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Article: JobKeeper and employee re-engagement

Many businesses impacted by COVID-19 have already let go or stood down employees. Does the recently introduced JobKeeper payment allow us to re-engage our employees?



21 April 2020

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JobKeeper and employee re-engagement

The events of early March saw some businesses impacted by COVID-19 earlier than others. Action taken may have included letting go or standing down employees.

With the introduction of the Federal Government's JobKeeper Scheme, many of these businesses may now consider re-employing or re-engaging with these employees in order to be ready to resume ordinary business once economic circumstances allow.

However, you need to consider whether the Jobkeeper concession is right for your business. There are several critical considerations you need to take into account:

- Will the business be able to sustain the cashflow impact from including all eligible employees in the scheme?
- Can the employers choose which employees are included in the scheme?
- What are the legal issues from employing or re-engaging with your employees?
- How will the business benefit from including the employees in the scheme?
- What ongoing obligations will the employer have in relation to the re-engaged employees?

Cash flow impact from JobKeeper scheme

The JobKeeper scheme is a wage reimbursement scheme. It results in the following minimum cash flow requirements for employers for the six months of the scheme:

	April	May	June	July	August	September	October	Total
Payment out	3,000	3,000	3,000	4,500	3,000	3,000	-	19,500
Payments in	-	(3,000)	(3,000)	(3,000)	(4,500)	(3,000)	(3,000)	(19,500)
Net payments out/ (in)	\$3,000	-	-	\$1,500	(\$1,500)	-	(\$3,000)	-

This means, for each employee you include in the scheme, you will need to fund up to \$3,000 (\$4,500 for July) over the duration of the six- month period.

For example, if you stood down ten employees without pay, you would need to fund an additional \$30,000 over the six-month period to meet minimum pay requirements. The scheme does not give you any compensation for administering these payments for the employees or meeting funding costs for the six months. In this case, you would carefully need to consider the non-cash benefits from including the employees in the scheme, including employee goodwill and the potential to engage with the employees to add value to the business during the scheme period.

However, where you continue to pay all your employees more than \$1,500 per fortnight regardless of the scheme, the benefit of the scheme will all accrue to the employer and the decision is much easier.

Employer eligibility for JobKeeper

An eligible employer does not need to register for the scheme. If an employer does not register for the scheme, they will not need to pay the eligible employees the minimum \$1,500 per fortnight. However, they will also not receive the government wage reimbursement.

Your eligibility as an employer is generally based around demonstrating a reduced turnover of either 15%, 30% or 50% depending on whether you are part of a large group or whether you are an ACNC charity. For more information on eligibility requirements visit: bentleys.com.au/COVID-19

You need to consider which employees are eligible and for which periods.

Employee eligibility for JobKeeper

The starting point is that eligible employees need to meet the following requirements:

- They must have been employed as at 1 March 2020.
- They must have been over age 16 at that date.
- They must have been either:
 - permanent full-time or part-time employees, or
 - casual employees employed on a regular and systematic basis for at least 12 months before 1 March 2020.
- They must not have nominated for JobKeeper for another employer. The ATO information states that the employee can choose which employer by returning the completed nomination form except they cannot choose a casual employer over a permanent one.
- On 1 March 2020 was:
 - an Australian citizen, the holder of a permanent visa or the holder of a protected special category visa and reside in Australia; or
 - a New Zealand citizen holding a Special Category (Subclass 444) visa and was a resident of Australia for tax purposes.
- They were employed at any time during the relevant fortnight.
- They provide notice to their employer that they agree to be included in the scheme (in the form of the JobKeeper employee nomination notice or similar).
- They are not in receipt of workers compensation (while not working), paid government parental or dad and partner leave during the fortnight.

The scheme is drafted on a 'one-in, all-in policy'. Therefore, should the employee meet the eligibility requirements, you cannot choose to leave them out. One of the eligibility requirements is the wage condition. While you will not be eligible to receive the \$1,500 payment from the government in respect of that employee unless you have paid this amount to the employee by the relevant time, the amendments to the Fair Work Act 2009 (Cth) obligate you to pay the minimum to every employee who is otherwise eligible. This otherwise eligible requirement raises an interesting question of whether by failing to nominate (for whatever reason) the employee with the ATO makes that employee ineligible.

Which re-hired or stood-down employees will be eligible?

In both cases, the individual must have been an employee as at 1 March 2020. So, if an employee was let go before this time, they will not be eligible.

The employer response to the COVID-19 impacts have been varied.

Employers have:

- stood down employees under the very limited right contained in the *Fair Work Act 2009* (Cth),
- stood down employees under an EA,
- simply ceased to offer duties for a period, or
- agreed to maintain employees on unpaid leave (strictly speaking not a stand down – often known as a furlough).

While the latter two are not strictly what we would call a “stand down”, the JobKeeper legislation does not base eligibility on the concept of “stand down”.

Any circumstance where the connection with the (otherwise eligible) employee has been maintained as at 1 March 2020 will seemingly qualify for the JobKeeper payment.

If employees were formally terminated prior to 1 March 2020 they will not qualify.

However, if employees (who would otherwise qualify for the payment) were employed as at 1 March 2020 and were made redundant since, they may be re-employed and then be eligible for the payment.

Stood down employees

An employee you have stood down after 1 March 2020 will be an eligible employee for JobKeeper purposes if you pay them at least \$1,500 per fortnight you wish to claim for. For the two fortnight periods in April, provided you pay the employee at least \$3,000 in total by the end of April, they will still qualify. It will not matter that the payments are outside of your usual pay cycle. However, going forward, like for other employees, you will need to pay at least \$1,500 a fortnight to each of these employees in line with your existing pay cycle.

Given there will be a month lag from when the payment must be made by the employer to the employee to when the ATO will pay the employer, there will clearly be a cash-flow timing disadvantage with accessing the benefit for stood down employees. Any benefit that does come in the form of the payment from the ATO will need to be passed on to the employee in full. In addition, leave entitlements will continue to accrue to the stood down workers during this period.

The benefit for the employer is not a cash-flow one, but rather a readiness to commence business when it is in a position to do so. The business may also consider whether it can compel a previously stood down employee to do the equivalent of \$1,500 work per fortnight. This may depend on whether a worker has been strictly “stood down”, in which case the employer has already decided it has no useful work for the employee to do, or whether it was simply a furlough or other arrangement.

It is open to employers to issue JobKeeper Enabling Directions under the legislation including to perform different duties, at different locations or to be stood down, either partially or fully. There are strict consultation requirements under the legislation before giving such a direction. These provisions could potentially be used to compel employees to provide work in exchange for the JobKeeper payment, provided their usual rate of pay is maintained.

Re-hired employees

You can re-hire employees who were in your employment as at 1 March 2020 and, as long as you pay them at least \$1,500 per fortnight after you re-engaged them, you will be entitled to the JobKeeper payment in respect of them.

Can you choose which employees to include?

No. The Explanatory Memorandum states that employees must be included on a one-in, all-in basis. However, the employee will only be included in the scheme where the employer notifies the ATO of their inclusion in the scheme. This will occur through ATO online services from 4 May 2020. This means that stood down employees cannot be left out.

Which payments count?

In many cases, employers made a payment to an employee they either stood down or dismissed that was not their usual wage. Does the employer have to pay them an additional amount to qualify for the minimum \$1,500 a fortnight or can the previously paid amount count?

Leave payments

Leave payments made to stood down employees during the two fortnights commencing 20 March and 13 April will count towards the minimum. However, it is not clear whether the ATO will allow leave amounts paid in a lump sum before 30 March to count towards the minimum.

Redundancy payments

An employer can re-engage an employee they made redundant since 1 March 2020 and the employee will be eligible for the JobKeeper payment provided that they are not receiving the JobKeeper payment from another employer. Such employees will need to report their change of circumstances to Services Australia if they are already in receipt of the JobSeeker payment.

If an employer has made someone redundant, they have likely paid them a redundancy payment and any accrued leave. A payment is a redundancy payment if it is paid to an employee upon the employer deciding that it no longer wants the role to be performed by anyone (ie. the employee is not being replaced).

Genuine redundancy payments are subject to a tax-free threshold.

If you do wish to re-hire an employee, you may wish to negotiate with them about the basis on which that takes place. You may agree to the re-payment by the employer of the redundancy payment, but, perhaps, to allow the employee to keep their accrued leave payment.

The redundancy payment will likely not qualify as a payment for JobKeeper eligibility purposes as it is not in respect of work done or leave, and PAYG tax has not been deducted.

If an employee will agree to the repayment of the redundancy payment this can be reversed and the employee's employment maintained on the basis of the JobKeeper payment or their normal wage (if they are working).

Other payments outside ordinary wage

You let go an employee but paid them a bonus. Now you want to know whether that bonus payment can be treated as a wage for JobKeeper purposes upon re-hiring them? The ATO has made clear that any eligible payment must be made during the period of re-employment.

Similar to the redundancy payment, you may be able negotiate with your employee to pay back some or all of that bonus payment on the basis that you will re-engage them and pay them that amount during the relevant JobKeeper fortnight periods. This should be sufficient to meet minimum payment requirements for JobKeeper purposes provided the employee agrees.

Other employment law issues on re-employing people

If you re-employ an employee, you will need to consider the basis on which they are re-engaged. This could be on the same terms and conditions as previously or you may agree new conditions with the employee.

You will also need to update leave accruals as there will be continuity of service from the date of termination if employment has been reinstated under the JobKeeper scheme.

If you intend to use the JobKeeper enabling directions to change the normal basis on which employees work for you, you must ensure that you comply with the consultation requirements or large penalties can apply, both to the employer and persons involved in any contravention.

Summary

Before you access the JobKeeper scheme as an employer, you should undertake a cost benefit analysis taking into account some of the matters raised in this article.

You need to consider how your business' cash flow will be impacted and ensure you are not having to 'double-pay' employees in order to access JobKeeper.

You also want to make sure you do not create unforeseen workplace disputes in trying to access the JobKeeper payments.

Contact us

Should you require any further information, we can assist as follows:

- **For tax and payment related matters, contact [your local Bentleys advisor](#) or 1300 BENTLEYS (1300 236 853)**
- **For employment law related matters, contact [Dentons](#)**

Disclaimer: This information is general in nature and should not be relied on as advice. It does not take into account the objectives, financial situation or needs of any particular person. You need to consider your financial situation and needs and seek professional advice before making any decisions based on this information.

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