

‘What you need to know about the JobKeeper Scheme’ Webinar Q&A

1. Is the \$1,500 a net amount in the employee’s pocket or is it the gross amount before tax?

A: The JobKeeper payment of \$1,500 per fortnight is a gross amount, before tax.

2. If you nominate with your employer and then you are subsequently dismissed by the employer or you resign, can you nominate another (your new) employer before September 2020 if you get a new job?

A: No, because in order to be eligible for the JobKeeper payments you needed to be employed by the eligible employer as at 1 March 2020.

3. What happens to an employee’s rate of pay if s/he is asked to work different duties to normal?

A: If the new duties attract a lower hourly rate of pay, the employee must continue to be paid their old base rate of pay (on an hourly basis). If, on the other hand, the new duties attract a higher rate of pay, the employer must pay the higher base rate of pay (on an hourly basis). This is called the **hourly rate of pay guarantee**.

4. If the employee is on JobKeeper payments but cannot be usefully employed and the employer directs the employee to take annual leave, do you think the employee could reasonably refuse?

A: Under the JobKeeper changes to the *Fair Work Act*, an eligible employer may request (not direct) an employee who is entitled to JobKeeper payments to take annual leave, provided that the employee will still be left with an annual leave balance of at least 2 weeks. The employee must consider and **not unreasonably refuse** such a request. If there is a dispute over this, either the employer or the employee may lodge a Form 13A with the Fair Work Commission.

5. Should employers discuss issues relating to any family violence that employees may be experiencing if required to work at home and any implications of these on the employer if employees do experience family violence as a result of working at home?

A: An eligible employer may direct an employee to work from a different location, including from home, but the performance of the employee’s duties at that place must be safe. The direction must also be reasonable in all of the circumstances. Accordingly, if an employee is concerned about working from home because of domestic or family violence, these concerns should be brought to the employer’s attention and, if the parties are unable to come to

a mutually acceptable agreement about the location of work, a Form 13A may be lodged with the Fair Work Commission.

6. If you are a casual employee who has been working regularly for the same employer for more than 12 months, but who stopped receiving shifts after 1 March, can you be entitled to JK payments?

A: If your employer is eligible, you meet all the eligibility criteria for JobKeeper payments and you complete a Nomination Form, your employer can and should pay you and then be reimbursed by the Government. This is the case even if you have not received any shifts (or very few shifts) since 1 March 2020 due to the coronavirus pandemic. Provided you are still employed (ie, you are still on the employer's books) then you should be paid.

7. I have lost one full day of work since March 2020. I'm now working two days a week. In my case the JobKeeper subsidy would be greater than my actual salary. I have therefore told my employer that I'm willing to start working again a third day. Is it totally up to me to work this third day? I would receive the full amount anyway?

A: If you and your employer are both eligible for JobKeeper payments and you have been directed to reduce your work hours in accordance with a JobKeeper enabling stand down direction, you are entitled to be paid the higher of either \$1500 gross per fortnight (JobKeeper payment) or the wages for the hours you work. If you say that the hours you are now working attract wages that are less than \$1500 gross per fortnight you are nevertheless entitled to be paid \$1500 gross per fortnight even without having to work any extra hours. If your employer now asks you to work a third day you should consider that request. You are entitled to the JobKeeper payment without working the extra hours but ultimately it is up to you to decide what you think is reasonable in the circumstances and what you think is best for the future of your employment relationship.

8. With respect to taking annual leave at half the rate, for twice the time, does this mean that the JobKeeper payment can 'top up' the employee's pay during that same period?

A: An eligible employer who makes an agreement with an eligible employee about the employee taking annual leave at half pay for a certain period of time must pay the employee the higher of either \$1500 gross per fortnight (JobKeeper payment) or the annual leave payment for the hours of your leave.

9. In relation to the requirement that employees be left with at least two weeks of annual leave if an employer requests an employee to take annual leave: is this two weeks on a pro rata basis for permanent part-time employees?

A: Currently, the legislation (*Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*) does not mention the words "pro rata". The legislation simply provides that the employee must not be left with a balance of paid annual leave of fewer than 2 weeks. There may be an argument that this should be read consistently with s87 of the *Fair Work Act*, which sets out the entitlement to annual leave and provides that annual leave accrues according to the employee's *ordinary hours of service* but there is no caselaw on this issue yet.

10. If you were stood down by your employer after 1 March 2020, when does your entitlement to the payment start from?

A: If you were stood down (whether it was a full stand down or a partial stand down) during March 2020, then, provided both you and your employer are eligible (and provided you have completed and returned your Nomination Form and your employer has paid you at least \$1500 gross per fortnight since 30 March 2020), your employer should be reimbursed by the Government for every fortnight since 30 March 2020.

11. If I'm an eligible casual employee and I nominate for the JobKeeper scheme (and my employer qualifies for the scheme), do I still receive JobKeeper payments if I can't work due to illness or injury? I had a non-work-related accident just after being stood down because of the coronavirus.

A: Provided you are still employed and you are not receiving workers' compensation weekly payments because you are wholly incapacitated, then your employer should pay you the \$1500 gross per fortnight. Your employer should get that amount back as a reimbursement from the Government which is paid to employers in arrears.

12. Do you need to bring a dispute to the Fair Work Commission first before applying to court for a civil penalty against an employer?

A: No, you do not need to exhaust the Fair Work Commission's dispute resolution process before you are entitled to file an application for a civil penalty order with the Federal Circuit Court of Australia, the Federal Court of Australia or an eligible State court.

13. Does the Fair Work Ombudsman have any power to enforce civil penalty provisions under the new part to the *Fair Work Act*, or is it only possible for individual employees to take these matters to court?

A: The Fair Work Ombudsman has standing (along with employees and their unions) to apply for a pecuniary penalty if the employer has contravened a civil remedy provision.

14. Is an employee who is eligible for JobKeeper, but on authorised unpaid leave (e.g. unpaid personal / carer's leave), entitled to receive the JobKeeper payment even though they are not able to work?

A: If you and your employer are both eligible for JobKeeper payments, you should receive the \$1500 gross per fortnight even if you are on unpaid leave, provided you are not receiving the Government's Parental Leave Pay or Dad and Partner Pay.

15. If a Form 13A is lodged with the Fair Work Commission, do all parties need to agree on the mode of dispute resolution or does the applicant choose how the matter will proceed? Is it mandatory for the employer to participate?

A: Employers, employees, unions and employer associations are all entitled to lodge an application to the Fair Work Commission to deal with a dispute about the JobKeeper provisions of the *Fair Work Act*. The Commission has the power to decide whether to deal with the dispute by way of mediation, conciliation, arbitration, or to make recommendations or to express opinions. Once an application is made (by the Applicant in the matter) the Respondent is entitled to lodge a jurisdictional objection if that is applicable. Commission conferences are held in private whereas Commission hearings are public. Parties generally need the permission of the Commission to be represented by a lawyer in a conference or a hearing. The Commission has the power to order that particular people attend proceedings or produce documents.