



MILLS
OAKLEY

Covid-19 Employment Update (NSW)

By Partner, Rachael Sutton

What we will cover:

- Updates to the JobKeeper scheme.
- Changes to the employment law landscape including job keeper directions, modern awards and ending employment.
- COVID-19 WHS considerations.



MILLS
OAKLEY

MO

Job Keeper Extension



Job Keeper /Seeker

- 21/7/20 announced **JobKeeper Payment** will be **extended by six months to 28/3/21** and the temporary **Coronavirus Supplement** for those on income support will be **extended by three months until 31/12/20**.
- From 28/9/20, eligibility will be based on actual turnover in the relevant periods, the payment will be stepped down and paid at two rates.



New Turnover Period

- Decline in turnover: It will be necessary to show the requisite decline in turnover for the September 2020 quarter (which will include the Victorian lockdown period) compared to the same period in 2019.
- Similarly, employers that want to qualify for JobKeeper period 4 January to 28 March 2021, will now only have to show their turnover is also down in the December 2020 quarter compared to the same period in 2019, rather than for each of the June, September and December quarters.



Decline in turnover unchanged

The extent of the decline in turnover will remain unchanged, being:

- 50 per cent for those with an aggregated turnover of more than \$1 billion;
- 30 per cent for those with an aggregated turnover of \$1 billion or less; or
- 15 per cent for Australian Charities and Not for profits Commission-registered charities (excluding schools and universities).

Businesses and not-for-profits will generally be able to assess eligibility based on details reported in the Business Activity Statement (BAS) as representing their GST turnover. It needs to be confirmed that the Law Companion Ruling 2020/1 applies equally to the new turnover tests. Alternative arrangements will be put in place for businesses and not-for-profits that are not required to lodge a BAS (for example, if the entity is a member of a GST group).



Employee Eligibility

- Previously, an eligible employee must have been employed by the employer on 1/3/2020.
- Effective from 3/8/20 the relevant date of employment will move to 1/7/20, increasing employee eligibility for the existing first phase and the second phase extension.
- This change allows employers to include new employees as eligible employees. This also means that employees that had left a previous JobKeeper employer could now nominate a new JobKeeper employer they have been employed with since 1/7/20, which was not possible previously.



Job Keeper Payments

Employees who were employed for less than 20 hours a week on average in the four weekly pay periods ending before 1 March 2020 will receive the lower payment rate.

JobKeeper Payment rates from 28 September 2020 to 28 March 2021:

- 28 September 2020 to 3 January 2021:
 - Full rate per fortnight: \$1,250 and
 - Less than 20hrs worked per fortnight rate: \$750
- 4 January 2021 to 28 March 2021:
 - Full rate per fortnight: \$1,000 and
 - Less than 20hrs worked per fortnight rate: \$650

The full rate applies for eligible employees who, in the four weeks of pay periods before 1 March 2020, were working in the business or not-for-profit for 20 hours or more a week on average, and for eligible business participants who were actively engaged in the business for 20 hours or more per week on average in the month of February 2020. Those that worked on average less hours will get the lower rate.



MILLS
OAKLEY

Legislative and Award Changes for Covid-19



JobKeeper pre 28/9/20

- The existing Fair Work Act JobKeeper provisions started on 9/4/20 and end 28/9/20 and apply to JobKeeper employers/ employees.
- They enable employers to give 'JobKeeper enabling directions' to eligible employees. In certain circumstances, this means that employers can temporarily:
 - stand down an employee (including by reducing their hours or days of work)
 - change an employee's usual duties
 - change an employee's location of work.
- The new provisions also enable qualifying employers and eligible employees to make agreements to change their days and times of work and take annual leave in certain circumstances.
- The Fair Work Act JobKeeper provisions don't remove or change employees' general protections (such as the right to exercise or refuse a workplace right) or protections from unfair dismissal or discrimination.



Jobkeeper post 28/9/20

Legacy Employers

- From 28 September 2020, employers who previously participated in JK but no longer qualify are legacy employers and can use some of the JobKeeper provisions (with some changes) for their previously eligible employees if they:
 - no longer qualify (or choose not to participate) from 28 September 2020
 - can demonstrate at least a 10% decline in turnover for a relevant quarter and get a certificate from an eligible financial service provider or make a statutory declaration if they are a [small business employer](#).
- Under the extended JobKeeper provisions, legacy employers can:
 - issue JobKeeper enabling stand down directions (with some changes)
 - issue JobKeeper enabling directions in relation to employees' duties and locations of work
 - make agreements with employees to work on different days or at different times (with some changes).

Qualifying employers

- Qualify for the JobKeeper scheme and receive JobKeeper payments for their eligible employees.
- Can access the JobKeeper provisions under the FWA.



Legacy employers 10% decline in revenue

Legacy employers need to meet a 10% decline in turnover test (turnover test) for each relevant quarter. To demonstrate this, they need to get a certificate, or make a statutory declaration if they are a [small business employer](#), for the relevant quarter.

Period for JK Direction or Agreement	Quarter to meet 10% decline in turnover test	Comparison Quarter
28 September to 28 October 2020 (inclusive)	June 2020	June 2019
28 October 2020 to 27 February 2021 (inclusive)	September 2020	September 2019
28 February to 28 March 2021 (inclusive)	December 2020	December 2019



Award Changes

- There are two main award variations to 99 modern awards
 - unpaid “pandemic leave” and
 - allocations for employees to take double their annual leave at half pay and they are contained in Schedule X and are temporary



Awards Changes

- Variations for: Clerks, Restaurant and Hospitality Awards
- There are three major changes to these awards, all are designed to give employers and employees more flexibility during the pandemic.
 - There is greater flexibility in job roles and duties
 - There is greater flexibility in arranging work hours
 - There is increased flexibility when it comes to leave



Ending Employment

- An employee who loses their job due to the effects of Covid-19 may be entitled to redundancy if the role no longer exists or the business closes down.
- NES sets out the requirements for notice and severance
- Usual rules apply for termination during leave or stand-downs



MILLS
OAKLEY

MO

Work Health & Safety



Workers Compensation

- The COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Bill 2020 [NSW] was assented to on 14 May 2020.



The New Section 19B – Contracting COVID-19

- Section 19B: Presumptions relating to certain employment in relation to COVID-19:
 - (1) If a worker, during a time when the worker is engaged in **prescribed employment**, contracts the disease COVID-19 (also known as Novel Coronavirus 2019), then for the purposes of this Act, it is presumed (unless the contrary is established)—
 - (a) that the disease was contracted by the worker in the course of the employment, and
 - (b) the employment—
 - (i) in the case of a person to whom clause 25 of Part 19H of Schedule 6 applies—was a substantial contributing factor to contracting the disease, or
 - (ii) in any other case—was the main contributing factor to contracting the disease.



Prescribed Employment (s19B(9))

- the retail industry (other than businesses providing only on-line retail),
- the health care sector, including ambulance officers and public health employees,
- disability and aged care facilities,
- educational institutions, including pre-schools, schools and tertiary institutions (other than establishments providing only on-line teaching services),
- police and emergency services (including fire brigades and rural fire services),
- refuges, halfway houses and homeless shelters,
- passenger transport services,
- libraries,
- courts and tribunals.
- correctional centres and detention centres,
- restaurants, clubs and hotels,
- the construction industry,
- places of public entertainment or instruction (including cinemas, museums, galleries, cultural institutions and casinos),
- the cleaning industry,
- any other type of employment prescribed by the regulations for the purposes of this definition.



Test For Contraction of COVID-19 (section 19B(2))

- A worker is taken to have contracted COVID-19 for the purposes of this Act if the result of a medical test—
 - that complies with requirements prescribed by the regulations in relation to the disease, and
 - that was carried out for the purpose of determining if the worker has contracted the diseaseis a result prescribed by the regulations in respect of the disease.



Test For Contraction of COVID-19 (section 19B(3))

- A worker is taken to have contracted COVID-19 for the purposes of this Act if the worker is classified by a medical practitioner as having COVID-19, having satisfied the epidemiological or clinical criteria (or both) prescribed by the regulations for the purpose of making that classification.



Date of Injury (section 19B(4) (whichever comes first))

- the worker is diagnosed by a medical practitioner as having COVID-19 following a prescribed test result, as referred to in subsection (2),
- the worker is classified by a medical practitioner as having COVID-19, as referred to in subsection (3),
- the worker dies as a result of COVID-19.



COVID-19 Closure

- Summary:
 - The COVID laws were introduced relatively quickly to respond to the challenges faced by the workers compensation system as a result of the COVID impact.
 - Changes have also eased requirements for workers to enable them to receive ongoing weekly payments without the need to attend their GP monthly to obtain a certificate of capacity.
 - The presumptive legislation is quite helpful for workers contracting the disease and gets rid of the stresses of trying to prove that the condition was contracted in the course of employment as well as not having to prove that employment is a substantial or the main contributing factor respectively.



MILLS
OAKLEY

Working from Home – better or worse?



Injury at Home?

- Section 4: A worker will need to establish that he/she suffered an injury arising out of or in the course of their employment in accordance with section 4 of the Workers Compensation Act 1987.
- Section 9A: A worker must establish that work is a substantial contributing factor to the injury.
- Section 4(b): In the case of a disease work needs to be the main contributing factor to the contraction of a disease or the main contributing factor to the aggravation, acceleration, deterioration and/or exacerbation of a pre-existing condition.

- An injury could include the contraction of COVID-19. The contraction of an infectious disease due to a virus entering a worker's body in the course of his or her employment has been held to constitute an injury within the meaning of the Workers Compensation Act 1987 Act (*Favelle Mort Ltd v Murray* (1976) 133 CLR 580).

- Physical injuries, such as injuries from falling down the stairs in your home to answer a work call or injuries related to a poor ergonomic set-up, may have a sufficient connection to work and working from home to establish causation.
- Psychological injuries due to feelings of isolation, anxiety, or concern about the global pandemic, could also be substantially a result of working from home and hold employers liable



Watch Out when WFH!

- Make sure employees are comfortable working from home both physically and psychologically. This may warrant safety checks including ensuring workers have ergonomically viable home workspaces in place.
- Make sure there is an understanding of break times the most common being lunch. In particular, there should be an understanding as to when someone can go for a run and when they can't.
- Keep the communication going generally and check on wellbeing.
- Consider what arrangement best suits both employer/employee regarding WFH.



MILLS
OAKLEY

Returning to work in the office and the WHS & Industrial Implications



Returning to work...

- What are the legal obligations in terms of work health and safety and for employment?
- What are the legal pitfalls?
- Where can I get guidance?



Employer's Duties

- At common law and employer has a non-delegable duty of care and the standard of care required of an employer is of the highest level (Kondis v State Transit [1984] 154 CLR 672; Burnie Port Authority v General Jones Pty Limited [1994] CLR 520). This duty requires an employer to be pro-active in identification of risks and hazards in the work-place and to take positive steps to eliminate or minimise the incident of risk. Where risks are known, an employer is required to warn employees and to take positive measures to prevent risks from manifesting by way of injury.
- Implied duty of trust and confidence, in the employment contract
- In addition to common law duties, as a primary duty holder under the Work Health and Safety Act, 2011 an employer is required to ensure safety so far as is reasonably practicable. A breach occurs where the employer fails to meet a standard referred to in the specific duty of care.
- In summary employer need to take steps to make workplaces safe for workers to return and others to attend.

Other duty holders

Nature of Activity	Duties Associate with the activity	Relevant Standard
Operation of business or undertaking	Primary Duty of Care (PCBUs and specific classes of duty holders)	Reasonably Practicable
Organisation decision making governance	Officer's Duty of Care	Due Diligence
Work activities (including supervision)	Worker's Duty of Care	Reasonable Care
Circumstantial attendance at workplace (visitors)	Duty of Care of Others (at a workplace)	Reasonable Care



It's everyone's responsibility

“If everyone in our system will speak up to forgetful colleagues, no matter their level or position, we can avoid most incidents of preventable harm.”

John Noseworthy, CEO of the Mayo Clinic



Covid Safe Workplaces

- 3 step framework which each state and territory will implement based on conditions specific to their situation
- The National COVID-19 Coordination Commission (**NCCC**) has released a template COVIDSafe Plan, underpinned by the Safe Workplace Principles which were released on 24 April 2020.
- Under these Principles employers and workers must work together to:
 - promote safe work practices as they reopen;
 - review the way they work to mitigate any risks; and
 - control and respond to the transmission of COVID-19 in the workplace.



Covid Safe Workplaces

- Industry specific COVID-19 guidance has also now been published on the Safe Work Australia (**SWA**) website.
- Working from home is still recommended during steps 1 & 2, with a plan for a physical return to work in step 3. Step 3 is being implemented in NSW.
- There is no prohibition on returning to work (only in Victoria – work permits and curfews in place).



Current restrictions in NSW

- All businesses can now open and operate under the one person per 4 square metre rule. Some businesses subject to specific restrictions about the maximum number of people permitted at the venue, such as hospitality venues and places of public worship.
- It is still the case that employers must allow employees to work from home where it is reasonably practical to do so.
- Some types of businesses are required to have a COVID-19 Safety Plan.
- Some venues are also required to register as a COVID safe venue. This includes hospitality venues, places of public worship, funeral homes, crematoria and gyms.
- Occupiers of certain premises, or the occupier of the premises on which certain events are held, are required to have a COVID-19 Safety Plan.



Considerations for Employers

- the logistics of employees returning— what changes will need to be made to how work is arranged, can you split employees into teams or stagger start/finish and break times? Will there be a roster of when employees can come into the office;
- consider WHS obligation in respect of first aiders and fire wardens?;
- what information, training and instruction will be provided to workers before they return and what information will be displayed in the workplace or communicated in other ways, such as a message when an employee first logs into the IT system;



Considerations for Employers

- consider WHS obligation in respect of first aiders and fire wardens?;
- what information, training and instruction will be provided to workers before they return and what information will be displayed in the workplace or communicated in other ways, such as a message when an employee first logs into the IT system;
- managing physical distancing requirements in the office particularly around workspaces, meeting rooms and communal areas;
- implementation of strict hygiene measures and cleaning protocols;



Considerations for Employers

- managing employees who may be unable to return to work in the early days such as vulnerable employees, such as those over 65 with a chronic medical condition, or aged over 70;
- managing those with carers' responsibilities;
- whether they will mandate daily temperature testing, and/or the completion of health declarations or a questionnaires before workers and others enter site;
- the obligations on employees who are unwell and decide to be tested for COVID-19, any employee who tests positive to COVID-19 and emergency management plans; and
- how you will respond to a case of COVID-19 in the workplace.



Industrial & Privacy Obligations

- employers will need to take into account any obligations or requirements under applicable legislation and industrial instruments, for example, in respect of changes to hours of work.
- employers also need to be careful to balance these measures against their obligations under privacy legislation.
- any Covid Plan will need to be the subject of consultation with employees and their representatives (if applicable). Preferably, this consultation should occur before employees return to the workplace as some employees may not accept what is being proposed and there should be time for feedback before finalising the risk assessment.



Consequence of breach

- It would not necessarily follow that the fact that, corona virus appeared in a workplace that this would mean that there had been a breach of duty of WHS.
- The duty does not require complete success, only that reasonable practicable steps are taken. As a minimum an employer must show it has followed the Principles.
- An employer failing to have regards will likely find itself in difficulty hence the importance of adequate planning.



Issues for Employers

- There are problems inherent in planning and steps employers might take.
- **COST** - Many steps are likely to involve additional cost at a time when many employees are already under huge financial pressure.
- **REVENUE** – Many steps eg staggered start times and shorter days – are likely to affect the volume of income producing work which businesses can do and so reduce income at a time when employers must be keen to maximise it. There are likely to be questions in some cases of whether a return is worthwhile if employees will not be able to work as fully as they have previously.



Disputes or Claims

- Risk of disputes, adverse action, bullying or workers compensation claims if employees feel that employers have not done enough to protect their well-being and/or feel their concerns have been ignored or feel they are being forced to return to work.
- Employees who feel that inadequate steps have been taken may argue they have been subjected to adverse action or resign and say that their reason for doing so is a failure to put in place sufficient steps to preserve their safety giving rise to claims of constructive, unfair or wrongful dismissal, breach of contract or adverse action.
- Employees may also make complaints to SafeWork or whistleblower complaints.



Disputes and Claims

- In order to respond to or pre-empt them, the employer would need to have taken such steps as were reasonable to protect health and safety and at a minimum followed the Principles and complied with any obligations under industrial instruments and/or JobKeeper direction rules.
- Be careful responding to refusals to come to work, with a refusal to pay wages or treating employment as having been abandoned. Whilst an employer could impose a requirement to return. The question would then be whether the employee became disentitled to pay by reason of failing to comply with a lawful and reasonable instruction. The question would then be whether the instruction was lawful and reasonable.
- The same considerations apply in respect to a dismissal.
- Lastly beware of opting for the redundancy option – these decisions may be challenged by employees on the basis whether the employer has met the necessary consultation obligations.

Summary

- Have a COVID 19 Safe Plan
- Check Public Health Orders and follow SafeWork Australia guidance including industry specific guidance
- Risk Assessment - most workplaces were not designed for infection control!
- Follow advice relevant to your industry
- How will you deal with infection?
- Consult, educating and training staff – its everyone's responsibility
- Review control measures
- Have regard for contractual, industrial and jobkeeper obligations
- What is the best strategy in terms of productivity and costs?
- Future Proof your plan – contingency plans – adapting into the future?



Contact Us

Rachael Sutton

Partner, Workplace Relations and Safety

Mills Oakley, Sydney

Phone: +61 2 8289 5808 or 0406424576

Email: rsutton@millsoakley.com.au