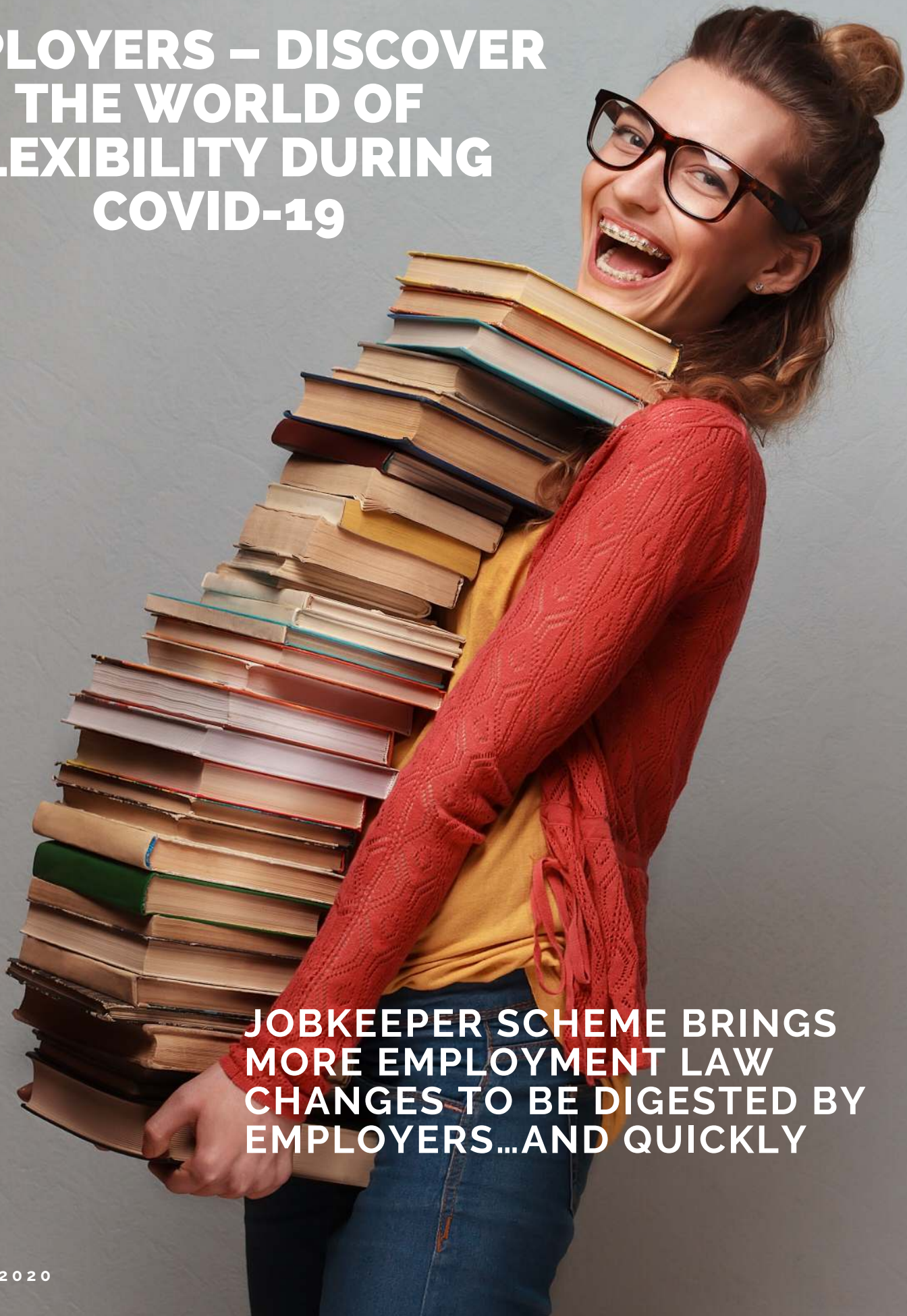


**EMPLOYERS – DISCOVER
THE WORLD OF
FLEXIBILITY DURING
COVID-19**



**JOBKEEPER SCHEME BRINGS
MORE EMPLOYMENT LAW
CHANGES TO BE DIGESTED BY
EMPLOYERS...AND QUICKLY**

CONFUSED ABOUT CHANGES DUE TO THE JOBKEEPER SCHEME? A MUST KNOW FOR EMPLOYERS...

On 9 April 2020, changes were made to the Fair Work Act 2009 (Cth) (Jobkeeper provisions) in light of the JobKeeper wage subsidy scheme (JobKeeper scheme) being implemented.

ARE THE JOBKEEPER PROVISIONS PERMANENT?

No. The Jobkeeper provisions are current law, but only apply until 28 September 2020. After 28 September 2020 they will cease to have effect.

ELIGIBLE/NON ELIGIBLE MIX

There is a likelihood that some qualified employers will have a mix of employees; some employees that are eligible for the Jobkeeper scheme, and some employees that are not.

Directions

Provided that the direction is not unreasonable in all of the circumstances (including with regards to the impact a direction may have on any caring responsibilities the eligible employee may have), the qualified employer can make (and the eligible employee has to comply with) a 'Jobkeeper enabling direction', such as:

- a stand down (including reduction of hours or days);
- a change in duties, and/or
- a change in the location of work.

Agreements

The qualified employer and eligible employee can agree to some flexible working options:



The Jobkeeper provisions mean more flexibility for employers and employees to deal with the economic impact of COVID-19, but they cannot be used by all employers with respect to all employees.

This newsletter provides clarity on the Jobkeeper provisions, including who can use them, what flexibility they provide, the relevant pay obligations, leave accrual and other entitlements, and protections.

WHO CAN USE THE JOBKEEPER PROVISIONS?

The Jobkeeper provisions can only be used:

1. if the employer qualifies for the Jobkeeper scheme (qualified employer);
2. if the employee is eligible to receive JobKeeper scheme payments (eligible employee); and
3. for the period in which JobKeeper scheme payments are being claimed with respect to that eligible employee.

Qualified employers can only use the Jobkeeper provisions with respect to their eligible employees. For those employees not eligible for the Jobkeeper scheme, the usual Fair Work Act 2009 (Cth) (Fair Work Act) provisions will apply (as well as any applicable Modern Award or Enterprise Agreement, and employment contract 'employment instruments').

It is important therefore, that qualified employers consider each individual employee's status before making any workplace decisions affecting employees, to ensure that they are complying with all obligations under the Fair Work Act and employment instruments. If employers are unsure, they should seek advice from an Employment Lawyer to prevent being exposed to potential employment claims if they get it wrong.

WHAT DO THE JOBKEEPER PROVISIONS PROVIDE?

In essence, the Jobkeeper provisions allow for the following:

- Change in the dates and times of work (but not reducing the eligible employee's ordinary hours of work);
- Agreeing for annual leave to be taken; and
- For the eligible employee to take double the amount of annual leave at half pay.

WHAT IS A 'JOBKEEPER ENABLING DIRECTION'

There are three different types of Jobkeeper enabling directions that a qualified employer could use:

Jobkeeper Stand down direction

The qualified employer can give a Jobkeeper stand down direction (in writing) for an eligible employee to reduce their hours of work or be stood down from work completely provided that:

- the eligible employee cannot be usefully employed on his/her usual days or hours because of changes to the business arising out of the COVID-19 pandemic, or due to a government initiative to reduce the spread of COVID-19;

- the Jobkeeper stand down direction is safe including with regards to the nature and spread of COVID-19;
- the Jobkeeper stand down direction is necessary to keep some or all of its employees in employment (but must be relevant to each eligible employee affected); and
- the qualified employer has complied with its written notice and consultation obligations before giving the Jobkeeper stand down direction.

Stand down is a temporary measure with the intention being that when the eligible employee can again be usefully employed by the qualified employer, the eligible employee will return to work.

Whilst stood down (or on reduced hours) an eligible employee can provide the qualified employer with a request to work in another job, or request for training or professional development. If such a request is made, the qualified employer must consider the request and cannot unreasonably refuse it.

If a Jobkeeper stand down direction is made, the eligible employee's usual hourly base rate cannot be reduced.

The duties also need to be safe (including in light of the nature and spread of COVID-19) and reasonably be in the scope of the qualified employer's business operations.

A direction to perform different duties can only be given if the qualified employer has information that leads it to believe that this direction is necessary to keep one or more employees employed.

The qualified employer must comply with its written notice and consultation obligations before giving a direction to perform different duties.

What pay level is applicable when duties are changes?

- If an eligible employee is performing duties that are below their usual classification, they are still to be paid at the base rate of pay applicable to their usual duties; or
- If an eligible employee is performing duties that are above their usual classification, they are to be paid the base rate of pay that applies to that higher classification.

The location needs to (1) be safe; (2) be suitable to perform the duties; (3) not be an unreasonable travel distance (including having regard to the circumstances of the COVID-19 pandemic); and (4) be reasonably within the scope of the employer's business operations.

The qualified employer must comply with its written notice and consultation obligations before giving a direction to work from a different location.

HOW LONG IS A JOBKEEPER ENABLING DIRECTION VALID FOR?

A Jobkeeper enabling direction is only valid until:

1. It is withdrawn or revoked; or
2. It is replaced by a new Jobkeeper enabling direction; and
3. No later than midnight on 27 September 2020.

FLEXIBLE WORKING AGREEMENTS

The Jobkeeper provisions enable employers and employees to make written agreements regarding the following:

Change the days and times that the eligible employee performs work (but not reducing the ordinary hours or work)

If a qualified employer provides an eligible employee with a request to change the days and times of the eligible employee's work, the eligible employee must consider the request and cannot unreasonably refuse the request, provided that the change in days and times is safe including with regards to the nature and spread of COVID-19, and is reasonably within the scope of the qualified employer's business operations.

The eligible employee taking paid annual leave (by agreement)

The qualified employer can request that the eligible employee takes paid annual leave provided that this would not result in the eligible employee having an annual leave balance of less than 2 weeks.



Direction to perform different duties

The qualified employer can direct an eligible employee (in writing) to perform different duties.

Any such duties need to be within the skill and competency of the eligible employee and the eligible employee must hold any applicable licences and qualifications for the duties being performed.

Direction to work from different location

The qualified employer can direct an eligible employee to work from a location that is different from the eligible employee's normal place of work, including the eligible employee's home.

If such a request is made by the qualified employer, the eligible employee has to consider the request and cannot unreasonably refuse the request.

The employee taking double the amount of annual leave at half pay



PAY OBLIGATIONS

An eligible employee must receive the highest of either:

- \$1,500 gross per fortnight; or
- An amount payable in relation to their performance of the work during the fortnight.

Meaning that, if an eligible employee only works part time and would ordinarily receive equal to or less than \$1,500 gross per fortnight under their employment contract and/or Modern Award or Enterprise agreement, the qualified employer must pass on the entire \$1,500 gross per fortnight to the eligible employee.

If an eligible employee continues to perform work for which their pay entitlements are calculated to be above \$1,500 gross per fortnight (including any applicable loadings, penalty and overtime rates etc), the eligible employee is entitled to receive the full amount calculated for their performance of work. In this circumstance the qualified employer will pass on the entire \$1,500 gross to the eligible employee and will need to top up the difference.

ACCRUING LEAVE AND OTHER ENTITLEMENTS

If a JobKeeper stand down direction is provided, or if an eligible employee takes double the amount of annual leave at half pay,

the eligible employee continues to accrue leave as they would have done had the Jobkeeper stand down direction or agreement regarding annual leave never been made.

An eligible employee's entitlement to redundancy pay and payment in lieu of notice of termination is calculated as it would have been had the JobKeeper stand down direction or agreement regarding annual leave never been made.

DISPUTES

The Fair Work Commission can deal with any disputes arising out of the Jobkeeper provisions.

PROTECTIONS

Many of these new obligations and entitlements are considered workplace rights under the Fair Work Act, such that an eligible employee would be able to make a general protections claim against a qualified employer if the qualified employer took adverse action against the eligible employee for exercising or proposing to exercise their workplace rights.

PRECEDENCE

If the Jobkeeper provisions are utilised, they take precedence over any conflicting Fair Work Act, Modern Award/Enterprise Agreement or contractual provisions.

WHAT IF THE JOBKEEPER PROVISIONS DO NOT APPLY TO ME?

If the Jobkeeper provisions do not apply to you because you are not a qualified employer, or you are a qualified employer with some non-eligible employees, you still have use of the other provisions of the Fair Work Act, which include stand downs and redundancies provided that you meet the criteria of those provisions..

REGISTERING FOR THE JOBKEEPER SCHEME

Employers can find more information on and can register for the JobKeeper scheme via the ATO website at <https://www.ato.gov.au/General/JobKeeper-Payment/JobKeeper-guides/>



ASSISTANCE

If employers require help, assistance or advice regarding these new changes to the law or their legal position generally, please contact Holly Edmondson, the Principal of Blossom Lawyers on 0432 778 601 or via holly@blossomlawyers.com.au www.blossomlawyers.com.au

