

An aerial photograph of a long bridge spanning a river. The water is a deep blue-green color, and the surrounding landscape is a mix of green vegetation and brownish-yellow earth. A single white car is visible on the bridge. The image is partially obscured by a dark blue diagonal shape on the right side.

Dealing with IR issues during the pandemic

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Today's Session

1 JobKeeper & Its Flexibilities

3 How to achieve flexibility without utilising the new laws

2 Changes to Leave & Award Provisions



Jobkeeper and its flexibilities

JobKeeper Payments



Full rate



<40 hrs per fortnight

Until 27 Sep 2020

\$1,500 per fortnight

\$1,500 per fortnight

28 Sep 2020 – 3 Jan 2021

\$1,200 per fortnight

\$750 per fortnight

4 Jan 2021 – 28 Mar 2021

\$1,000 per fortnight

\$650 per fortnight

JobKeeper Enabling Stand Down Directions

“

...the employee cannot be **usefully employed** for the employee's normal days or hours during the jobkeeper enabling stand down period because of changes to business **attributable to:** (i) the COVID-19 pandemic; or (ii) government initiatives to slow the transmission of COVID-19...

Fair Work Act section 789GDC(1)(c)

Rules relating to JESDs

Where employer is currently entitled to jobkeeper payment for employee:

- JESD must not be unreasonable
 - Must consult with employee:
 - ◆ At least 3 days before the direction was given; or
 - ◆ A lesser notice period of the employee genuinely agreed to the lesser notice period
- Must keep a written record of the discussion
- Employee's base rate of pay must not be reduced

Rules relating to JESDs

Where employer was previously entitled to jobkeeper payment for employee:

Must not require employee to work a reduced number of hours which is less than 60% of the employee's ordinary hours of work as at the start of 1 March 2020, unless:

- The employee's ordinary hours of work have changed on or after 1 March 2020 for reasons that aren't attributable to COVID-19 or government initiatives to slow the transmission of COVID-19, in which case: not less than 60% of those most recently changed hours
- The employee wasn't employed on 1 March 2020, in which case:
 - ◆ Not less than 60% of the ordinary hours of work when the employee's employment started, or
 - ◆ Not less than 60% of those hours of work as most recently changed for non-COVID reasons

Rules relating to JESDs

Where employer was previously entitled to jobkeeper payment for employee but no longer is:

- Must hold a 10% decline in turnover certificate for the designated quarter at the time the direction is given
- Cannot require an employee to work less than 2 hours in a day
- JESD must begin on or after 28 September 2020
- Direction terminates if employer ceases to satisfy the 10% decline in turnover test at the test time, being:
 - ◆ The start of 28 October 2020; or
 - ◆ The start of 28 February 2021
- Direction must not be unreasonable

Duration of JESDs

→ Direction continues until:

- ◆ Withdrawn or revoked by the employer
- ◆ Replaced by a new JESD
- ◆ 29 March 2021

Other Jobkeeper Tools

Vary duties

- Duties must be safe, reasonably within the scope of the employer's business operations, and employee must have any required licence or qualification

Vary days of work

- Performance of duties on those days and times must be safe, reasonably within the scope of the employer's business operations and not have the effect of reducing the employee's number of hours of work

Vary location of work

- Place must be safe, suitable for the employee's duties, reasonably within the scope of the employer's business operations and not require the employee to travel an unreasonable distance

Other Jobkeeper Tools

→ Taking annual leave:

- ◆ Employee must consider and not unreasonably refuse a request if complying with the request will not result in the employee having a balance of paid annual leave of fewer than 2 weeks
- ◆ An employee is not required to comply with a request to the extent that it relates to taking annual leave after **28 September 2020**

JESD Disputes - Jurisdiction

→ FWC can:

- ◆ Mediate
- ◆ Conciliate
- ◆ arbitrate

FWC does not have jurisdiction to determine eligibility for JobKeeper

Jobkeeper Disputes

The FWC may make any of the following orders:

1. an order that the FWC considers desirable to give effect to a JED;
2. an order setting aside a JED;
3. an order substituting a different jobkeeper enabling direction; or
4. any other order that the FWC considers appropriate.

- *Wilfred Lam v Mobile Technology International Pty Ltd* [2020] FWC 436
- *Transport Workers' Union of Australia v Prosegur Australia Pty Limited* [2020] FWC 3865
- *Ms Leonie McCreedy v Village Roadshow Theme Parks Pty Ltd* [2020] FWC 2480



Changes to Leave

Unpaid Pandemic Leave

Up to 2 weeks unpaid
leave if required to
self-isolate

Employee must give
notice

Evidence
Requirements

Annual Leave at Half Pay

- The employee and their employer may agree to the employee taking twice as much leave on half pay
- Any such agreement to take twice as much annual leave at half pay must be recorded in writing
- A period of leave under must start before 29 March 2021, but may end after that date

Pandemic Leave Disaster Payment

- Provided by Services Australia
- Only available to individuals in New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia
- Lump sum payment where the state's department of health or a health official has directed the individual to self-isolate
- Only available if (among other criteria), individual isn't entitled to pandemic leave, or personal/carer's leave

Long service leave changes in NSW

- Notice of long service leave of less than one month if the worker agrees to the lesser period of notice
- Can take leave in periods of leave of not less than one day's duration
- Can take long service leave in advance of less than one month if the worker agrees to that lesser period of leave
- The amendments have effect until 12 March 2021

Current status of award changes

Clerks – Private Sector Award

- Schedule I ends 30 November 2020
- Schedule X ended 30 June 2020

Passenger Vehicle Transportation Award

- Schedule X no longer in operation as of 30 June 2020

Vehicle Repair, Services and Retail Award

- Schedule I ends 30 November 2020
- Schedule X to end 29 March 2021

Manufacturing and Associated Industries and Occupations Award

- Schedule X in operation until 29 March 2021

Beware of contractual constraints!

- Consider whether your organisation has the power under its employment contracts to:
 - ◆ Reduce hours of employees
 - ◆ Vary an employee's days of work
 - ◆ Vary an employee's location of work
- Is 'fresh' consideration required?



How to achieve flexibility without using new laws



PiperAlderman

Planning for the end of JobKeeper - Existing Tools



Stand down
(FW Act section 524)



Directing employees
to take leave, or
obtaining employee
agreement to take
leave or reduce
ordinary hours



Enterprise agreement
variations

Redundancy

Section 524 Stand Downs



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: industrial action (other than industrial action organised or engaged in by the employer); a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown; **a stoppage of work for any cause for which the employer cannot reasonably be held responsible.**

Fair Work Act section 524

Bargaining



**Enterprise bargaining –
during a pandemic**



**Extended notice period
for industrial action –
*Hudson Ports***



**Other ways to entrench
changes**

Redundancies – to restructure or not?



Benefits

- Reduce unnecessary headcount in short term
- Reduce operating costs
- Implement more effective operating models
- 'Agile' workforce
- So long as its 'genuine', legal way of terminating employment



Disadvantages/Risks

- Permanent loss of skilled workers
- Unable to bring those workers quickly back if there is an uplift
- Cost of redundancy
- Risk of claims being brought:
 - Unfair Dismissal
 - Adverse Action

Redundancies – Legal Risks (Recent cases)

Unfair dismissal

No 'genuine redundancy'

- *Matthew Browne v MySharedServices Pty Ltd* [2020] FWC 4455
- *Aron Solway v Vision Blonde Pty Ltd* [2020] FWC 4233
- *Mark Green v Duratec Limited* [2020] FWC 4960
- *Nikolas Allan v Dapto Fish Feast* [2020] FWC 3657
- *Philippe Elomar v Z Transport Group T/A Z Staff Pty Ltd* [2020] FWC 4773

Redundancies – Legal Risks

Adverse Action

Where an employer takes adverse action because an employee exercised a workplace right

- Employee is unwell/in isolation
- Carer's responsibilities i.e. homeschooling, childcare
- Disabilities
- Flexible work
- Complaints and/or inquiries

Guerin v Horndale Pty Ltd **[2020] FWC 3918**

- Removal of JobKeeper payments – employee refused to work extra shift

Questions?



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