

Wednesday, 8 April 2020

## CV04 4.2

### JobKeeper Scheme - changes to *the Fair Work Act 2009*

#### JobKeeper Scheme

After strong campaigning for a wage subsidy by Australian Unions, the Government announced the JobKeeper program, having previously ruled out countenancing such a scheme.

#### Changes to *the Fair Work Act 2009*

In order to allow for the implementation of the JobKeeper scheme, the Government has chosen to make changes to *the Fair Work Act 2009 (FW Act)*. This briefing note steps through the changes made to the FW Act as part of the JobKeeper scheme.

*The Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020 (CERPO2 Act)* inserts a number of entirely new provisions into the FW Act (**New Provisions**), including a new Part 6-4C entitled “Coronavirus economic response”. The repeal of these provisions is automatically set occur on 28 September 2020.

#### Employer Obligations

The new provisions provide that an employer who qualifies the JobKeeper scheme and would be entitled to a JobKeeper payment for a worker if they satisfied the wage condition, must pay the employee an amount of at least \$1500 per fortnight.<sup>1</sup> The practical effect of this is that an employer who qualifies for the JobKeeper scheme but fails to pay an employee at least \$1,500 in a relevant fortnight contravenes a civil remedy provision.<sup>2</sup> An employer is also required to pay the greater of the available amount of JobKeeper payment or the wages that would otherwise be payable for the work performed in the period.<sup>3</sup>

#### JobKeeper enabling Directions

The new provisions of the FW Act provides for employers to give what are known as “JobKeeper enabling directions”.<sup>4</sup> These are: “JobKeeper enabling stand down direction” (s 789GDC); Directions to perform duties (s 789GE); and, Direction on location of work (s 789GF). These directions may only be given by employers who have qualified for the JobSeeker payment at the time of giving the direction, where the employer becomes entitled to JobKeeper payment/s for the employee for a period that consists of or includes the period that the direction applies.<sup>5</sup> Any directions given under these sections have effect despite any applicable terms in a Modern Award, enterprise agreement, or employment contract or transitional instrument.<sup>6</sup>

A JobKeeper enabling direction must be in writing and be reasonable in the circumstances. It will not apply unless the employer has given at least three days’ (unless otherwise agreed) written notice of intention and consulted and, (in relation to duties or location of work) has information that leads them to belief the direction is necessary for continued employment.<sup>7</sup>

---

<sup>1</sup> FW Act s 789GD; When an entity qualifies for the JobKeeper scheme and is entitled to a payment in relation to a worker is to be determined by legislative instrument. Further details will be provided once this is available.

<sup>2</sup> FW Act s 789GD; see above n1

<sup>3</sup> FW Act s 789GDA

<sup>4</sup> FW Act s 789GC, Part 6-4C

<sup>5</sup> FW Act ss 789GDC(1)(b), 789GDC(1)(b), 789GE(1)(b), 789GE(1)(f), 789GF(1)(b), 789GF(1)(f); note as to eligibility etc. see above n1.

<sup>6</sup> FW Act ss 789GDC(2), 789GE(2), 789GF(2)

<sup>7</sup> FW Act ss 789GK -789 GN

### A new form of Stand Down

The new provisions (s 789GDC) enable an employer to give a direction to an employee known as a JobKeeper enabling stand down direction. This allows for a stand down if an employee cannot be usefully employed because of the COVID-19 pandemic or the Government's initiatives to slow the spread of COVID-19.

This stand down provision not only allows for a worker to be stood down completely (as does s 524), but also allows employers to reduce: the number of days on which a worker works; the number of hours worked on a given day; and/or the number of hours worked overall. A worker is not stood down whilst on a period of leave authorised by the employer or whilst otherwise authorised to be absent. A worker's hourly rate of pay cannot be less due to a JobKeeper enabling stand down direction than would otherwise be applicable.<sup>8</sup>

An employee to whom a JobKeeper enabling stand down direction applies may request to engage in reasonable secondary employment, training or professional development.<sup>9</sup> An employer must consider, and cannot unreasonably refuse, any request so made.<sup>10</sup>

### Alterations to duties, location

The new provisions (ss 789GE-789GE) allow an employer to give directions in relation to a workers' duties and/or their location of work (including to direct the worker to work from home).

A direction to perform duties must be within the employee's skill and competence, and must be safe (including but not limited to with respect to COVID-19).<sup>11</sup> A worker's base rate of pay must be the greater of the otherwise applicable rate of pay, or the base rate for the duties performed.<sup>12</sup>

Where a direction is given in relation to work location, the location must be suitable, any associated travel must not be unreasonable. It must be safe to perform the duties (including with respect to COVID-19).<sup>13</sup>

### **Employer "Requests"**

The new provisions also allow employers who qualify for the JobKeeper scheme to make certain requests, which workers (for whom the employer is entitled to JobKeeper payments) must consider and cannot unreasonably refuse.<sup>14</sup> These include requesting that the worker agree to an alteration of the days and times that they work, or that the worker take annual leave.<sup>15</sup> Agreeing or not agreeing to an employer request is a workplace right (for the purpose of the general protections).<sup>16</sup>

### Alterations to days and time of work

An employer can request that a worker agree to work on different days, or at different times.<sup>17</sup> If an agreement is reached, the employee's duties must be safe (including with regard to COVID-19), and reasonably within the scope of the employer's operations.<sup>18</sup> The agreement must not have the effect of reducing the employee's number of hours of work (compared with the employee's ordinary hours of work).

---

<sup>8</sup> FW Act 789GDB(2)

<sup>9</sup> FW Act s 789GU(b)

<sup>10</sup> FW Act 789CU(c)-(d)

<sup>11</sup> FW Act s 789GE(1)(a)-(c)

<sup>12</sup> FW Act 789GDB(3)

<sup>13</sup> FW Act s 789GF(1)(c)-(f)

<sup>14</sup> FW Act ss 789GG(1)(a)-(b), 789GJ(1)(a)-(b), 789GG(1)(d)-(e), 789GJ(1)(e)-(f); As to qualification etc. see above n1.

<sup>15</sup> FW Act ss 789GG, 789GJ

<sup>16</sup> FW Act s 789GY(b)-(d)

<sup>17</sup> Note: making a request is considered a workplace right for the purpose of the General Protections (see s 789GY(b))

<sup>18</sup> TFW Act s 789GG(1)(c)

## Annual Leave

An employer can request that a worker take annual leave, provided that this would not leave them with a balance of less than 2 weeks'.<sup>19</sup>

## **Enforcement**

A number of the new provisions are civil remedy provisions, for which penalties can be sought in the Federal Court, Federal Circuit Court, or an eligible state or territory court on application by a worker, a union or an FWO inspector.<sup>20</sup>

The new provisions add Part 6-4C (Coronavirus economic response) to the functions of the FWC conferred by the FW Act.<sup>21</sup> The new provisions provide that the FWC may deal with a dispute about Part 6-4C, including by arbitration, on application by a worker, a union, an employer or an employer organisation.<sup>22</sup> In dealing with a dispute, the FWC must take into account fairness between the parties, and may make orders giving effect to, setting aside, different JobKeeper enabling direction, or substituting a different direction; as well as any other orders the FWC considers appropriate.<sup>23</sup>

Contravening an FWC order exposes a person to civil penalties, however, it is not an offence to contravene a FWC order made in relation to Part 6-4C.<sup>24</sup>

---

<sup>19</sup> FW Act s 789GJ(1)(d)

<sup>20</sup> The civil remedy provisions are: s 789GD – Obligation of employer to satisfy the wage condition; s 789GDA(2) – Minimum payment guarantee; s 789GDB(2) – Hourly rate of pay guarantee; s 789GDB(3) – Minimum rate of pay – duties of work; s 789 GU – Employee requests for secondary employment, training etc.; s 789 GW – Contravening a FWC order; s 789GXA – Misuse of jobkeeper enabling direction

<sup>21</sup> FW Act s 576(r)

<sup>22</sup> FW Act ss 789GV(1)-(3)

<sup>23</sup> FW Act ss 789GV (4), 789GV(7).

<sup>24</sup> FW Act ss 675(2)(k); 789GW