



# JobKeeper 2.0

Enabling Directions Explained

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## Part 1

# JobKeeper will continue, here's what it means

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The JobKeeper initiative is set to continue until March 2021, allowing employers to access changes in the Fair Work Act that give them greater flexibility in managing their business and their employees.



These changes include great powers for employers to:

- ✓ vary an employee's duties
- ✓ change an employee's hours of work
- ✓ change an employee's location of work
- ✓ change the days or times when an employee is to perform work

- ✓ until 27 September 2020, agree with an employee to take annual leave, including at half pay

In this guide we outline the changes in the Fair Work Act and how employers can correctly apply them in their business.

## Part 2

# The JobKeeper *Life Raft*

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JobKeeper has been of immense help during the unprecedented impact of the COVID-19 pandemic.



*"JobKeeper has been a blessing. It's been amazing...it's unfortunately not going to keep all of our employees in a job at the end, but it's certainly been wonderful help for now."*

Debbie Thorne-Morley  
Manager, Caversham Wildlife Park  
*Employsure client*

The IR flexibility included in the program has kept employers and their staff employed, and given businesses all around the country the best opportunity to return to business-as-usual when lockdowns and restrictions lift.

The JobKeeper legislation provided more than just a wage subsidy. Employers under the scheme have been given a set of rights to help them keep their business

afloat during these trying times. These provisions give employers some leeway to manage their staff and roster in a way that best suits during the COVID-19 pandemic and associated lockdowns and restrictions.

These are called **JobKeeper Enabling Directions**.

## Part 3

# What is a JobKeeper Enabling Direction?

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Broadly speaking, employers receiving JobKeeper payments for eligible employees can give JobKeeper Enabling Directions to vary certain terms of the employee's employment as long as it meets the criteria.

Under JobKeeper 2.0, an employer who qualifies for the scheme can do any or a combination of the following:

- ✓ vary an employee's duties
- ✓ reduce an employee's hours of work, including to zero
- ✓ change an employee's location of work
- ✓ change the days or times when an employee is to perform work
- ✓ until 27 September 2020, agree with an employee to take annual leave, including at half pay

Employers who qualified for JobKeeper but not for JobKeeper 2.0 and have suffered a 10% decline in turnover can do any or a combination of the following:

- ✓ vary an employee's duties
- ✓ reduce an employee's hours of work to a minimum of 60% of the hours that they worked as at 1 March 2020



- ✓ change an employee's location of work
- ✓ change the days or times when an employee is to perform work

However, to issue a JobKeeper Enabling Direction certain conditions must be met which are standard to all Directions. Each of the Directions have specific requirements that must be met for the individual Direction to be used.

This short guide will help you better understand what these Directions are, how you can implement them, as well as any further questions you may have.

## Part 4

# JobKeeper Enabling Stand Down Directions

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JobKeeper Enabling Stand Down Directions give employers more leeway to reduce their employees' hours.

JobKeeper Enabling Directions can potentially be used to help avoid a redundancy until things pick up again. In particular, if they comply with all of the conditions regarding JobKeeper Enabling Stand Down Directions, you can reduce an employee's hours, (including up to zero) for employers who continue to qualify for the scheme.

Employers who previously qualified for JobKeeper and continue to show a 10% decline in turnover can reduce an employee's hours to a minimum of 60% of the hours that they worked as at 1 March 2020. Using this provision may allow them to keep the employee in employment in the short term, before making a final decision in the future on whether a redundancy is required once business conditions are more stable.

Business owners should note that the period of stand down under a JobKeeper



Enabling Direction is counted towards the employee's length of service as if they had been working and is taken into account when determining how much notice and redundancy pay is required.

Therefore, delaying a redundancy through a JobKeeper Enabling Stand Down may result in higher costs if you do decide to proceed with a redundancy in the future.



If you meet the rules below, you can take the following actions:

- ✓ direct an employee not to work on a day or days they usually work, or
- ✓ work for a lesser period than they would ordinarily work on a particular day or days, or
- ✓ work a reduced number of hours compared to their normal hours.

In relation to JobKeeper, EmploySure can assist employers by:

- ✓ helping them to understand the JobKeeper provisions in the Fair Work Act and other legislation to the extent that it applies to workplace relations
- ✓ helping them to better understand any changes to the Fair Work Act and JobKeeper legislation (workplace relations only)



## Handy Tip

EmploySure recommends employers to get in touch with a workplace relations expert if they are considering enacting stand downs.

Stand downs are one of the most complex aspects of the Australian workplace relations system.

## Criteria for Enacting a Stand Down Direction

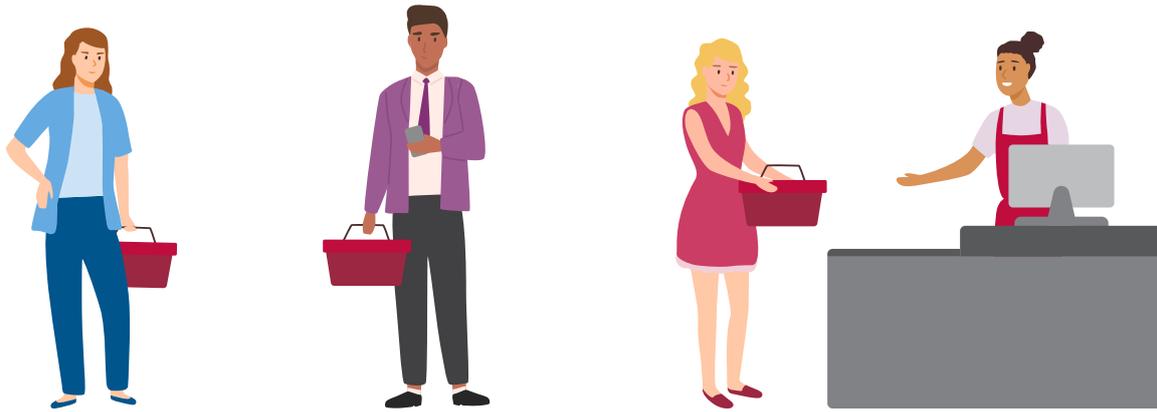
To make a Direction in this way, the rules for employers who qualify for JobKeeper are:

- your business must qualify for the JobKeeper scheme at the time the Direction is given
- it must be the case that the employee cannot be usefully employed for their normal days or hours because of changes to the business attributable to the COVID-19 pandemic or government initiatives to slow the transmission of COVID-19 (e.g. Government shutdowns of businesses)
- the implementation of the Direction must be safe
- the Direction must be reasonable in all the circumstances
- your business must be entitled to receive the JobKeeper payment for the employee in the period to which the Direction applies
- the employee must be paid the greater of the JobKeeper payment per fortnight or the amount payable for work performed
- the employee's hourly rate of pay cannot be reduced
- before giving the Direction, your business must consult the employee (or their representative) about the Direction
- the employee must be given 3 days' written notice of your business' intention to give the Direction (or earlier, if genuinely agreed with the employee)
- the Direction must be in writing

If the above rules are complied with, the employee must comply with the Direction. If the employee does not comply, you or the employee can make an application to the Fair Work Commission (FWC) to deal with the dispute.

However, it is always recommended to work out the issue with the employee prior to seeking dispute resolution assistance from the FWC.

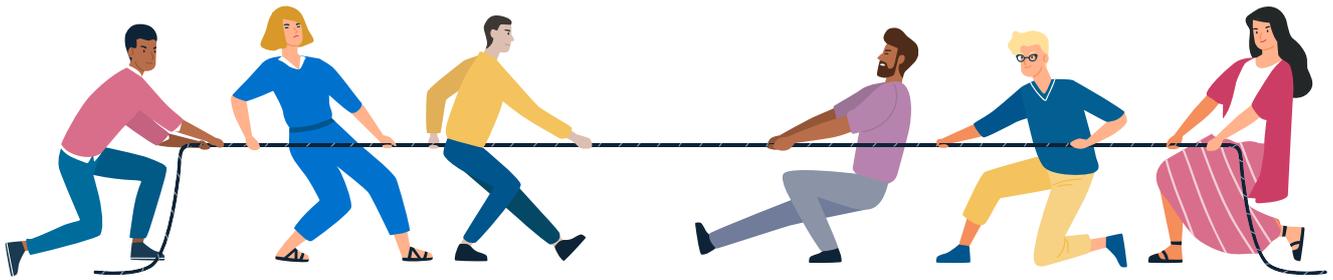




**From 28 September 2020, the rules for employers who previously qualified for JobKeeper are:**

- you must have been entitled to a JobKeeper payment in a fortnight ending before 28 September 2020
- your business must not be entitled to receive the JobKeeper payment for the employee in the period to which the Direction applies
- at the time the direction is given, you must hold a 10% decline in turnover certificate that covers you for the designated quarter
- it must be the case that the employee cannot be usefully employed for their normal days or hours because of changes to the business attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 (e.g. Government shutdowns of businesses)
- the implementation of the Direction must be safe
- the Direction must be reasonable in all the circumstances
- before giving the Direction, your business must consult the employee (or their representative) about the Direction
- the employee must be given 7 days' written notice of your business' intention to give the Direction (or earlier, if genuinely agreed with the employee)
- the Direction must be in writing
- the Direction may only reduce the employee's hours to a minimum of 60% of the ordinary hours that they worked as at 1 March 2020
- the Direction cannot require the employee to work less than two hours in a day

For information on what to pay employees contact your accountant, financial adviser or registered tax agent.



## Avoid redundancies using Stand Down Directions

In recent times, Australia's business landscape has changed. The COVID-19 crisis has forced employers to review every aspect of their business, from safety to staffing. As we adapt to this new operating environment, many small businesses will review their staffing levels against their revenue, cash flow and operating requirements. For many employers, the term redundancy may be a part of this review.

While redundancy may be a legitimate option for employers, it is a complicated process. There are many employers who find the situation extremely difficult to manage as there are not only a variety of different employment relations considerations regarding redundancy, but also personal concerns that have the potential to significantly impact a business. In some cases, redundancy can be very expensive. In others not so much. And, if you don't follow appropriate processes, an employer can potentially be exposed to a variety of claims.

A redundancy generally occurs when an employee's job is no longer required to be performed by anyone.

Redundancy doesn't have to be your first or only option. There are alternatives, and for the duration of the JobKeeper legislation, a Stand Down Enabling Direction is a strong alternative to going through the redundancy process as long as you satisfy the criteria.



### Handy Tip

If you are considering making redundancies, EmploySure recommends you get in touch with a workplace relations expert.

Seek advice to make sure you know all you need to know before making a workplace decision.

## Can I give a Direction to increase an employee's hours?

The amendments to the Fair Work Act do not explicitly give employers a right to unilaterally increase an employee's hours of work. They only allow a Direction to be issued to reduce an employee's hours, where certain requirements are met.

A permanent employee's hours of work could therefore only be increased in accordance with the provisions of an applicable industrial instrument, or by mutual agreement. A casual employee's hours of work could only be increased from their usual hours where the increase is reasonable.



## Employees returning from Stand Down

If you have given your employees a JobKeeper Enabling Stand Down Direction, you may ask them back to work at any time, without notice.

Employsure recommends being reasonable in your request. If you have stood down your staff for a long period of time, it would be reasonable to give your staff at least a couple of days' notice before asking them to return to work. It's also recommended to be mindful of your employee's personal situation if it's been a

while since you stood them down.

Upon returning, if you wish to alter the employee's hours or locations of employee's work, or their duties, any Directions must still comply with the JobKeeper legislation, as set out in this guide.

Finally, under the current legislation employers may only be able to keep their employees on a JobKeeper Enabling Stand Down Direction until 28 September 2020 if they do not qualify for JobKeeper 2.0 and do not meet the 10% decline in turnover test.

## Part 5

# Other Options Under JobKeeper

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We've looked at Stand Downs. Now let's examine other employer powers under JobKeeper.

Other than the ability to change an employee's hours of work, using JobKeeper 2.0 you have the ability to use Enabling Directions to:

- ✓ Change the employee's duties
- ✓ Change the work location
- ✓ Alter the days or times when an employee performs work (but not reduce the number of hours)

Certain rules apply which are detailed below.

If an employee does not agree to change the days or times they work, you should ask them to outline their reasons for refusing the request.

Similar to above, if the employee's refusal is not reasonable, you may be able to lodge a dispute with the Fair Work Commission.

### Requesting employees to change their days or times of work

You may request an eligible employee to perform duties on different days or at different times to usual, provided this is safe and reasonably within the scope of your operations. However, their number of hours remain the same.

For instance, you have a part-time employee who works Monday and Tuesday 6am to 12pm. However, due to COVID-19 you no longer open the store at 6am, but instead open at 10am. Also, due to business slowing down you realise that you only need one staff member to cover Monday and Tuesday shift and have decided to take that burden on yourself to save costs.

Therefore, you can use the Direction to come to an agreement with the employee to change their working days to Wednesday and Thursday from 10am to 4pm.

**COFFE**  
**LATTE**  
**MOCHA**  
**ESPRESSO**  
**MACCIATO**      **LEMONADE**  
**CAPPUCCINO**      **TEA**



## *How to implement this Enabling Direction*

**For employers who qualify:**

- your business must be entitled to receive the JobKeeper payment for the employee in the period to which the Direction applies
- performance of the employee's duties on those days or times is safe
- the agreement to change days and times does not reduce the employee's number of hours of work
- the Direction is reasonable in the circumstances
- the employee must be paid the greater of the JobKeeper payment per fortnight or the amount payable for work performed
- before giving the Direction, your business must consult the employee (or their representative) about the Direction
- the employee must be given 3 days' written notice of your business' intention to give the Direction (or earlier, if genuinely agreed with the employee)
- the Direction must be in writing



**From 28 September 2020, for employers who previously qualified for JobKeeper:**

- you must have been entitled to a JobKeeper payment in a fortnight ending before 28 September 2020
- your business must not be entitled to receive the JobKeeper payment for the employee in the period to which the Direction applies
- at the time the Direction is given, you must hold a 10% decline in turnover certificate that covers you for the designated quarter.
- performance of the employees duties on those days or times is safe and reasonably within the scope of your business operations
- the agreement to change days and times, does not reduce the employee's number of hours of work or require the employee to work less than 2 hours in a day

- the Direction is reasonable in the circumstances
- before giving the Direction, your business must consult the employee (or their representative) about the Direction
- the employee must be given 7 days' written notice of your business' intention to give the Direction (or earlier, if genuinely agreed with the employee)
- the Direction must be in writing

Once you have made this request in writing as per the criteria, the employee must consider the request and cannot unreasonably refuse this. If the employee agrees to change the days or times they work, this agreement must be confirmed in writing.

For information on what to pay employees contact your accountant, financial adviser or registered tax agent.

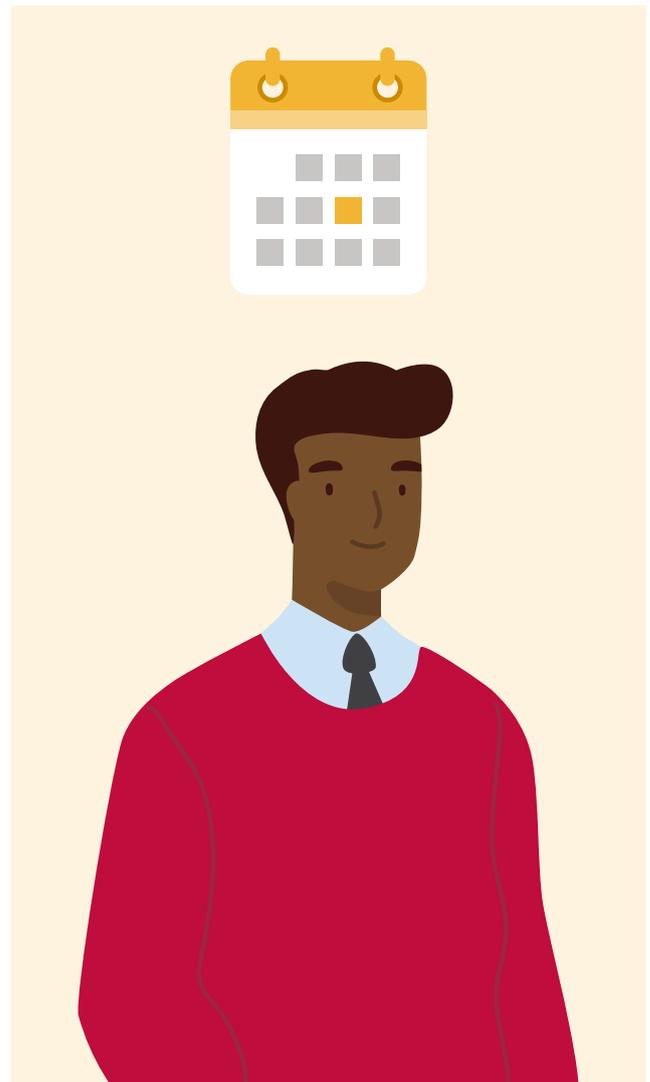
## Requesting employees to take annual leave

You may request an employee to take a period of annual leave before 27 September 2020, provided that complying with the request will not result in the employee's annual leave balance falling below two weeks. Agreements under the JobKeeper provisions for employees to take annual leave will cease to have effect on 28 September 2020.

You can also request that an employee take their annual leave at half pay over a longer period of time. For instance, if the employee has 4 weeks of annual leave accrued, under this rule, the employee can take 8 weeks of annual leave at half the pay to elongate the time away on annual leave. If you reach an agreement of this nature, you must record this in writing and have it acknowledged by the employee.

### *How to implement this Enabling Direction*

- Your business must qualify for the JobKeeper scheme
- Your business must be entitled to receive the JobKeeper payment for the employee in the period to which the Direction applies
- Consult with the employee and/or their representative about taking paid annual leave. Provide details as to how this will work (eg leave for twice the amount of time, for half the pay) and ensure that it does not leave the employee with less than 2 weeks accrued annual leave
- The Direction is reasonable in the circumstances
- The employee must be given 3 days' written notice of your business' intention to give the Direction (or earlier, if genuinely agreed with the employee). The employee must consider this request and not unreasonably refuse the Direction
- Once mutually agreed to, the Direction must be in writing



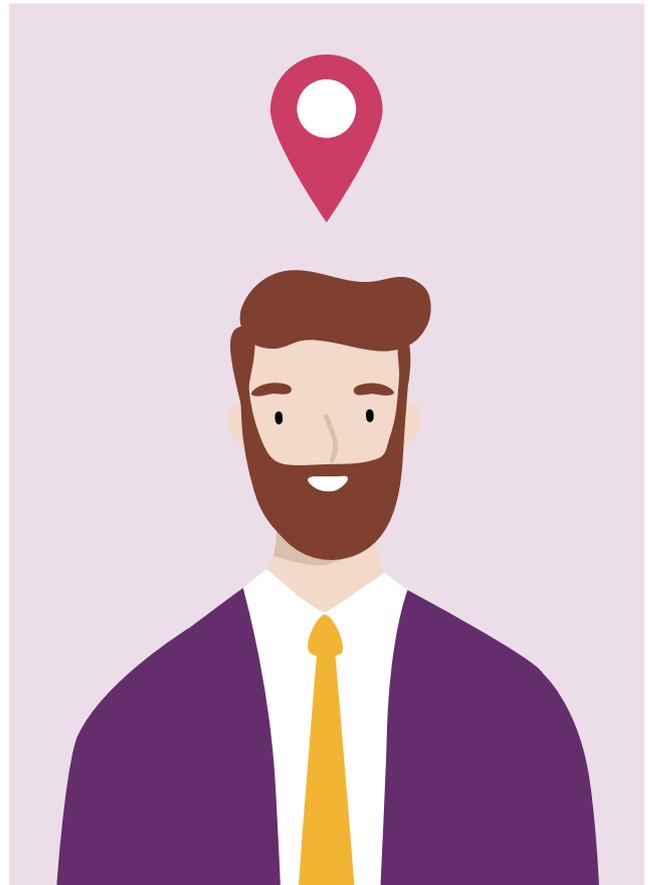
## Changing the Locations of Employees

JobKeeper Enabling Directions allow employers to also move their employees around workplaces more easily. Employers can direct employees to perform duties at another workplace that is different from their normal workplace.

This Direction can include requesting employees to work from home.

**To make a Direction in this way, the rules for employers who qualify for JobKeeper are:**

- your business must qualify for the JobKeeper scheme at the time the Direction is given
- the place must be suitable for the employee's duties
- the employee must not have to travel an unreasonable distance to get to the place
- the performance of the duties at the place must be safe and reasonably within the scope of your business operations
- you have information that leads you to reasonably believe that the Direction is necessary to continue employment of one or more employees
- the Direction must be reasonable in all the circumstances
- your business must be entitled to receive the JobKeeper payment for the employee in the period to which the Direction applies
- the employee must be paid the greater of the JobKeeper payment per fortnight or the amount payable for work performed
- before giving the Direction, your business must consult the employee (or their representative) about the Direction
- the employee must be given 3 days' written notice of your business' intention to give the Direction (or earlier, if genuinely agreed with the employee)
- the Direction must be in writing





**From 28 September 2020, the rules for employers who previously qualified are:**

- you must have been entitled to a JobKeeper payment in a fortnight ending before 28 September 2020
- your business must not be entitled to receive the JobKeeper payment for the employee in the period to which the Direction applies
- at the time the Direction is given, you must hold a 10% decline in turnover certificate that covers you for the designated quarter.
- you direct the employee to work either at home or at a place that does not require the employee to travel an unreasonable distance
- the place is suitable for the employee's duties
- the performance of the duties at the place must be safe and reasonably within the scope of your business operations
- you have information that leads you to reasonably believe that the Direction is necessary to continue employment of one or more employees
- the Direction must be reasonable in all the circumstances
- before giving the Direction, your business must consult the employee (or their representative) about the Direction
- the employee must be given 7 days' written notice of your business' intention to give the Direction (or earlier, if genuinely agreed with the employee)
- the Direction must be in writing

For information on what to pay employees contact your accountant, financial adviser or registered tax agent.

## Changing an Employee's Duties

Using this Enabling Direction the employer can direct the employee to perform any duties that are within the employee's skill and competency.

To make a Direction in this way, the rules for employers who qualify for JobKeeper are:

- your business must be entitled to receive the JobKeeper payment for the employee in the period to which the Direction applies
- performance of the employee's duties is safe
- Where the employee is required to have a licence or qualification to perform those duties, the employee has the required licence or qualification
- the duties are reasonably within the scope of the employer's business
- the Direction is reasonable in the circumstances
- you have information that leads you to reasonably believe that the Direction is necessary to continue employment of one or more employees
- before giving the Direction, your business must consult the employee (or their representative) about the Direction
- the employee must be given 3 days' written notice of your business' intention to give the Direction (or earlier, if genuinely agreed with the employee)
- the Direction must be in writing
- you must ensure that the employee's base rate of pay (worked out on an hourly basis) is not less than the greater of the following:
  - the base rate of pay (worked out on an hourly basis) that would have been applicable to the employee if the Direction had not been given to the employee; the base rate of pay (worked out on an hourly basis) that is applicable to the duties the employee is performing.





**From 28 September 2020, the rules for employers who previously qualified are:**

- you must have been entitled to a JobKeeper payment in a fortnight ending before 28 September 2020
- your business must not be entitled to receive the JobKeeper payment for the employee in the period to which the Direction applies
- at the time the Direction is given, you must hold a 10% decline in turnover certificate that covers you for the designated quarter.
- you direct the employee to perform any duties within the period of your Direction that are within the employee's skill and competency
- the duties are safe and reasonably within the scope of your business operations
- where the employee is required to have a licence or qualification to perform certain duties, the employee has that licence or qualification
- the Direction is reasonable in the circumstances
- you have information that leads you to reasonably believe that the Direction is necessary to continue employment of one or more employees
- before giving the Direction, your business must consult the employee (or their representative) about the Direction
- the employee must be given 7 days' written notice of your business' intention to give the Direction (or earlier, if genuinely agreed with the employee)
- the Direction must be in writing

For information on what to pay employees contact your accountant, financial adviser or registered tax agent.

## Part 6

# JobKeeper Enabling Directions FAQs

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### How long does an Enabling Direction apply for?

Once a JobKeeper Enabling Direction is issued, it will remain in force until:

- it is withdrawn or revoked by the employer
- it is replaced by a new JobKeeper Enabling Direction given by the employer to the employee under that section
- the employer ceases to qualify for the JobKeeper scheme either after 27 September 2020, 3 January 2021 or 28 March 2021
- for employers who previously qualified, the employer no longer meets the 10% decline in turnover test at either 28 October 2020 or 21 February 2021

In all cases, JobKeeper Enabling Directions will automatically cease to have effect from the start of 29 March 2021 as set out in the Fair Work Act.

### What if my employee refuses to follow the JobKeeper Enabling Direction I have given them?

An eligible employee who is given a JobKeeper Enabling Direction in accordance with the Fair Work Act must comply with the Direction, unless the Direction is not reasonable in the circumstances or the JobKeeper provision allows for reasonable refusal (e.g. days of work and taking paid annual leave Enabling Directions).

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 Commission has the power to approve the Direction, set it aside or provide an alternative JobKeeper Enabling Direction. Failure to comply gives rise to a breach of the Act. Please note that this is accessible by both parties. The employee can also make an application to the FWC to deal with the dispute.

Besides taking a dispute to the Fair Work Commission, you may also be able to discipline the employee for a failure to

follow a reasonable management Direction if the employee does not comply with Directions to work at different locations, perform different duties, or to work reduced hours.

### **Do employees continue to accrue entitlements when they are on an Enabling Direction?**

Where you have given an employee a JobKeeper Enabling Stand Down Direction or reach an agreement with an employee to take annual leave at full or half pay, the employee will accrue leave entitlements as if the employee has continued to work their usual hours during this period.

The period in which the JobKeeper Enabling Stand Down Direction or annual leave agreement applied will also be counted for the purposes of calculating redundancy pay and payment in lieu of termination.

### **Does the employee accrue entitlements when they are on an Enabling Direction?**

Yes. If you have given the employee an Enabling Direction, 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 in line with The JobKeeper Payment?**

Firstly, you need to assess the reasons

why you want to do this. Is it because there is no work for the employee to do, or is it for cost saving reasons?

As an employer, it is your obligation to pay employees for any work they perform, even if that is over and above the JobKeeper payment.

To align your employee's pay to the JobKeeper payment, it would be done by reducing the employee's hours of work in consultation with the employee and where reasonable to do so. Keep in mind that the employee's rate of pay cannot be reduced using an Enabling Direction.

Cutting an employee's rate of pay could be achieved by agreement with the employee provided that there was genuine agreement and their rate of pay was still equal to or greater than their minimum wage and entitlements. However, care must be taken not to pressure the employee into such an agreement.

Furthermore, to drop the employee's hours of work, you must satisfy the criteria: that the employee cannot be usefully employed for the employee's normal days or hours due to the COVID-19 pandemic or government initiatives to slow the transmission of COVID-19. As such, if the employee can usefully be employed and your intention is to reduce the employee's pay to the equivalent to JobKeeper payments so that you are not out of pocket, then you will not lawfully be able to utilise this Enabling Direction.

