COVID-19 JOBKEEPER
APRIL UPDATE / CLARIFICATIONS

COVID-19 JOBKEEPER UPDATE – CLARIFICATIONS

The enactment of the JobKeeper scheme is a welcome approach by the federal government to assist both businesses and employees through this most difficult time, however it has created some confusion in its operation and interpretation. The confusion appears a combination of the Australian Taxation Office (ATO) and Treasury being responsible for the administration of the scheme, but not being au-fait with workplace relations laws and practices, as well as the almost daily changes to the interpretation of the amending legislation, we endeavour to clarify some of those issues currently being raised for the industry.

THE "ONE IN ALL IN" RULE

Some members have expressed queries over the selection of eligible employees to participate in the JobKeeper scheme and the related "one in, all in" rule.

Essentially, an eligible employer cannot be selective over which eligible employees will participate in the scheme. The ATO has advised there is a "one in, all in" rule whereby if an eligible employer seeks to participate in the scheme, all eligible employees need to be offered the right to nominate. Although eligible employees may choose not to participate.

REDUNDANT EMPLOYEES

Although the JobKeeper scheme allows eligible employers to re-employ terminated employees whose positions were genuinely made redundant after 1 March 2020 and nominate them for participation in the scheme, there does not appear to be an obligation to do so. Some businesses do not have the cashflow to re-employ those employees, and then stand them down on a JobKeeper enabling stand down direction, particularly after having paid out their redundancy entitlements and accrued statutory entitlements.

STAND DOWN OF EMPLOYEES – THERE ARE TWO KINDS

Given the recent amendments to the *Fair Work Act*, there are now effectively two types of stand down provisions and employers need to be aware of the differences.

Original provision

The 'original' legislative provision permits employers to stand down employees who 'cannot be usefully employed' by the employer due to a stoppage of work for which the employer cannot reasonably be held responsible. Traditionally this provision was used as a result of

natural disasters such as fires, floods, and other weather-related conditions that did not allow work to take place. During such a period they are not entitled to be paid wages, but do accrue entitlements.

We are seeing an increased amount of disputation in the Commission relating to employers who sought to use this stand down provision some weeks ago.

JobKeeper stand down
By contrast, the newly minted legislative provisions that permit an employer to stand down employees only relate to employers and employees who are participating in the JobKeeper scheme. Participating employers are required to follow the related consultation and the 3-day notification requirements.

When an employee is subject to a JobKeeper stand down direction (to not work on certain days, to work for a lesser period, or to work for a reduced number of hours), the employer must pay them either the JobKeeper payment, or their usual pay rate for any hours that the employee does actually work – whichever is more.

Where an employee is subject to a JobKeeper enabling stand down direction to not work at all, the employer must pay the employee the JobKeeper payment during the stand down period.

AMENDING TERMS OF EMPLOYMENT
A JobKeeper enabling direction does not cover all terms of an employee's contract of employment.

JOBKEEPER ENABLING DIRECTION
Employers participating in the JobKeeper scheme can potentially direct a participating employee to undertake different duties and or work at a different location, so long as it is reasonable to do so. Participating employers are required follow the related consultation and the 3-day notification requirements.

When an employee is subject to a JobKeeper enabling direction relating to change of duties or location of work, the employer must pay them either the JobKeeper payment or their usual pay for any hours that the employee does actually work – whichever is more.

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AMENDING OTHER THAN UNDER JOBKEEPER

Should an employer need to make other amendments to the terms of an employee's contract of employment, it should be undertaken by way of agreement. Employers need to ensure that such an agreement was reached without coercion or duress and that the amendments are formalised in writing. A relevant contract of employment, enterprise agreement or applicable Award may affect such a negotiation.

We are in trying and difficult times, and we urge members to seek advice where necessary. Members should feel free to utilise the templates and resources we have created to help you through this process. They are available on our website: https://www.therealmediacollective.com.au/industrialrelations/

Should you have any queries about JobKeeper related issues, please feel free to contact Charles Watson to discuss on 0428 568 032 or via email charles@thermc.com.au