

Special Members Update / Thursday 9 April 2020

**Workplace Flexibility and JobKeeper legislation passes both houses of Parliament on 8 April 2020; Fair Work amends 99 Modern Awards**

As you may be aware, a number of Bills passed both Houses in Parliament yesterday (8 April 2020) – in particular in relation to Workplace Flexibility and JobKeeper Payments. These changes will not apply until the Bills receive Royal Assent (which under most circumstances generally takes a week however in the current environment, this may be seen as a matter of urgency).

**Summary of Workplace Flexibility Arrangements**

- An employer who qualifies for the JobKeeper scheme may alter the employee's duties and the location of the employee's work. These directions must be safe, reasonable, within the skills and competencies of the employee, and within the scope of the business' operations. The rate of pay will be no less than the employee's current rate of pay or the relevant rate of pay in the employee's Award/Agreement – whichever is greater
- An employer can alter an employees' hours of work by directing an employee to change either the days the employee works, the number of hours in the days the employee works or reduce the employee's hours to zero (i.e standdown). Again, this only applies where the employee cannot be usefully employed at their normal days or hours because of changes attributable to COVID-19 pandemic; or government initiatives to slow the spread of COVID-19. The following conditions also apply:
  - The intent to give the employee the direction must be in writing
  - Provide at least 3 days' notice before the direction is given
  - Consult with the employee and keep written records of the consultation
  - The stand down provisions do not apply where an employee is on paid/unpaid authorised leave
- If an employer qualifies for the JobKeeper scheme in relation to an employee, the **employee must consider and must not unreasonably refuse the employer's request to take annual leave, provided that the leave arrangement will not result in a leave balance of less than 2 weeks**. In the absence of an employee's agreement the matter could be settled by Fair Work. Employees and employers can also agree to the employee taking leave at half pay – it is important to note that the advice provided by Fair Work in the past in relation to leave accruals when an employee takes leave at half pay is the annual leave will still accrue on the employee's ordinary hours. For example, if a FT employee takes 38 hours of leave (1 week) at half pay, they will accrue leave on all 38 hours – not 19 hours.

**Summary of JobKeeper Payment legislation**

- Businesses affected by COVID-19 can receive \$1,500 per employee, per fortnight
- The businesses must pass the payment on to their staff
- The wage subsidy package is budgeted for six months
- Employees need to be either a full-time or part-time employee - or a casual worker who has been employed regularly with the same employer for more than a year.
- Employees need to be either an Australian citizen, someone with a permanent visa, a Protected Special Category Visa holder, a non-protected Special Category Visa holder who has been residing continually in Australia for 10 years or more, or a Special Category (Subclass 444) Visa holder.
- The JobKeeper payment is a **taxable** payment

- Where an employee is receiving payment for hours worked and/or leave taken, the \$1500 is **not in addition to** the payment for ordinary hours or leave
- Superannuation is not calculated on the JobKeeper portion of a payment – so for example, if the employee is not working at all, the \$1500 per fortnight paid by the employer is not subject to SG. If the employee receives \$1500 and part of the payment is for actual hours work – say \$900 of OTE – then the \$900 is subject to SG but not the remaining \$600. If the employee earns \$2000 in the fortnight and the payment is for OTE that they have worked, then the entire \$2000 is subject to SG
- The Government is urging all businesses who've signed up for the JobKeeper Payment to pay their staff the \$1,500 a fortnight **now**, and claim the money back from the Australian Tax Office in May.

Unfortunately, the ATO is yet to release information on how this payment will be processed for STP purposes so at this stage, we cannot advise if it will form part of gross payment or if it will be a separate identifiable allowance that may be required for data matching purposes.

### **Changes to Modern Awards**

The Fair Work Commission has varied **99 modern awards** to provide an entitlement to unpaid 'pandemic leave' and the flexibility to take twice as much annual leave at half pay.

The awards now:

- provide up to two weeks unpaid leave if an employee is required to self-isolate or is prevented from working because of measures taken by government or medical authorities in response to the COVID-19 pandemic,
- allow an employer and employee to agree, in writing, to take double the amount of annual leave on half pay.

Some important things to note are:

- The granting of leave is up to two weeks leave and can be for a shorter period.
- Pandemic leave or annual leave at half pay under must commence before 30 June 2020 but may end after that date.
- An employer can request evidence that would satisfy a reasonable person that the leave is taken for a reason given in the clause.
- Pandemic leave does not affect any other paid or unpaid leave entitlement of the employee and it counts as service under the NES
- An employer may agree to give an employee more unpaid pandemic leave but is not required to.

More information can be access via the following link -

<https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/flexibility-in-workplace-laws-during-coronavirus/unpaid-pandemic-leave-in-awards>