultation process the employee/their representative expressed views to the employer and the employer considered those views.
22. If all the conditions applicable to a JED are satisfied the JED will continue to apply until such time as it is withdrawn, revoked or replaced or 29 March 2021, whichever is earlier.

Agreement to work different days/times

23. A legacy employer may make a written request to an employee to work on different days or at different times compared with their ordinary days or times of work if the following conditions are met:
- a. the employer was entitled to a JKP for the employee for a fortnight that ended before 28 September 2020; and
 - b. the request is made pursuant to s.789GJD (2) of the FWA; and
 - c. if the request is made on or after 28 September 2020 the employer is not entitled to one or more JKP's for the employee; and
 - d. if the request is made before 28 September 2020, the employer will not be entitled to a JKP for the employee for the fortnight beginning on 28 September 2020; and
 - e. at the time the request was given, the employer held a 10% decline in turnover certificate that covers the employer for the designated quarter applicable to that time; and

- f. the performance of the duties on the days or at the times is safe having regard (without limitation) to the nature and spread of COVID-19 and reasonably within the scope of the employer's business operations; and
- g. does not have the effect of reducing the employee's number of hours of work (compared with the employee's ordinary hours of work); and
- h. the agreement does not have the effect of requiring the employee to work less than 2 hours in a day; and
- i. the employer is not entitled to one or more JKP's for the employee for a period that consists of or includes the relevant period or for periods when considered together consist of or include the relevant period;
- j. the relevant period of the JED begins on or after 28 September 2020.

If each of these conditions are met, the employee must consider the request and may not unreasonably refuse the request.

Agreement to take annual leave

- 24. The temporary provisions in the FWA which continue to permit an employee who remains or becomes eligible to participate in the JKS to enter into an agreement with an employee that they take annual leave (provided all conditions for such an agreement are met) do not apply to legacy employers.

PRACTICAL TIPS

- 25. You should inform your employees of any changes which impact them (e.g. decrease in JobKeeper payment rate).
- 26. Employers who have never been eligible to participate in the JKS or are no longer eligible to do so must ensure that the arrangements they have with their employees comply with employment law. If the temporary flexibilities in the FWA don't apply, an employer can only vary the hours/days of work/location/duties of an employee with that employee's informed consent and in the absence of coercion and duress. An employer cannot make unilateral changes to the terms and conditions of employment. If they attempt to do so they will be in breach of the employment contract and this will expose them to a range of legal claims.
- 27. If you are an employer who remains eligible to participate in the JKS and are issuing JED's for the first time, you should seek advice from a lawyer specialising in employment law to ensure that the terms of the JED are in fact compliant with the law and that you have followed the correct process (e.g. notice of intention, consultation).

28. If you are an employer who remains eligible to participate in the JKS and have issued JED's previously, you should inform the employees who have received JED's that they will continue to apply until the end of the JKS (28 March 2021) or until such time as they are revoked, replaced or varied, whichever is earlier.
29. If you are an employer who remains eligible to participate in the JKS and have issued JED's previously but the circumstances of your business have changed (e.g. you want to increase or decrease the hours to be worked), you will need to replace the existing JED with a new one.
30. If you have employees who have been stood down for many months and there is little or no prospect of there being any change, it is worth assessing whether or not their role is in fact redundant. This is because stand down by its nature is a short-term measure.

Need help? Contact Elizabeth Devine on 02 8215 1539 or at elizabeth@devinelaw.com.au

Elizabeth Devine of Devine Law at Work is a specialist in employment law and conflict management. Based in Sydney, Australia, Elizabeth provides advisory, educational and conflict management services to employers across Australia and to their related entities across Asia, North America, the United Kingdom and Europe.