
End of the JobKeeper scheme and the JobKeeper enabling provisions in the Fair Work Act

SUMMARY

The JobKeeper scheme ends on 28 March 2021 and no further extensions to the scheme have been announced.

This will mean that:

- No payments will be made under the scheme for fortnights after 28 March 2021; and
- All JobKeeper enabling directions and agreements will cease after 28 March 2021.

End of the JobKeeper scheme

Employers were advised of the details of the JobKeeper scheme in [Employer Advice Nat 040/20](#) and [Employer Advice Nat 073/20](#).

Payments made under the JobKeeper scheme correspond to JobKeeper fortnights. The final fortnight in respect of which an employer may make a claim for a payment ends on 28 March 2021. Employers will not be entitled to JobKeeper payments for any subsequent fortnights.

As the JobKeeper wage subsidy is paid monthly in arrears, businesses are required to submit a monthly business declaration in order to receive payments. The final declaration will be due by 14 April 2021.

JobKeeper enabling directions and agreements under the Fair Work Act

As explained in [Employer Advice Nat 083/20](#), amendments were made to the *Fair Work Act 2009* (Cth) (**FW Act**) to enable employers eligible for the JobKeeper payment to:

- direct that an employee work for less hours than the employee would ordinarily work, including nil hours (**JobKeeper enabling stand down directions**);
- direct an employee to perform any duties within their skill and competency, provided the duties are safe, the employee holds any required licence or qualification and the duties are reasonably within the scope of the employer's business operations;
- direct an employee to perform duties at a place (including the employee's home) that is different from the employee's normal workplace; and
- reach agreement with an employee for the employee to perform work on different days or at different times during a period than the employee's ordinary days or times of work, with an employee required to not unreasonably refuse to reach agreement.

After 28 March 2021, employers will no longer have the capacity to issue JobKeeper enabling directions or reach Jobkeeper enabling agreements. All JobKeeper enabling directions and agreements will cease to have effect after 28 March 2021.

What options do employers and employees now have?

Employers and employees can enter into an informal agreement to vary an employee's duties, location of work or hours of work provided that the arrangements agreed upon are lawful under relevant awards and laws.

If an employee is currently stood down and is not working any hours due to a JobKeeper enabling stand-down direction, such direction ceases to have effect after 28 March 2021. If an employer wishes to continue to stand down the employee, the circumstances will need to meet the requirements of the stand down provisions in the FW Act and any additional requirements in an enterprise agreement. Also, the employer will need to give the employee notification under the provisions on the FW Act, rather than relying on the Jobkeeper enabling stand down direction previously given.

What are the stand down requirements of the FW Act?

Section 524 of the FW Act gives an employer the right to stand down employees without pay in certain circumstances. There are a number of requirements that must be met. These requirements are complex to apply in practice and there is a considerable amount of case law about the meaning of the expressions used in section 524.

If a stand down is held by a Court or the Fair Work Commission to not meet the requirements of the FW Act, the employer will have an obligation to pay the employees who were invalidly stood down. Therefore, it is essential for employers to carefully consider whether the various requirements are met before proceeding to stand down any employees.

Section 524 of the Act states: (underlining added)

Employer may stand down employees in certain circumstances

- (1) *An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:*
 - (a) *industrial action (other than industrial action organised or engaged in by the employer);*
 - (b) *a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;*
 - (c) *a stoppage of work for any cause for which the employer cannot reasonably be held responsible.*
- (2) *However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:*
 - (a) *an enterprise agreement, or a contract of employment, applies to the employer and the employee; and*
 - (b) *the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.*

Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.

Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).

(3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.

Key questions that would need to be asked in considering whether there is a right to stand down an employee include:

1. Can the employee be 'usefully employed'?
2. Has there been a 'stoppage of work' for the employee, or just a significant slow-down? A stand down relates to circumstances where there is a stoppage of work for the relevant employees – not just a slow-down.
3. Is the stoppage of work for a cause that 'the employer cannot reasonably be held responsible'?
4. Will the stoppage of work be temporary? Stand downs are not able to continue for an excessive, indefinite period.

Some enterprise agreements contain limitations on an employer's right to stand down employees, so any relevant provisions in an applicable enterprise agreement need to be considered as well as the provisions of section 524 of the FW Act.

Employers are urged to contact Ai Group for advice before standing down employees.

Do you require further advice?

For further information or assistance, please contact Ai Group.

Ai Group has set up a [special section on our website](#) to provide access to Ai Group advice and assistance relating to the COVID-19 pandemic and the recovery from the pandemic.

A handwritten signature in black ink, appearing to read 'S. Smith'.

Stephen Smith
Head of National Workplace Relations Policy