

Coronavirus Economic Response – extended temporary Fair Work Act provisions (legacy employers)

A legacy employer is a national system employer who:

- qualified for, and received a JobKeeper payment in respect of certain employees before 28 September 2020;
- no longer qualifies for, or is receiving, a JobKeeper payment in respect of certain employees on or after 28 September 2020; and
- has experienced a 10 % decline in their actual GST turnover for the designated quarter compared to the corresponding 2019 quarter and holds a certificate from an eligible financial service provider (or, if a small business employer, has instead chosen to have a statutory declaration to this effect).

A legacy employer can access the Fair Work Act JobKeeper provisions relating to directions and agreements on or after 28 September 2020.

Under these provisions any existing agreement or JobKeeper enabling direction (JED) will cease as of 27 September 2020. In relation to periods on or after 28 September 2020, a legacy employer can also:

Make a JED, including a JobKeeper enabling stand down direction (noting that a 10 % decline in turnover certificate **must** be held before making a JED)

The direction must be reasonable, safe for the employee, and provide arrangements that are reasonably within the scope of the employers' business operations. If a JED is unreasonable in all of the circumstances, it does not apply. [section 789GK].

An employer seeking to issue a JED must have consulted with the employee and provided 7 days' notice in writing of their intention to issue a JED (or less notice if employee genuinely agrees). Legacy employers will be required to comply with the expanded consultation requirements in new section 789GMA, and the existing requirement for JEDs to be in writing under section 789GN.

With a JED, an employer can:

A stand down JED cannot be given unless the employee cannot be usefully employed for their normal days or hours because of changes to the business attributable to the Coronavirus pandemic or government initiatives to slow the transmission; and the direction must be safe, having regard to the nature and spread of Coronavirus [section 789GJA].

If the employer has information that leads them to reasonably believe that the direction is necessary to continue the employment of one or more employees [section 789GL]

Give a request to an employee to work on different days and times to their ordinary days or times of work (noting that a 10 % decline in turnover certificate **must** be held before requesting an agreement):

- the employee must consider and not unreasonably refuse the request;
- the agreement must be in writing; and
- the agreement does not require the employee to work less than two consecutive hours in a day on which the employee will work. [section 789GJD]

Direct an employee to:

- not work on a day, or days, on which the employee would usually work; or
- work for a lesser period than normal on a particular day or days; or
- work reduced hours.

Directions must be in writing and are subject to the following requirements:

- the direction must not require the employee to work less than 60 % of the employee's ordinary hours of work as at the start of 1 March 2020; and
- the direction must not require the employee to work less than two consecutive hours in a day on which the employee will work. [section 789GJA]

Direct an employee to perform any duties within their skill and competency, provided:

- the employee has any relevant licence or qualification;
- the duties are safe having regard to COVID-19; and
- the duties are reasonably within scope of the employer's business operations [section 789GJB]

Direct an employee to work somewhere other than their usual place of work (including their home), provided:

- the place is suitable for the employee's duties;
- if the place is not the employee's home, does not require the employee to travel an unreasonable distance; and
- performance of the employee's duties at this place is safe and in scope with the employer's business operations [section 789GJC]

A period served under a JED or agreement counts as service for all purposes [section 789GR]
 If a JobKeeper enabling stand down direction applies to an employee, entitlements accrue and are calculated according to their ordinary hours of work as if the direction or agreement was not in place [section 789GS]
 If a JobKeeper enabling stand down direction applies to an employee, the employer must ensure the hourly rate of pay is not less than their normal base rate of pay. If the employee is performing duties that attract a higher rate of pay under a JED, they must be paid the higher rate of pay [section 789GDB]
 If a JobKeeper enabling stand down direction applies to an employee, they may request to engage in reasonable secondary employment, training or professional development, which must be considered and cannot be unreasonably refused [section 789GU]
 Benefits employees have under these provisions constitute workplace rights for the purposes of the general protections [section 789GY]

An employee must comply with a valid JED [section 789GQ]
 An employee does not have to comply with a JED if it is unreasonable in all the circumstances [section 789GK]

An employee, an employer, an employee organisation or an employer organisation can apply to the FWC for orders relating to the JED or a dispute about the operation of these provisions [section 789GV]

An employee can be represented by their employee organisation or, seek leave of the FWC to be represented by a lawyer or paid agent [section 595].

The FWC may mediate, conciliate, make a recommendation or express an opinion, or arbitrate the dispute, make a recommendation or express an opinion [sections 595 and 789GV].

Safeguards
 A JED can't be used to make an employee redundant [section 789GZA]
 A JED cannot be used to reduce the hourly rate of pay for an employee [section 789GDB]
 An employer can't misuse a JED by giving one when they know that they are not authorised to [section 789GXA]
 An employee must be paid the amount they are entitled to be paid for the hours they have actually worked [section 323]
 The new provisions operate subject to the existing conditions in the FWA relating to the payment of wages provisions, general protections, unfair dismissal, and unlawful termination in s 772, and any anti-discrimination, WHS or workers' compensation laws [section 789GZ]
 The Courts can enforce very serious penalties against employers that don't comply with these provisions [sections 789GD, 789GU, 789GW]
 The Minister can exclude employers from the operation of these Provisions [section 789GX]
 The Federal Court can hear disputes about whether an employer issued a JED or Agreement and did not satisfy the 10 % turnover test [789GXD]
 Penalties apply for employers who knowingly obtain a false 10 % certificate or make a false declaration.

Any other order that the FWC considers appropriate

Cancel the JED

Vary the terms of the JED

Uphold the terms of the JED

Normal conditions apply

The employer and employee must comply with the FWC's order [section 789GW]

The JED will continue in effect until it is withdrawn or revoked by the employer, or is replaced by a new JED [section 789GP]. JEDs or agreements will cease to apply to an employee where the employer no longer satisfies the 10 % decline in turnover test [sections 789GJE and 789GJF]
 The JED and agreement provisions will cease on 29 March 2021. This means that on this date all JEDs and agreements cease and employment terms and conditions revert to what they were without the JEDs or agreements in place.