

3 September 2020



JobKeeper 2.0 and associated changes to the Fair Work Act

A photograph of a man in a blue shirt looking at a laptop screen in an office setting. The image is partially obscured by a dark blue diagonal overlay that contains the main text and logo. The man is looking towards the right side of the frame.

Discover
how we can
**make the
difference.**

Could it be any more complex?

Industry more generally has applauded the extension of JobKeeper until March 2021.

The new package, which has been coined JobKeeper 2.0, is intended to be more targeted than the original JobKeeper – as various sectors recover at different paces to the challenges that COVID-19 presented, and is still presenting.

The changes not only impact on the ability of businesses to claim JobKeeper assistance, but also the amount of this assistance and the ability of employers to manage employees through JobKeeper directions.

We have sought our best to simplify the changes in the timeline below:

JobKeeper employee eligibility

From 3 August 2020

- Where a business qualifies for JobKeeper, participation is to be extended to employees who qualify. These employee cohorts are:
 - full or part-time employees; or
 - fixed term or maximum term employees; or
 - long term casuals employed on a regular and systematic basis during the 12 months period that ended at 1 July (changed from 1 March).
- Such employees need to be invited to participate under the “one in all in” rule. You cannot select only certain employees to make the offer to.
- Eligible employees who agree to participate in Jobkeeper will receive the minimum \$1,500 per fortnight.

From 27 September 2020

- JobKeeper ceases for all of those that do not qualify for the extended program.
- The extended program only applies if the September quarter BAS discloses the requisite year on year turnover drop (be that 15%, 30% or 50% depending on your organisational type and turnover). If it is going to be “line ball” as to if the requisite drop will occur, it will be vital to complete the September quarter BAS without delay – as the first JobKeeper fortnight for the extended system ends on 11 October 2020. Note that the relevant test is considerably more prescriptive than the previous one – it will be based on comparing your actual turnover for BAS reporting purposes (including GST free and input taxed supplies) on a year on year basis for the quarter. For monthly lodgers, this will be sum of the 3 monthly returns.
- The benefits under the extended program are lower and will differ depending on if the employee was working more than 20 hours per week (for whom the benefit will fall from \$1,500 to \$1,200 per fortnight) or less (for whom the benefit will fall to \$750 per fortnight). The timing for the test of hours worked will be the two fortnightly pay periods prior to 1 March 2020 or 1 July 2020. The period with the higher number of hours is to be used for employees who were eligible at 1 March 2020.
- New participants can still enter the extended program – subject to passing the entry requirement of a sufficient down turn in turnover for the September quarter.

From 4 January 2021

- There is a further test based on the turnover for the December quarter to ascertain if an employer can enter into/stay in the JobKeeper program.
- The benefits under the extended program are lower and will differ depending on if the employee was working more than 20 hours per week (for whom the benefit will fall to \$1,000 per fortnight) or less than 20 hours (for whom the benefit will fall to \$650 per fortnight).
- At this stage, there is no change to the 1 March or 1 July test times for an employee to either qualify for the scheme or from which to calculate their average hours worked.

From 28 March 2021

- All JobKeeper ceases.

Fair Work overlay

JobKeeper does not exist in isolation, and its ability to promote and preserve employment is also dependent upon the scheme being aligned with Fair Work provisions.

Given the extension of JobKeeper, Legislation has also been enacted in order to extend the relevant Fair Work Act 2019 provisions to allow employers to temporarily vary the working arrangements of employees via the so-called “JobKeeper enabling directions”.

Given that employers may potentially now be moving in and out of the JobKeeper regime, the amendments to the Fair Work Act propose to introduce two broad categories of employer which will exist during the extension period.

These are:

- Qualifying employers — employers who are eligible for JobKeeper on behalf of their employees both before and after 28 September 2020.
- Legacy employers — employers who were eligible for JobKeeper payments prior to 28 September 2020, but do not qualify on or after this date.

For Legacy employers to continue to benefit from the proposed amendments to the Fair Work Act, they must first obtain an applicable written certificate that confirms that they have satisfied a 10% decline in turnover for the following periods:

- Between 28 September 2020 and 27 October 2020, a legacy employer must have had a 10% decline in turnover in the June 2020 quarter, compared to the June 2019 quarter.
- Between 28 October 2020 and 27 February 2021, a legacy employer must have had a 10% decline in turnover in the September 2020 quarter, compared to the September 2019 quarter.
- Between 28 February 2021 and 28 March 2021, a legacy employer must have had a 10% decline in turnover for the December 2020 quarter, compared to the December 2019 quarter.

Newton & Henry Pty Ltd can provide these certificates to employers. An individual certificate is needed for each employer and for each period above. Employers with less than 15 employees (including full time, part time and casuals) can “self assess” their compliance via a Statutory Declaration.

If the Legislation is finalised in its current form, the proposed amendments to the Fair Work Act on JobKeeper directions will have the following effect:

From 27 September 2020

- For all employers - the ability of employers to direct employees in certain circumstances to take additional annual leave will be removed;
- For qualifying employers - JobKeeper directions will be able to be issued according to existing rules;
- For legacy employers - an employer will still have the ability to direct the employee to specific duties of work, or the location for work, however the revised direction needs to meet the following criteria:
 - The direction can be for no less than 60% of the employee's ordinary hours as at 1 March 2020.
 - The direction cannot require the employee to work for less than 2 consecutive hours in a day.
 - The period of notice before giving a modified JobKeeper enabling direction must be 7 days rather than 3.

Employers must notify all employees subject to JobKeeper directions once they cease to be legacy employers or qualifying employers (as the case may be).

From 31 March 2021

- All JobKeeper directions cease.

The current circumstances do not act to change the employee's right to make a claim to the Fair Work Commission under either the Unfair Dismissal or General Protections provisions. Therefore it is important that employers ensure they are adequately informed about the potential impact of any decision they intend to make as it relates to an eligible Jobkeeper employee before acting on it.

These rules, especially the JobKeeper/Fair Work interactions are complex. We are here to help!

For specific fair work questions please contact:

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