



Members Update

Dear member,

Welcome to the June 2020 member's update.

This month focuses on Jobkeeper (again) as there have been significant changes and announcements from the ATO on 29th May as well changes to the Fast Food Industry Award for NON Jobkeeper eligible employer/employees. There has also been an additional case before the courts in regards to stand-downs and the ability to take paid personal leave during stand-down, and NSW Industrial Relations have made further temporary changes to the NSW LSL Act.

RECENT ATO ANNOUNCEMENTS

Payments that count towards the fortnightly \$1500 Jobkeeper payment.

On 24 April 2020, the ATO provided us with advice on which payments form part of the \$1500 Jobkeeper payments. As per changes advised on 29 May 2020, the ATO has varied their stance on some payments as per the following (note the changes in red below):

These payments to employees count towards the \$1,500 per fortnight:	These payments do not count towards the \$1,500 per fortnight:
salary and wages covered by section 12-35 of Schedule 1 to the Taxation Administration Act 1953	Government Paid Parental Leave (GPPL)
all allowances other than a reimbursement of expenses or a fringe benefit	workers' compensation absence (not able to work)
overtime, shift and penalties	reimbursements of expenses incurred by employees'
bonuses and commissions	directors' fees (that are not salary and wages)
PAYG withholding amounts under 12-35 of Schedule 1 to the Taxation Administration Act 1953	lump sum payments (lump sum A, B, D and E)
amounts applied under an effective salary sacrifice arrangement	exempt foreign income (exempt from pay as you go withholding)
	employment termination payments
	fringe benefits provided to an employee which are not part of an effective salary sacrifice arrangement.

We are currently seeking clarification on unused annual leave and long service leave payments on termination of employment due to resignation/dismissal – which are NOT lump Sum A/B payments nor are they eligible termination payments and are therefore not specifically addressed in the ATO's advice - [Click here for more information](#)

It is our opinion that these payments do not form part of “salary and wages covered by section 12-35 of Schedule 1 to the Taxation Administration Act 1953”. They are dealt with separately under S 12-90 of the Act and as such, these payments would not count towards the \$1,500 per fortnight.

Monthly paid employees

You may/may not be aware of a recent Fair Work case where Qantas was accused of withholding the Jobkeeper payment for monthly paid employees. The case addressed the averaging of Jobkeeper payments for monthly paid employees over the entire month and compared these payments to payments received by fortnightly paid employees.

Example:

	Month of June 2020	
	Monthly paid employee - pay date 15 June (Qantas method)	Fortnightly paid employee - pay date 5 June and 19 June - Fair Work advice on how the monthly payment should be assessed
Employee works 1 June to 14 June and taken unpaid leave from 15 June to 30 June. Salaries & wages + \$1000 per week for work performed	Payment for month of June + \$2000 (for salaries and wages for work performed 1 June to 14 June plus \$1000 JobKeeper Top-Up = \$3000 payment to employee for June	Payment for month of June = \$2000 (for salaries and wages for work performed 1 June to 14 June plus \$1500 JobKeeper Top-Up for fortnight 15 June to 28 June = \$3500 payment to employee for June

As per the example above, it can be seen that there is a disadvantage to the monthly paid employee when averaging the \$1500 fortnightly payment over the month (whether the employer pays \$3000 per month or \$3250 per month).

The Fair Work Commission advised Qantas to review the way they were paying these employees and that “payments can be made monthly but should be assessed on a fortnightly basis”. However, as the Jobkeeper payment rules fall under the ATO’s jurisdiction, Fair Work could not enforce any payment to be made by Qantas.

Subsequently, the ATO have advised that if an employee’s work pattern and employment status remains constant throughout the relevant period, it will be reasonable to allocate a monthly payment equally to each fortnight. The ATO will also accept an equal allocation as reasonable even if there is only minor variation between fortnights.

However, if the work performed by the employee differs significantly over the period, it may not be reasonable to allocate a monthly payment equally to each fortnight. An equal allocation is more likely to be unreasonable in cases where the difference is caused by a change to the employee’s usual work patterns or employment status – for example, the employee is stood down or their usual hours of work are significantly reduced during the month.

In some cases, employers who have paid at least \$3,000 before tax to employees in a four-week period may have, in good faith, simply allocated that payment equally to each fortnight. There may be some circumstances where that allocation is not reasonable (for example, because the work performed by the employee significantly differed between the two fortnights). In these cases, for JobKeeper fortnights ending in April or May, the ATO will allow you until the end of June to make any additional payments necessary to ensure that a reasonable allocation of the payments you have made is at least \$1,500 per fortnight. [Examples are provided here.](#)

Superannuation guarantee

For SG calculation purposes, the Jobkeeper payments to employees are excluded from being salary and wages and is not included as part of the employee’s ordinary time earnings. Additionally, where the Jobkeeper top-up payments – along with some OTE worked by the employee – push the employee over the \$450 minimum payment per month, the Jobkeeper payment will not count towards the minimum payment. [Examples are provided here.](#)

***Please check your Award/agreement for any additional superannuation entitlements outside of the ATO’s minimum superannuation obligations.

SICK LEAVE DURING STAND-DOWN

Another case involving Qantas and Fair Work was whether employees who have been stood down during COVID-19 can access sick leave. Fair Work had originally advised "Yes - they can", however on 18 May 2020 the Federal Court of Australia handed down a different decision.

Fair Work have advised that they are currently reviewing the decision. [View here.](#)

NSW LONG SERVICE LEAVE ACT 1955 AMENDMENT

Usually a period of unpaid stand-down will not count towards the period of continuous service for the purposes of LSL. The Long Service Leave Act 1955 for NSW has been temporarily amended so that a period of stand-down without pay relating to COVID-19 will count towards an employees' continuous service for LSL purposes. This applies to stand-downs between 11 March and 12 September 2020.

[View more information here.](#)

CHANGES TO MODERN AWARDS – NON JOBKEEPER EMPLOYER/EMPLOYEES

On 19 May, Fair Work announced changes to the Fast Food Award. The changes apply for the first full pay period on/after 19 May 2020 to 31 July 2020.

Schedule H changes apply to:

- employers covered by the Fast Food Award and who don't qualify for JobKeeper payments
- employees covered by the Fast Food Award who aren't eligible for JobKeeper payments.

New flexibilities for part-time work.

- An employer and an employee can agree in writing to new flexible part-time employment arrangements. If they do this, the new arrangements temporarily replace the standard part-time arrangements currently in the award.

Annual leave

An employer can ask an employee to take paid annual leave if:

- the reasons for the request are attributable to the coronavirus outbreak or Government initiatives to slow its transmission
- it's necessary to help the employer to prevent or minimise the loss of employment
- the employee still has at least 2 weeks of accrued paid annual leave left after taking the leave.

If an employer makes a request, it needs to:

- be in writing
- be reasonable in all the circumstances
- have considered the employee's personal circumstances
- give at least 72 hours' notice before the leave starts
- tell the employee that the employer agrees that any dispute about whether the request is reasonable can be arbitrated by the Commission.

The leave under the Schedule needs to start before 16 June 2020.

More detailed information on these changes can be found [here](#).

MEMBERS WEBINAR

Our June webinar will be held on 17th June at 1pm (duration approx 1h30) where we will be discussing ***Year End Update - 2019/20 In Review plus Key Rates and Thresholds Update***

[Register here](#)