

Jobkeeper disputes and the Fair Work Commission – Stop press ATO changes

Date: 20 April 2020

In anticipation of upcoming disputes about jobkeeper directions and requests, the Fair Work Commission has set up a dedicated **JobKeeper disputes page** which can be found here: [JobKeeper disputes](https://www.fwc.gov.au/about-us/coronavirus-covid-19-updates-advice/jobkeeper-disputes) (<https://www.fwc.gov.au/about-us/coronavirus-covid-19-updates-advice/jobkeeper-disputes>).

When do employees have to comply with a jobkeeper enabling direction or request?

As a result of the recent amendments to the *Fair Work Act 2009* (Cth), employers may now use jobkeeper enabling directions and may request jobkeeper employees to change days or times of work and/or to take annual leave. These amendments are repealed on 28 September 2020. (See <https://www.legislation.gov.au/Details/C2020A00038>)

However, jobkeeper employees can refuse directions or requests if they are **unreasonable or unsafe** or if the required **3 days' written notice and consultation** requirements have not been met (where applicable).

Each direction and request has additional criteria which must be satisfied, as set out below.

Jobkeeper enabling stand down directions must satisfy the hourly rate of pay guarantee, the employee must not be on paid or unpaid authorised leave or absence, the employer must reasonably believe that it is necessary to continue the employment of one or more employees and the employee must not be able to be usefully employed on the normal days/hours because of COVID-19 or government initiatives to slow transmission of COVID-19.

Jobkeeper changes to location directions require the employer to reasonably believe the direction is necessary to continue the employment of one or more employees, the direction must not involve unreasonable travel and the new workplace must be suitable for the employee to perform their duties.

Jobkeeper working different duties directions require the employer to reasonably believe the direction is necessary to continue the employment of one or more employees, must satisfy the hourly rate of pay guarantee, the duties must be reasonably within scope of the employer's business and the duties must be within the employee's skill and competency (including the employee holding required licenses or qualifications).

Jobkeeper working different days or times requests require that the duties on those days or at those times are reasonably within scope of the employer's business and that the different working times do not reduce the employee's hours of work compared with the employee's normal hours of work.

Jobkeeper to take annual leave requests must leave the employee with a retained balance of 2 weeks' accrued annual leave.

Disputes about jobkeeper directions and requests

If there is a dispute about a request or direction, it can be dealt with by the Fair Work Commission (FWC), including by arbitration, mediation, conciliation or by providing recommendations.

The FWC may make orders to give effect to a jobkeeper enabling direction, to set a direction aside, to substitute a direction or make any other order it considers appropriate and will consider the fairness between the parties concerned. If any order is contravened a maximum penalty of 60 penalty units may be imposed.



An application can be made to the Fair Work Commission by an employer, employee or employee/er representatives using Form 13A. (See <https://www.fwc.gov.au/content/rules-form/application-the-commission-deal-with-jobkeeper-dispute-coronavirus-economic>)

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The ATO now advises all employees should be nominated and that employers should not “pick and choose between their eligible employees” and has made the employee nomination form available. (See <https://www.ato.gov.au/General/JobKeeper-Payment/Employers/Your-eligible-employees/> _

See also: <https://www.fwc.gov.au/about-us/coronavirus-covid-19-updates-advice/jobkeeper-disputes> and PG Guidance in Jobkeeper payment and changes to the FW Act (https://www.lexisnexis.com.au/en/COVID19/guidance_toolkit).