

JobKeeper and the 2nd wave: What should I know?

On Tuesday 21 July 2020, the Australian Government announced the extension of the JobKeeper wage subsidy scheme and introduced a two-tiered system for the JobSeeker payment to better align employee's post-pandemic income to their pre-pandemic income. On Monday 27 July 2020, the Fair Work Commission inserted temporary 'Paid Pandemic Leave' provisions into three awards covering for employees working in residential aged care facilities. Employers should consider how these changes might impact their existing and future workforce management strategies.

JobKeeper and JobSeeker changes

The JobKeeper and JobSeeker Coronavirus Supplement have been extended until 28 March 2021 and 31 December 2020, respectively. The Government has stated that this extension recognises that economic recovery remains significantly affected by the COVID-19 pandemic and that these further arrangements will provide additional support for Australians and their businesses.

For the JobKeeper Payment, a two-tiered system will be introduced from 28 September in an effort to better align employee's income post-pandemic to their income pre-pandemic. Those that were employed for less than 20 hours a week on average in the four weekly pay periods ending before 1 March 2020 will now receive a lower payment from the end of September.

The new payment scheme is outlined in the Table below:

Date	Full rate per fortnight	Less than 20 hours worked per fortnight
28 Sept 2020 to 3 Jan 2021	\$1200	\$750
4 Jan 2021 to 28 March 2021	\$1000	\$650

Additionally, from 28 September businesses will be required to reassess their eligibility by reference to their actual June and September quarter turnovers to demonstrate that they are suffering ongoing significant financial difficulty. The 30% decline will need to be demonstrated in both quarters to remain eligible for the payment in the December quarter. Another reassessment will need to be performed for the March quarter, where the relevant decline in actual turnover must be demonstrated for the previous three quarters (June, September and December).

This reassessment process does not apply until 28 September 2020. Therefore, if businesses do not meet the actual turnover decline prior to this date, they still remain eligible for the payment until 27 September.

As for the JobSeeker Coronavirus Supplement, the new rate will be \$250 per fortnight. From 25 September 2020, the Assets Test and the Liquid Assets Waiting Period will be reintroduced. The JobSeeker partner income test will also increase from 25 cents for every dollar of partner income earned over \$996 per fortnight to 27 cents earned over \$1165 per fortnight. Additionally, to improve incentives to work the income free area for the JobSeeker Payment and Youth Allowance (Other) has been increased to \$300 per fortnight from \$106 per fortnight.

Childcare providers take note

Eligibility for JobKeeper payments ceased from 20 July 2020 for:

- a) Employees of an approved provider of childcare services where those employees' ordinary duties are that they engaged principally in the operation of the childcare centre; and
- b) Eligible business participants where the business entity is an approved provider of childcare service.

It is recommended that childcare providers ensure that they do not pay the above employees the JobKeeper Payment as they will not be reimbursed for any payments made after 20 July 2020. Childcare providers may need to take advice on what its obligations and available options are concerning employees that are no longer recipients of the JobKeeper Payment.

New Fair Work Act JobKeeper provisions in action

Since the Fair Work Commission (FWC) introduced the JobKeeper stand down and leave provisions in April 2020, approximately 40 applications to deal with disputes have been lodged. Over 30 of those were dismissed on the basis that they concerned eligibility for the JobKeeper Payment, which is outside the jurisdiction of the FWC. For those inquiries, employees should seek information from the Commissioner of Taxation.

The following four cases provide useful clarification about the new provisions:



Allan Jones v Live Events Australia Pty Ltd [2020] FWC 3469

Mr Jones was issued a JobKeeper enabling stand down on 11 June 2020 which stated that his minimum hours of work would be reduced from 80 to 48 per fortnight. However, since the direction was issued, there was in fact no material change in his working hours. The main challenge to this direction was whether it was reasonable in the circumstances.

An objective assessment of reasonableness, taking into account all relevant matters, concluded that the direction was unreasonable since it was overwhelmingly precautionary in nature. It was held that a contingency which is so disproportionate from the actual circumstances or from those reasonably forecast is an unreasonable direction.



Cassandra Powell v H & M Pty Ltd [2020] FWC 2514

H&M requested that Ms Powell take paid annual leave, but she refused. The FWC was required to determine whether her refusal was unreasonable.

It was held in these circumstances that Ms Powell's refusal was unreasonable because there was a need to support business continuity. Furthermore, job security for all employees of H&M outweighed the inconvenience to Ms Powell at not being able to plan her annual leave at a time suitable for her.



Leonie McCreedy v Village Roadshow Theme Parks Pty Ltd [2020] FWC 2480

Similarly, in this case Ms McCreedy was directed to take a substantial amount of annual leave, which was refused. She had planned five holidays in the upcoming months and wished to keep her accrued leave for those occasions.

It was said that the test is not whether the employer acted reasonably or unreasonably in its request to take paid annual leave, but rather whether Ms McCreedy unreasonably refused. In all the circumstances the refusal was unreasonable, excessive and vitriolic since the annual leave she proposed to take had not been approved. Further she had not considered the employer's reasonable request that employees assist in reducing their annual leave liabilities at a time when it was unable to operate its business.



W.C. [2020] 2928

The employer issued JobKeeper directions to its employees, to the effect that the Applicant's hours were reduced to 65% of his pre-pandemic arrangements. Later, the Applicant's hours were further reduced to 12 hours per week and the question for the FWC was whether the direction was reasonable.

The FWC stated that it was not their role to stand in the shoes of the employer, unless their position was clearly untenable. Given the employer's commitment to review the pandemic situation each month and reassess viable working hours, the direction was held to be reasonable.

Just In: Awards connected with residential aged care workers will include Paid Pandemic Leave provisions from 29 July 2020

On 27 July 2020, the FWC Full Bench decided to vary the Aged Care Award, the Nurses Award and the Health Professionals Award to insert a temporary paid pandemic leave entitlement for employees working in residential aged care facilities. The FWC had originally refused to insert this entitlement on 8 July 2020.

The specific award variations are being finalised at the time of writing and will be operative from 29 July 2020 for an initial period of 3 months.

Highlights of the Full Bench decision are as follows.

- The incidence and seriousness of COVID-19 cases linked to the aged care sector has worsened since the FWC's 8 July decision.
- Most of that worsening is being felt in Victoria, but it cannot be assumed the current outbreak of COVID-19 will remain confined to Victoria and recent events show how rapidly circumstances can change.
- Aged care employees are in the frontline of community efforts to protect the aged from infection and paid pandemic leave is necessary to support aged care employees in their critical work.
- The entitlement to paid pandemic leave is 2-weeks paid leave on each occasion an employee is required to self-isolate (either on the advice of their doctor, or because they have been told to isolate by a government medical authority).
- Employees able to work from home are not entitled to paid pandemic leave.

- Casual employees engaged on a regular and systemic basis are entitled to paid pandemic leave with their payments calculated as an average of earnings of the previous six-weeks.
- It will be a condition that employees agree to undertake a COVID-19 test at the earliest opportunity.
- If an employee with COVID-19 is entitled to receive workers compensation, they are not entitled to paid pandemic leave.
- If an employee is isolating because they are sick, and is entitled to paid personal leave they must exhaust that entitlement first before being entitled to paid pandemic leave.
- The FWC foreshadows that their paid pandemic leave decision may require future adjustment if circumstances change.
- Also, the FWC has foreshadowed future events may lead it to consider creating paid pandemic leave in other awards and the FWC will continue to monitor developments.

It remains unclear whether this temporary entitlement will also be added (at some future point in time) to other Awards connected with health care workers, as originally proposed by the ACTU to the Fair Work Commission. The other Awards include:

- *Aboriginal Community Controlled Health Services Award 2010*
- *Ambulance and Patient Transport Industry Award 2010*
- *Medical Practitioners Award 2010*
- *Pharmacy Industry Award 2010*
- *Social, Community, Home Care and Disability Services Industry Award 2010*
- *Supported Employment Services Award 2010*

Your contacts

If your business is impacted by any of these employment changes connected with COVID-19 and you require further guidance, please contact our employment and workplace relations team.



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