

# ALAEA JobKeeper

## Does signing the forms allow an employer to change the EA or Award terms?

There is likely to be confusion around the legislative changes to the variations of enterprise agreements and powers available to a company in receipt of the JobKeeper payments. I have structured the questions and answers accordingly.

## Difference between an agreement variation and powers available under JobKeeper

Given the circumstances and the rate at which things are changing, this is understandably an area of confusion.

### Powers Under JobKeeper

Under the new JobKeeper provisions<sup>1</sup> of the *Fair Work Act 2009* (Cth) (**FW Act**) an employer who qualifies for the JobKeeper Scheme is authorised to give an employee a *reasonable* direction (**JobKeeper Enabling Direction**) modifying, among other things, the duties to be performed by the employee, and/or the location of the employee's work. JobKeeper Enabling Directions are only valid until 28 September 2020, and they are *reasonable*.

An employer may also make a request (**JobKeeper Request**) that an employee takes paid annual leave or work different days or hours. Although phrased as a request, the employee "*must not unreasonably refuse the request*".<sup>2</sup>

### Variation to an Enterprise Agreement

A variation to an enterprise agreement (**Variation**) is an existing provision<sup>3</sup> of the FW Act. A Variation modifies an enterprise agreement for the remaining functional term (until replaced or terminated) of the agreement. A variation must be done with the genuine agreement of the majority of employees covered by the agreement and is similar to the process of making an enterprise agreement.

## Practical effects of signing the JobKeeper form

For your employer to receive the JobKeeper payment, you must agree for the employer to nominate you, this is generally done by completing the ATO JobKeeper Employee Nomination Notice.

The JobKeeper provision of the FW Act requires the employer to be eligible for JobKeeper payments in order to issue JobKeeper Enabling Directions. It does not appear to be a requirement that an individual employee must be in receipt of the JobKeeper payment in order for the employer to issue a JobKeeper Enabling Direction(s).

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<sup>1</sup> Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020; *Fair Work Act 2009* (Cth) ss 789GA – 789GZB.

<sup>2</sup> *Ibid* s 789GG(1)(e), s 789GJ(1)(f).

<sup>3</sup> *Ibid* s 210.

## ALAEA JobKeeper

On this basis, nominating or not, doesn't appear to have a material effect on the validity of JobKeeper Enabling Directions.

### **Does signing the form pave the way for an employer to make JobKeeper Enabling Directions?**

No. it does not appear to have any material effect on the validity of JobKeeper Enabling Directions.

### **Does signing the form pave the way for an employer to make JobKeeper Requests?**

Potentially.

It may be necessary that an employee is receiving JobKeeper payments in order for an employer to issue a valid<sup>4</sup> JobKeeper Request.

Sections 789GG and 789GJ require the employee to be entitled to “*one or more jobkeeper payments for the employee*” before a valid JobKeeper Request can be made.

### **Does signing the form pave the way for an employer to make variations to the Enterprise Agreement?**

#### Short Answer

No.

The *Fair Work Amended (Variation of Enterprise Agreements) Regulations 2020* only changes the access period. It does not change the other requirements for variations to agreements.

Although a valid JobKeeper Enabling direction may be inconsistent with the terms of an enterprise agreement.

#### Detailed Answer

On 16 April 2020, Christian Porter, Minister for Industrial Relations, introduced the *Fair Work Amended (Variation of Enterprise Agreements) Regulations 2020* (Delegated Legislation under the *Fair Work Act 2009*) which inserted regulation 2.09B and part 7 – 4 into the *Fair Work Regulations 2009* (Cth).

This insertion modified the function of s 18(04) of the FW Act to reduce the access period for changes to an enterprise agreement from 7 days to 1 day. This modification is legislated to be automatically repealed after six months, unless extended before that date (16 October 2020).

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<sup>4</sup> Ibid s 789GG(1)(b), s 789GJ(1)(b).

## ALAEA JobKeeper

Variations to enterprise agreements are still required to be undertaken in accordance with section 210 of the FW Act. That is, the following steps must still be taken:

- Employees covered by the agreement must be given a copy of the proposed variations including any materials incorporated by reference into the agreement (see s 180(2)); and
- Employees covered by the agreement must be given a copy of the disclosure documents if any (see s 180(4a)); and
- The terms of the proposed variation(s) must be explained to employees (see s 180(5)); and
- The terms of the proposed variation(s) must be compliant with s 182 of the FW Act, BOOT test etc.; and
- Be genuinely agreed pursuant to s 188, i.e. 50% + 1 vote; and
- an application must be made to the FWC for a variation.

### **Does signing the form pave the way for an employer to make variations to the Ground staff Award [MA00048]**

No, changes to the Award are done by the FWC. Employers are not empowered to make any changes to the Award.

Although a valid JobKeeper Enabling direction may be inconsistent with the terms of the Award.

### **If on long term paid leave, can an employee fill in a job keeper form later when their leave is over?**

The deadline for enrolment in the JobKeeper program is 30 April 2020<sup>5</sup>. At this stage it appears enrolments after this date will not be accepted.

If an employee wishes to nominate for JobKeeper, they should do so before the end of April. If they do not want to nominate, no further action is required.

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<sup>5</sup> ATO information on enrolment <[https://www.ato.gov.au/general/jobkeeper-payment/employers/enrol-for-the-jobkeeper-payment/?=redirected\\_URL](https://www.ato.gov.au/general/jobkeeper-payment/employers/enrol-for-the-jobkeeper-payment/?=redirected_URL)>.

# ALAEA JobKeeper

## Other relevant information relating to JobKeeper directions and Requests

### JobKeeper Enabling Directions

An employee must comply with a *valid* JobKeeper Enabling Direction.<sup>6</sup>

For a JobKeeper Enabling Direction to be *valid*, it must be:

- made because the employer has information that leads them to reasonably believe that the direction is necessary to continue the employment of one or more employees of the employer;<sup>7</sup> and
- reasonable in all the circumstances;<sup>8</sup> and
- made after consultation with the employee or the employees representative;<sup>9</sup> and
- with three days' notice, unless the employee agrees to a lesser period;<sup>10</sup> and
- in writing;<sup>11</sup> and
- expire on or before 28 September 2020<sup>12</sup>

using a JobKeeper Enabling Direction and employer may:

- direct an employee to perform other safe duties within the employee's skill and competency.<sup>13</sup>
- direct an employee to perform their duties at a suitable place other than the usual place of work, including from home as long as the employee is not required to travel an unreasonable distance.<sup>14</sup>

### JobKeeper Requests

And employee must not unreasonably refuse a *valid* JobKeeper Request.<sup>15</sup>

An employer may request the following:

- that an employee performs their duties on different days and at a different time than usual.<sup>16</sup>
- that an employee takes paid annual leave, so long as it would not result in the employee having less than two weeks leave balance.<sup>17</sup>

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<sup>6</sup> *Fair Work Act 2009* (Cth) s 789GQ.

<sup>7</sup> *Ibid* s 789GL(1).

<sup>8</sup> *Ibid* s 789GK.

<sup>9</sup> *Ibid* s 789GM.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid* s 789GN.

<sup>12</sup> *Ibid* s 789GP.

<sup>13</sup> *Ibid* s 789GE.

<sup>14</sup> *Ibid* s 789GF.

<sup>15</sup> Above 2.

<sup>16</sup> *Ibid* s 789GG.

<sup>17</sup> *Ibid* s 789GJ.

## ALAEA JobKeeper

For a JobKeeper Enabling Direction to be *valid*, the following conditions must be satisfied:

- the employer qualifies for the JobKeeper scheme;<sup>18</sup> and
- the employer is entitled to one or more jobkeeper payments 8 for the employee;<sup>19</sup> and
- the employer must make the request;<sup>20</sup> and
- in the case or annual leave requests, complying with the request must not result in the employee retaining less than two weeks of paid leave;<sup>21</sup> or
- the request does not lead to an agreement that has the effect of reducing the employee's number of hours of work (compared with the employee's ordinary hours of work);<sup>22</sup>

### Links

#### relevant documents

[Fair Work Act 2009 \(Cth\)](#)

[Fair Work Regulations 2009 \(Cth\)](#)

[Coronavirus Economic Response Package Omnibus \(Measures No. 2\) Bill2020](#)

[Explanatory Memorandum to the Coronavirus Economic Response Package \(Payments and Benefits\) Bill 2020 and the Coronavirus Economic Response Package Omnibus \(Measures No. 2\) Bill 2020](#)

[Fair Work Amended \(Variation of Enterprise Agreements\) Regulations 2020 \(Cth\)](#)

[Explanatory Memorandum to the Fair Work Amended \(Variation of Enterprise Agreements\) Regulations 2020 \(Cth\)](#)

#### Other links

[ATO JobKeeper advice](#)

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<sup>18</sup> Ibid 789GG(1)(a), 789GJ(1)(a).

<sup>19</sup> Above 4.

<sup>20</sup> Ibid 789GG(1)(c), 789GJ(1)(c).

<sup>21</sup> Ibid 789GJ(1)(d).

<sup>22</sup> Ibid 789GG(2)(d).