



JobKeeper.

A guide for Australian employers and businesses.

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Whilst the legislation for the JobKeeper scheme has been passed through parliament, rules as to how the scheme works, including eligibility and how payments are made and administered, are not included in this legislation and need to be decided by the Treasurer. These rules are expected to be made in the next few days. In the meantime, the below information is based on the Treasury information released on 5 April 2020, which may be subject to change. Given this, proceed carefully when deciding whether or not you participate in the JobKeeper scheme until more clarification is given by the Treasurer.

The below information applies to employers and employees covered by the Fair Work Act 2009 only.

General

What is it?

The Federal Government has introduced a subsidy that assists eligible employers impacted by COVID-19 to continue to pay eligible employees. Eligible employers can claim a payment of \$1,500 per fortnight per eligible employee from 30 March 2020, for a maximum period of 6 months.

When does it start?

The subsidy applied from 30 March 2020. The first payment will be received by registered employers from the ATO in the first week of May 2020.

As an employer, how do I apply?

To receive the JobKeeper subsidy, you must firstly register your interest at www.ato.gov.au/Job-keeper-payment.

An online application process will follow which involves identifying eligible employees for the JobKeeper payment.

Do I have to apply for JobKeeper payments?

No, there is no legal requirement or repercussions for not participating in the JobKeeper scheme. This is an individual decision for each business owner. However, if you choose not to participate in the scheme, you will not be able to access the subsidy.

If the decision is made not to access the JobKeeper payment, you can direct your employee/s (or ex-employee/s) to speak with Services Australia about options for the JobSeeker payment, which currently includes a Coronavirus Supplement.

Do I have to apply for all eligible employees?

This is not clear at this stage and will likely be confirmed by the rules set by the Treasurer in the coming days. On the face of it, the guidelines are indicating you would need to apply for all eligible employees. However, in practice, this will be difficult for the ATO to regulate. We recommend proceeding with caution until there is further guidance from Treasury, which we expect will be in the next few days.

General

How and when will the JobKeeper payment be made?

You can only claim the JobKeeper payment for eligible employees if you first pay the \$1,500 per fortnight (before tax) the JobKeeper payment to each eligible employee. These payments should be made using your payroll system and reported to the ATO via Single Touch Payroll.

Payments will be made to the eligible employer by the ATO monthly in arrears.

The first period starts on Monday 30 March 2020 and ends on Sunday 12 April 2020. You must pay your eligible employees at least \$1,500 per fortnight before tax (even if they would normally earn less than that amount) to be paid the JobKeeper payment. The final period will start on Monday 14 September 2020 and end on Sunday 27 September 2020.



Eligibility

How do I know if I am eligible?

The legislation refers out to rules which provide the details on how the scheme works, including eligibility criteria. These rules have not been decided at this point and will be set by the Treasurer in the coming days. Therefore, the below information on employer and employee eligibility is based on the information provided by the Treasurer on 5 April. Given this, proceed with caution in determining whether you are eligible or not to participate in the scheme.

Which employers are eligible for JobKeeper payments?

Employers (including not-for-profits) are eligible if:

- their business has an annual turnover of less than \$1 billion and they estimate their turnover has or will likely fall by 30 per cent or more relative to a comparable period a year ago (of at least a month), or
- their business has an annual turnover of \$1 billion or more and they estimate their turnover has or will likely fall by 50 per cent or more relative to a comparable period a year ago (of at least a month), and
- their business is not subject to the Major Bank Levy.

Self-employed individuals are also eligible if they meet the criteria above.

Charities registered with the Australian Charities and Not-For-Profit Commission are eligible if they estimate their turnover has or will likely fall by 15 per cent or more relative to a comparable period.

Who are eligible employees?

Eligible employees are employees who:

- are current employees of an eligible employer, including employees who have been stood down or re-hired
- were employed at 1 March 2020
- were, as at 1 March 2020, employed on a full time or part time basis, or had been employed on a regular and systematic casual basis for at least 12 months
- are at least 16 years of age at 1 March 2020
- are not receiving a JobKeeper payment from another employer
- were a resident for Australian tax purposes on 1 March 2020, and
- are an Australian citizen, the holder of a permanent visa, or a Special Category (Subclass 444) Visa Holder at 1 March 2020.

Eligibility

I hired an employee after 1 March 2020. Can I receive the JobKeeper payment for them?

No. The employee must have been engaged at 1 March 2020.

I am a company director that receives director fees. Am I an eligible employee?

A director receiving a salary or wage who satisfies the other eligibility criteria will be eligible to receive JobKeeper payments. An eligible business operated through a company that pays director fees to non-executive directors may nominate only one such individual to receive JobKeeper payments. Also one partner of a partnership, one beneficiary of a trust, and one shareholder of a company can be nominated to receive a JobKeeper payment.

I purchased a business just under 12 months ago and retained some casual employees who worked for the previous owner. Are these casual employees eligible?

This will depend on whether the employee's service with the previous owner was recognised by you at the time of the sale of the business. If you notified the employee in writing at the time of the sale that their service with the previous owner would not be recognised, the employee will not be eligible as they have not been employed on a regular and systematic basis for at least 12 months. If you have recognised the employee's previous service, and the employee's service amounts to at least 12 months and they were employed on a regular and systematic basis at 1 March 2020, the employee will be eligible.

Communication with employees

Do I have to tell my employees that we are participating in the JobKeeper scheme?

Yes. It is a requirement that you notify all eligible employees that you are receiving the JobKeeper payment.

We recommend that you notify your eligible employees by way of a memo, which you can access [here](#).

You are not required to notify employees who are not eligible, but can do so if you wish by way of memo, which you can access [here](#).

Do my employees need to agree to receiving the JobKeeper payment? What if they don't agree?

Eligible employees are not legally required to agree to receiving the JobKeeper payment. However, given that you are required to notify the employee that they have been nominated as an eligible employee for the scheme, we recommend that you do this in writing and have the employee acknowledge this. You can use this memo [here](#). This will avoid any issues with the employee receiving payments from more than one employer where they have multiple jobs. You must notify the ATO if an employee informs you that you are not their primary employer.

How do I tell my employees that we are not participating in the JobKeeper scheme? Do I need to tell ex-employees who were employed by me as at 1 March 2020?

It is a business decision whether or not you participate in the scheme. It is not mandatory. You are under no obligation to inform ex-employees that you will not be participating in the scheme, but you can choose to notify them if you wish as a pro-active measure.

If you choose not to participate, we recommend that you notify your employees by way of memo, which you can access [here](#).

My employees are not happy that we are not participating in the scheme and are alleging they are being bullied. What can I do?

You are under no legal obligation to participate in the scheme. Follow your normal grievance procedures if you receive any complaints from employees.

Payment and superannuation

What if an eligible employee earns less than \$1,500 per fortnight?

If you receive a JobKeeper payment for an eligible employee, you must pay that employee a minimum of \$1,500 per fortnight, before tax.

This means that if an employee typically earns less than \$1,500 per fortnight, you must still pay the employee \$1,500 per fortnight, before tax.

Employee still working

If an employee performs work to a value of \$1,000 per fortnight, you need to pay their normal wage of \$1,000 and the relevant superannuation on that amount, plus an additional 'top up' amount of \$500 as a result of the JobKeeper subsidy. You are not legally required to pay superannuation on the 'top up' amount of \$500, but can choose to pay this if you wish.

Employee not working

If the employee has been stood down and is not performing any work, but usually earns \$1,000 per fortnight, you need to pay them \$1,500 as a result of the JobKeeper subsidy. You are not legally required to pay superannuation on the \$1,500, but can choose to pay this if you wish.

What if an eligible employee earns more than \$1,500 per fortnight?

For an employee who usually earns more than \$1,500 per fortnight, the amount you need to pay will depend on whether the employee works their usual hours.

Employee still working

If an employee is still performing work for which they are entitled to be paid in excess of \$1,500 per fortnight, you must ensure they are paid the full amount they are entitled to. For example, if the employee typically earns \$2,000 per fortnight for the hours of work performed, you must continue to pay the employee wages of \$2,000 and applicable superannuation (even though you will only receive \$1500 as a JobKeeper payment).

However, if you have previously agreed with your employee writing with the employee to reduce their rate of pay to a lower rate, that still meets or exceeds the relevant minimum wage you can continue paying them that rate.

Employee not working

If the employee has been stood down and is not performing any work, but usually earns \$2,000 per fortnight, you only need to pay them \$1,500 per fortnight as a result of the JobKeeper subsidy. You are not legally required to pay them an additional \$500 to top their pay up to its usual level, nor are you legally required to pay superannuation on top of this, but you may choose to pay either or both of these amounts if you wish.

Payment and superannuation

Can I pay my employee less than the minimum wage?

No. You cannot pay an employee less than the minimum wage.

Do we have to pay the full \$1,500 per fortnight to employees, or can we just pay what we can afford?

If you receive the JobKeeper subsidy for an employee, you must ensure that employee receives a minimum of \$1,500 per fortnight, before tax.

If you believe you cannot afford to make the payments, it would not be advisable to seek the JobKeeper payment. We recommend you seek advice from your accountant as to what your options may be in order to continue claiming the JobKeeper payment if it happens after the payments commence.

If you fail to pay the eligible employee the full \$1,500 JobKeeper payment, you will be in breach of the Fair Work Act and may face penalties of up to \$12,600 as an individual for each contravention and \$126,000 as a corporation for each contravention. This is also in addition to any penalties that may be applied under the Commonwealth Criminal Code.

Do I have to pay superannuation on the JobKeeper payment?

You must continue to pay superannuation for any hours worked by your employees. If an employee is not working but you pay them the JobKeeper payment, you do not need to pay superannuation on this. If an employee is working, but you pay them a 'top up' JobKeeper amount, you do not need to pay superannuation on the JobKeeper component. We encourage you to seek advice from your accountant to ensure you are meeting your legal obligations relating to superannuation.

Stand Down

The below FAQs apply where an employee has been stood down under the stand down provisions in the Fair Work Act.

What if an eligible employee has been stood down? Will they receive the \$1,500 payment?

If you register for JobKeeper, you will be paid the JobKeeper payment of \$1,500 for each eligible employee in your business. This includes any employees who were stood down after 1 March 2020, as long as they meet the eligibility criteria. Eligible employees who have been stood down are entitled to the full \$1,500 JobKeeper payment.

What if an eligible employee has been stood down and their normal wages are in excess of \$1500 per fortnight?

If you receive the JobKeeper subsidy for an employee, you must ensure that employee receives a minimum of \$1,500 per fortnight, before tax.

It is your choice as to whether you top up their pay out of your own pocket to what they would typically earn.

What if an eligible employee has been stood down and their normal wages are less than \$1,500 per fortnight?

If you receive the JobKeeper subsidy for an employee, you must ensure that employee receives a minimum of \$1,500 per fortnight, before tax.

This means that even if an employee typically earns less than \$1,500 per fortnight, you must still pay the employee the full \$1,500 JobKeeper payment.

I have stood down my employees and they have sought employment elsewhere for the stand down period. Do I receive JobKeeper payments for them?

If you have registered for the JobKeeper subsidy and the employee is eligible, yes, as long as the employee is only receiving JobKeeper from you and not the other employer as well.

Termination

I terminated the employment of an employee after 1 March 2020. If I re-hire them, can I claim the JobKeeper payment for them?

Yes. If you re-hire an employee who was employed at 1 March 2020, you can receive the JobKeeper payment for them, provided the employee meets the eligibility criteria.

You cannot receive the JobKeeper payment for an employee who was terminated by you pre-1 March 2020 and then re-engaged post 1 March 2020. The employee must be in your employment as at 1 March 2020.

What if an employee's employment has been terminated and they ask if they can be re-hired to receive JobKeeper, but you don't want to?

You are not under any legal obligation to re-hire employees. You can explain to the ex-employee that unfortunately you are not in a position to re-hire them. The employee may wish to speak to Services Australia to determine if they are eligible for the JobSeeker payment, which currently includes a Coronavirus Supplement.

If an employee's employment was terminated after 1 March 2020, and I re-hire them, do I need to issue a new employment contract?

We recommend issuing a new Employsure contract. As the employee's previous employment has ended, this is a new offer and acceptance and all terms and conditions of the new offer should be included.

Do any terms in the old contract still stand if a whole new employment contract is issued?

No, the employee has accepted the terms and conditions set out in the new contract which supersedes any previous contractual terms. However, depending on your industrial instrument and the state or territory in which you are based, the prior period of employment may count towards an employee's continuous service for some purposes (for example, for long service leave).

Termination

What happens if my employee who is receiving JobKeeper resigns?

You should accept the resignation in writing and pay the employee any outstanding wages and accrued entitlements as normal. In addition, you must notify the ATO of the resignation.

My business has suffered a significant downturn. I can only afford to keep employees who are receiving the JobKeeper payments. Can I terminate the employment of the employees that are not receiving the JobKeeper payments, for example, visa workers that don't meet the criteria?

You must proceed with caution on this to avoid potential discrimination claims. An employee could potentially claim that they have been discriminated against on the basis of their race or nationality. WE recommend that you call the Advice line to discuss your particular circumstances. You would also need to demonstrate that the redundancy is genuine and follow a strict redundancy process to minimise the risk of a successful discrimination claim.

Can I dismiss an employee on JobKeeper for performance or disciplinary reasons?

If you wish to terminate an employee's employment who is receiving the JobKeeper payment, you can continue to do so, as long as you follow the normal processes in accordance with the Fair Work Act and other relevant legislation and industrial instruments, and your company policies and procedures. Please ensure you seek advice from the Advice Team before you terminate the employment of an employee so we can provide specific advice.

Leave, entitlements and service

What happens to employees on parental leave?

If you have an employee on parental leave as at 1 March 2020, you will receive a JobKeeper payment for them, as long as that employee is not receiving Parental Leave Pay from Services Australia.

I have an employee on unpaid leave. Can I receive the JobKeeper payment for them?

Yes, unless the employee is receiving government paid parental leave or Dad and Partner Pay.

What happens if an employee takes a period of annual leave whilst receiving the JobKeeper payment?

If an employee takes annual leave when they are receiving the JobKeeper payment, it would come from their annual leave entitlement as normal. You will continue to receive the JobKeeper payments for that employee as normal.

The standard rules will apply in relation to the JobKeeper payment in that the employee must be paid at least the \$1,500 JobKeeper payment, or the actual wages they are entitled to for that fortnight, whichever is greater. In addition, superannuation must be paid on all annual leave payments and time worked, but not on any 'top up' Jobkeeper payment.

Annual leave payment exceeds \$1,500

If the payment that the employee is entitled to receive for annual leave exceeds the \$1,500 JobKeeper payment, you will need to pay the employee the full amount that they are entitled to for that period of annual leave. For example, the employee takes 10 days of annual leave and is entitled to be paid \$2,000 for that period of leave. You will need to pay the employee \$2,000, which will include the \$1,500 JobKeeper payment.

Annual leave payment is less than \$1,500

If the payment that the employee is entitled to receive for annual leave is less than the \$1,500 JobKeeper payment, you will need to pay the employee the full \$1,500 JobKeeper payment. For example, the employee takes 2 days of annual leave and is entitled to be paid \$400 for that period of leave. If the employee is stood down for the remainder of the fortnight, you will need to pay the employee \$1,500, which will include the \$400 annual leave payment plus a 'top up' of \$1,100. If the employee perform works for the remainder of the fortnight, you will need to pay the annual leave payment, plus the wages for those hours worked, plus any 'top up' payment required to ensure the employee receives a minimum of \$1,500 for that fortnight.

Leave, entitlements and service

Does annual leave accrue whilst receiving JobKeeper payments?

Entitlements will continue to accrue for employees who are receiving JobKeeper payments, even if the employee has been stood down.

What if an employee was employed full-time for a number of years then moved to casual employment 6 months ago? Do they still get JobKeeper?

The key consideration for a casual employee is whether the employee has been engaged on a regular and systemic basis during the past 12 months. The employee's service as a full-time employee will be taken into consideration, so if they have been engaged on a regular and systematic basis since converting to casual employment, they will be entitled to the payment. If they have not been engaged on a regular and systematic basis since converting to casual employment, they will not meet the eligibility criteria for the JobKeeper payment.

What if an employee is receiving workers compensation payments?

If an employee is receiving workers compensation payments and they are not working, they are not eligible for the JobKeeper payment. They will continue to receive any applicable workers compensation payments. If an employee is on workers compensation but is performing duties (even if these are light duties or for reduced hours), they are eligible for JobKeeper payments provided they meet the eligibility criteria.

If I re-hire a permanent employee, what happens to their entitlements and service?

When you terminated the employment of the employee, you were required to provide notice of termination and pay out certain accrued entitlements (for example, accrued annual leave and long service leave). You may have also paid redundancy pay.

If you then re-hire the employee, their entitlements and service will usually start from scratch as you will engage them on a new contract of employment which will not recognise the prior service. However, depending on your industrial instrument and the state or territory in which you are based, the prior period of employment may count towards an employee's continuous service for some purposes (for example, for long service leave).

Leave, entitlements and service

What if one of my employee's has a second job, or takes up other work after being stood down?

An eligible employee is only entitled to receive the Jobkeeper payment from one employer, their primary employer. To avoid any confusion or double payments to the employee, it is important to have every eligible employee 'opt in' to receive the payment from you. You can use this memo to notify your eligible employee and seek their agreement [here](#).



Redundancy

What if I terminated an employee's employment on grounds of redundancy after 1 March 2020? Can I re-hire them, stand them down and then receive JobKeeper?

Employees who were engaged at 1 March 2020 and were made redundant can be re-hired and stood down, provided the stand down requirements in the Fair Work Act are met. As a business, you could then receive JobKeeper payments to pass on to that employee, provided that employee is eligible for the payment.

What happens to any redundancy pay I paid my employees? Can I get this back if I re-hire them?

At the point you terminated the employee on grounds of redundancy, they became entitled to the redundancy pay.

For this reason, you have no legal entitlement to recover this payment, even if you later re-hire the employee.

The rehire will be on a new employment contract.

If I re-hire an employee after making them redundant, can they claim unfair dismissal?

When an employee's employment is terminated on grounds of redundancy, they are entitled to challenge their termination in the Fair Work Commission through an unfair dismissal claim. Usually, this needs to be lodged within 21 days of their termination taking effect.

If an employee lodges an unfair dismissal claim, you may need to demonstrate that the redundancy was genuine. This means demonstrating that you no longer required the employee's job to be performed by anyone, that you complied with any consultation obligations that applied to the employment, and there were no reasonable redeployment opportunities in the business or that of an associated entity.

If you can demonstrate you met the above requirements, and re-engage the employee simply to provide the JobKeeper payment, it is likely you will be standing the employee down immediately upon re-hiring them in accordance with the stand down provisions of the Fair Work Act. In these circumstances, it is unlikely an unfair dismissal claim would be successful. However, it will not prevent employees from bringing a claim.

Redundancy

I am half-way through a redundancy process. What are my options?

If you are still in consultation with your employee about redeployment options, and you are receiving the JobKeeper payment for that employee, you could consider making a “JobKeeper enabling direction” under the Fair Work Act to reduce their hours of work as an alternative to redundancy. This would mean that you could keep the employee in employment so that they receive wages, and you can claim the Jobkeeper payment for them, as long as they meet the eligible employee criteria.



Amendments to Fair Work Act

– JobKeeper enabling directions

What is a “JobKeeper enabling direction”?

The Fair Work Act has been amended as a result of the JobKeeper scheme. As part of this, employers receiving JobKeeper payments can give eligible employees “JobKeeper enabling directions” to vary certain terms of the employee’s employment, such as reducing their hours of work, duties and location of work, without the employee’s consent. Certain conditions must be met, including:

- the direction must be responsive to business changes attributable to COVID-19 or government initiatives to slow the transmission (eg. government shut-downs of businesses or less patronage)
- you can only give the direction if the employee cannot be usefully employed for their normal hours
- you can only give the direction to an employee who you have received a JobKeeper payment for
- you must consult with the employee about the direction
- the direction must be reasonable in the circumstances
- the employee’s rate of pay cannot be reduced
- the JobKeeper payment must continue to be passed onto the employee
- the employee must be provided with at least three days’ notice of the intention to give the direction and
- the direction must be in writing

If you wish to issue a direction in accordance with the above, please contact our Advice Team for specific advice.

Can I force my employee to take annual leave?

If you are receiving the JobKeeper payment for an employee, you can request that employee to take annual leave, as long as the leave would not result in reducing the employee’s annual leave balance to less than 2 weeks. The employee cannot unreasonably refuse this request. If the employee does not agree to your request, you can apply to the Fair Work Commission to settle the dispute.

Amendments to Fair Work Act

– JobKeeper enabling directions

Can my employee take twice as much annual leave at half pay?

Yes. The Fair Work Act has been amended to allow you to agree with the employee that they take twice as much annual leave at half the employee's rate of pay for a period.

Does the employee accrue entitlements when they are on a "JobKeeper enabling direction"?

Yes. If you have given the employee a direction under the JobKeeper enabled direction provisions in the Fair Work Act, they will continue to accrue entitlements (such as annual leave and personal leave) as normal. The period they are subject to the direction will also be counted as service for the purposes of termination and redundancy pay.

Can I reduce my employee's pay?

You need to continue to pay employees for any work they perform. If the work they perform entitles the employee to be paid more than \$1,500 per fortnight, you must continue to pay them the amount they are entitled to.

If you need to drop an employee's pay and they are an eligible employee who you are receiving JobKeeper for, one way to do so is by reducing the employee's hours of work in accordance with the recent temporary amendments to the Fair Work Act. Under the Fair Work Act, you are now able make a "JobKeeper enabling direction" where you can direct the eligible employee to work fewer days or hours where they cannot usefully be employed for their normal hours because of business changes attributable to COVID-19 or a government initiative to slow the transmission (eg. government shut-downs). To do so, you need to:

- ensure the employee is an eligible employee who you have received the Jobkeeper payment for
- provide the employee with at least three days' notice of the intention to give the direction to reduce their hours
- consult with the employee
- ensure the direction is reasonable and
- ensure the direction is in writing.

However, the employee's rate of pay cannot be reduced when they are under a "JobKeeper enabling direction".

Amendments to Fair Work Act

– JobKeeper enabling directions

If an employee is not under a “JobKeeper enabling direction” and the employee earns above the minimum rate of pay required by their industrial instrument (ie their award or employment contract), you may attempt to negotiate with the employee to reduce their rate of pay. Note that there is no requirement for the employee to agree to this, and you cannot reduce their pay below the minimum required by their industrial instrument.

If you agree with the employee to reduce their rate of pay, this should be reflected in a written agreement that is signed by both you and the employee to avoid any future disputes on what was agreed.

What if my employee refuses to follow the “Jobkeeper enabling direction” I have given them?

An eligible employee who is given a direction in accordance with the Fair Work Act, must comply with the direction, unless the direction is not reasonable in the circumstances. If the employee fails to comply, you have the ability to make an application to the Fair Work Commission to deal with the dispute. The employee, as well as their union, is also able to make such an application. The Fair Work Commission has the power to approve the direction, set it aside or provide an alternative JobKeeper Enabling Direction. Failure to comply gives rise to breach of the Fair Work Act.

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Employsure is the largest provider of employment relations and workplace health and safety services in Australia - servicing over 27,000 clients nationally.

Why Employsure?

At Employsure, we believe all Australian employers, no matter the size, deserve access to comprehensive, quality, honest advice and support that is scalable to the needs of their business.

Since the introduction of the Fair Work Act in 2009, workplace obligations have become more complex and difficult to manage, especially for overstretched small business owners.

Employsure was established in response to these challenges. It is our aim to ensure Australian business owners have access to cost-effective, professional advice on all employment relations and work health and safety matters.

What we offer

Employsure provides customised documentation, unlimited advice, policy and procedure review, insurance and legal representation for small business owners.

Being an Employsure client means no surprises – we keep our clients updated on Award changes, wage updates and essential compliance issues. Our expert advisers are available 24 hours a day to guide employers through any difficulties they may face.

1300 207 182
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Employsure has given me the freedom to run my business in a way that I need to. It's given me the time and it's actually taken away a lot of worry that I previously had.

Kieran Syme | **DentFree AutoTree**



Google can only help you so far. Sooner or later you need to actually talk to somebody who is an expert in the field and that's where I found Employsure.

Ursula Zajackowski | **The Source Bulk Foods**



Biggest thing from Employsure, it gives us certainty. Where we have guidance and help of what we need in place, how to put it in place, and how to implement the systems for HR.

Jonathon Grealy | **Niche Reform**