

## COVID-19 - How do Employers navigate their workforce and survive the Pandemic ?

At a time where economic productivity has slowed down for most businesses, the Australian Federal Government has introduced a job-keeper scheme designed to encourage employers and employees to work together to find mutually beneficial and workable solutions. This is so employees can remain in the workplace throughout the pandemic and productivity can continue and businesses can remain on track.

The new provisions in the Fair Work Act 2009 (Cth) not only allow an eligible employer who qualifies for the job keeper scheme to pay an eligible employee \$1500 per fortnight, but once qualified and paying the job-seeker payments, the employer has the ability to give directions to the job seeker employees and also make agreements with those employees. Those directions and agreements will override applicable terms in other legal agreements, modern awards, enterprise agreements or transitional instruments. The new provisions are temporary and apply from 9 April 2020 until 28 September 2020.

### Directions Employers can take with Employees

Subject to the consultation process discussed below the directions that the employer can give are as follows:

#### 1. Directions on Location of Work

An employer can direct an employee concerning the employee's location of work (including to direct the worker to work from home). **(Section 789GF Fair Work Act 2009 (Cth))**.

#### 2. Directions to Perform Duties

An employer can direct an employee to perform certain duties but those duties must be within the employee's skill and competence and must be safe. **(Section 789GE Fair Work Act 2009(Cth))**.

#### 3. Job Keeper enabling Stand-Down Direction

This direction allows an employer to give a direction to an employee for a stand-down if an employee cannot be usefully employed because of the COVID-19 pandemic or the government's initiative to slow the spread of COVID-19.

Like the current stand down provision (S524) in the Fair Work Act 2009 (Cth), the new provision **(Section 789GDC Fair Work Act 2009 (Cth))** allows the worker to be stood down completely, but this provision also allows the employer to:

- (a) reduce the number of days in which a worker works;
- (b) reduce the number of hours worked on a given day; and/ or
- (c) reduce the number of hours worked overall by the worker.

A worker's hourly rate cannot be less due to a Job Keeper enabling stand down direction that would otherwise be applicable. Also a worker is not to be stood down whilst on a period of leave authorized by the employer or whilst authorized to be absent. (Section 789GDC Fair Work Act 2009 (Cth)).

## Employers are obliged to consult with Employees

The above directions will not apply, unless the employer has:

- (a) provided the employee at least three days written notice of intention of the direction (unless otherwise agreed with the employee)
- (b) consulted with the employee about the direction; and
- (c) in relation to duties or location of work has information that leads them to believe that the direction is necessary for continued employment.

A Job Keeper enabling direction must be in writing and be reasonable in the circumstances.

## Requests by the Employer to the Employee resulting in Written Agreement

The new provisions also allow an employer to make certain requests to workers who must consider the requests and cannot unreasonably refuse those requests (**Section 789GG Fair Work Act 2009 (Cth)**). 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 (**Section 789GG Fair Work Act 2009 (Cth)**). Agreeing or not agreeing to an employer request is a workplace right. Any agreement must be made in writing and must not have the effect of reducing the employees number of hours of work.

## Time Frames

As stated, these new provisions will remain in place from 6 April 2020 until 28 September 2020 at which it is expected that the worst of the COVID-19 pandemic will be over.

## Post Covid 19 - What is next?

After the 28th of September 2020, the Pre-Covid provisions under the Fair Work Act 2009 (Cth) will apply again. At that time, employers will not have the flexibility to direct employees or make certain requests. However, the temporary changes to the law means that currently, workers may work different duties, different days and work at different locations or not work at all. This uncertainty for workers means these workers may stay with the current employer or move to other employment or re-train for another role. For Employers, it is an economic decision to remain in business, preserve the work force as much as possible and increase productivity as much as possible, particularly once the restrictions are lifted.

For further information concerning employer obligations under the new Scheme, please contact:



**Holly Gardner**  
**Special Counsel**

T: (08) 8414 3333

E: [hgardner@jht.com.au](mailto:hgardner@jht.com.au)