

Fair Work Flexibilities

Legacy Employer Guide

To assist businesses with understanding and complying with the extended IR flexibility for legacy employers who no longer qualify for JobKeeper 2.0.

28 September 2020 to 28 March 2021



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Current as at 1 September 2020

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The novel coronavirus (COVID-19) pandemic has drastically shifted the course of life across the globe in 2020. As well as the global health crisis, each country now faces an economic one. In Australia, the Federal Government has rolled out a suite of financial stimulus packages to buoy the Australian economy where possible and support employers, employees and those that now find themselves out of work.

The JobKeeper scheme, described by the Prime Minister as “the biggest economic lifeline in Australia’s history” is aimed at preserving the employer-employee relationship, keeping more businesses in business and more people in jobs. The second phase of JobKeeper, to begin from 28 September 2020 allows ‘legacy employers’ who previously received JobKeeper subsidies under the first iteration of the scheme to continue to issue JobKeeper-enabling directions to eligible employees. The amending provisions are designed to assist those employers who will not re-qualify for JobKeeper 2.0 from 28 September 2020 because they do not meet the requisite decline in turnover test.

ACCI has prepared this guide on the IR flexibilities available to legacy employers, which seeks to explain and answer some of the more common questions employers may have around the modified Fair Work Act flexibilities available.

For detail around JobKeeper 2.0, including employer eligibility we recommend reading ACCI’s JobKeeper 2.0 Employer Guide.

Employers should at all times be conscious of their particular legal obligations applicable under the Fair Work Act 2009, their respective State and Territory WHS legislation and workers compensation legislation, as well as enterprise agreements, awards, contracts and policies and should seek further advice where necessary.

The content of this publication has been prepared based on material available to date (1 September 2020). The material in this guide is of a general nature and should not be regarded as legal advice or relied on for assistance in any particular circumstance or situation. In any important matter, you should seek appropriate independent professional advice in relation to your own circumstances. The Australian Chamber of Commerce and Industry accepts no responsibility or liability for any damage, loss or expense incurred as a result of the reliance on information contained in this guide.

Fair Work Act flexibility for JobKeeper Legacy Employers

1. Fair Work Act Flexibilities for legacy employers and employees

Legacy Employers: Employers who qualified for JobKeeper 1.0 prior to 28 September 2020 who do not qualify for JobKeeper 2.0 but are still able to show at least a 10% decline in turnover and so are able to access some modified workplace law flexibilities for their employees who previously received JobKeeper payments.

Under the temporary Fair Work Act changes employers and employees who previously received JobKeeper subsidies under the first iteration of the scheme (known as legacy employers) will continue to be able to give modified JobKeeper enabling directions **for employees for whom the employer previously received a JobKeeper payment** if they satisfy a **10% decline in turnover test**.

These temporary provisions are designed to provide ongoing assistance to businesses who do not re-qualify for JobKeeper 2.0 because they do not meet the requisite decline in turnover test but can still show they are suffering some level of distress.

Under the flexibilities legacy employers who can demonstrate a 10% decline or more in turnover in relevant quarter in 2020 compared to 2019 can give employees for whom the employer previously received a JobKeeper payment:

- A. **Directions:** changing their current employment arrangements which require the employee to:
 - Work reduced hours or days (a JobKeeper enabling stand down direction) to no less than 60% of the employee's ordinary hours as at 1 March 2020 and that does not require the employee to work less than 2 consecutive hours in a day;
 - Work at an alternative location; or
 - Undertake alternative duties.
- B. **Request** the employees to work different days/times to their ordinary hours/days (as long as the agreement does not require the employee to work less than 2 consecutive hours in a day). This request cannot be unreasonably refused.

These directions can only take effect for a period beginning on or after 28 September 2020.

The flexibilities that apply to legacy employers are not a mirror image of the original JobKeeper Fair Work Act flexibilities that applied to them in JobKeeper 1.0 so it is critical that employers understand the difference includes a number of restrictions that are set out in the following section.

If an employer currently has a JobKeeper direction/request in place but the employer will not qualify for JobKeeper 2.0 and will instead qualify as a legacy employer from 28 September 2020, that existing direction/request will automatically cease at the start of 28 September 2020.

In order to re-issue the direction/request employers will need to make sure that they meet the legacy employer requirements for the direction/request and that they comply with the notification and consultation requirements, both of which are set out in this section.

2. Annual Leave

Legacy employers CANNOT direct employees to take annual leave or make an agreement for the taking of annual leave at half pay.

Any requests to take annual leave by an employer or agreements with employees for the taking of annual leave at half pay made under JobKeeper 1.0 that extend beyond the end of JobKeeper 1.0 (27 September) cease to have effect on 28 September.

For example, if an employee on 15 September under JobKeeper 1.0 had been directed by their legacy employer to take two weeks annual leave from 5 October to 16 October this direction will cease to have effect on 28 September 2020. Meaning that the employee is NOT required to follow the direction to take annual leave during October.

Of course, this only applies to requests made under the JobKeeper Fair Work Act flexibilities. Any other annual leave arrangements an employer and employee have in place at the end of JobKeeper 1.0, such as a standard agreement to take annual leave, can continue unaffected.



3. Threshold requirement: 10% or more decline in turnover

For legacy businesses to qualify to use the Fair Work flexibilities they are required to prove at least a 10% decline in turnover in relevant quarters in 2020 compared with 2019 in order to access the flexibility provisions.

In order to prove the decline business are required to:

- obtain a 10% decline in turnover certificate from a financial services provider; OR
- if they choose to, self-certify where the employer is a small business with less than 15 employees (by head count, excluding casuals who are not employed on a regular and systematic basis).

To be clear a small business employer can still elect to obtain a written certificate from an eligible financial service provider if they choose.

The 10% decline in turnover test requires that:

- **between 28 September and 27 October**, a legacy employer must have a 10% decline in turnover certificate/self-certify for the June quarter (April, May and June) compared to June quarter 2019.
- **between 28 October and 27 February 2021**, a legacy employer must have a 10% decline in turnover certificate/self-certify for the September quarter (July, August, September) compared to September quarter 2019.
- **Between 28 February and 28 March 2021**, a legacy employer must have a 10% decline in turnover certificate/self-certify for the December quarter (October, November, December) compared to December quarter 2019.

Note: these dates align with the BAS lodgment dates for each completed quarter NOT the application of the turnover test for employers to qualify for JobKeeper.

IMPORTANT: A Legacy employer MUST obtain a 10% decline in turnover certificate/self-certify for each subsequent quarter in order to continue to be eligible to continue to use the Fair Work Act flexibilities.

A direction/request automatically ceases to lawfully operate if an employer does not obtain the relevant certificate each quarter.

3.1 Which financial service providers can issue a decline in turnover test certificate?

The following financial service providers can issue a certificate:

- a registered tax agent, BAS agent; or
- a qualified accountant.

Excluding financial service providers who are directors, employees or an associated entity of the employer or an associated entity of the employer.

3.2 How do small businesses self-certify?

Small business owners (less than 15 employees) may choose to have a statutory declaration to the effect that the employer satisfies the 10% decline in turnover test for the designated quarter applicable to a specified time.

The declaration must be made by an individual who either is, or is authorized by, the employer, and who has knowledge of the financial affairs of the employer.

3.3 How is 'turnover' defined?

Turnover is calculated as it is for GST purposes and is reported on Business Activity Statements (BAS). It includes all taxable supplies and all GST free supplies but not input taxed supplies.

For registered charities, they may also include donations they have received or are likely to receive in their turnover for the purpose of determining if they have been adversely affected.

Only Australian based sales are included and therefore, only Australian based turnover is relevant for this test. A decline in overseas operations will not be counted in the turnover test.

Current GST turnover is defined in the GST Act but has been modified for JobKeeper purposes. The amounts included in calculating current GST turnover are the same regardless of whether the business is currently GST registered.

There are four main modifications to the GST turnover calculation:

- Current GST turnover is calculated for the relevant quarter being tested (rather than for 12 months).
- Where an entity is part of a GST group, the entity calculates its GST turnover as if it wasn't part of the group. This means that supplies made by one group member to another will be included in the GST turnover for the purposes of the fall in turnover test.
- The calculation includes the receipt of tax deductible donations by a deductible gift recipient. It also includes gifts of money, property (with a market value of more than \$5,000) and listed Australian shares received by an ACNC-registered charity (that is not a deductible gift recipient). However, none of these receipts are included if they are from an associate.
- External Territories (e.g. Norfolk Island) are treated as if they formed part of the indirect tax zone (i.e. Australia).

Cash or accruals basis

Businesses may use an accruals basis of accounting to calculate both the current GST turnover. However, if the business usually prepares its activity statements on a cash basis, the ATO will allow it to calculate both the current and projected GST turnovers on a cash basis. The ATO expects businesses will usually use the same method as they use for GST. The ATO may seek to understand a business's circumstances where a different accounting method is used to normal. The basis used must be the same for calculating both the current and the projected GST turnover.

3.4 What if there are circumstances making it difficult to compare actual turnover?

The Commissioner of Taxation has discretion to set out alternative tests in specific circumstances where it is not appropriate to compare actual turnover in a quarter in 2020 with actual turnover in a quarter in 2019 under JobKeeper 2.0, which similarly apply to the 10% decline in turnover test that applies for legacy employers. No alternative tests have been determined as yet.

3.5 How does the turnover test apply to corporate groups or connected/affiliated businesses?

The 10% decline in turnover test will be determined by the aggregate turnover of the businesses.

Note that under JobKeeper 1.0, for certain group structures where staff are employed through a special purpose entity, rather than the operating entity, a modified decline in turnover test applied. It is likely the modified turnover test will remain under JobKeeper 2.0, however note the rules in relation to this are yet to be issued.

3.6 What do I do if my business has been trading for less than 12 months?

This situation will likely be addressed by an alternative test determined by the Commissioner of Taxation. Under JobKeeper 1.0, for example, where a business or not-for-profit had not been in operation for a year and therefore had an issue showing that turnover had fallen relative to a year earlier, the business could apply the alternative test which has been determined by the ATO to address this.

3.7 What if my business is not required to lodge a BAS?

Alternative arrangements will be put in place for businesses and non-for-profits that are not required to lodge a BAS (for example, if the entity is a member of a GST Group).

3.8 What happens if a legacy employer does not obtain (for whatever reason) the relevant certificate (or self-certify) for a quarter in a subsequent period?

Where an employer doesn't obtain the required certificate/self-certification for a subsequent period then:

- any directions or requests in place cease to operate on the first day of the subsequent period (either 28 October or 28 February) AND
- the employer cannot give any new directions or requests under the Fair Work Act flexibilities (unless they later get the required certificate/self-certification and satisfy all other requirements to re-issue or remake the direction or request).

3.9 What penalties are there for employers issuing directions or making requests without meeting the 10% decline in turnover test?

An employer who knowingly or recklessly fails to meet the 10% turnover test who proceeds to issue a JobKeeper-enabling direction or makes a request faces penalties of up to \$13,200 for individuals and \$66,600 for body corporates. These penalties may also apply where employees are not notified that a JobKeeper-enabling direction or agreement is continuing or will end during a quarter. Similar civil penalties also apply where an employer knowingly gives false or misleading information to an eligible financial service provider or makes a false declaration.

3.10 Can an employee challenge whether an employee has satisfied the 10% decline in turnover test?

A dispute can only be brought before the Fair Work Commission about whether an employer holds a 10% decline in turnover certificate for a relevant period, or whether the certificate was issued by an eligible financial service provider, but the Fair Work Commission cannot otherwise consider the 10% decline in turnover test.

An examination of whether an employer has actually satisfied the 10% decline in turnover test must be brought in the Federal Court. If the Federal Court finds the employer did not meet the requirement, they can terminate the direction or request.



4. Direction: to work reduced hours or days

IMPORTANT: The ability to direct employees to work reduced hours or days for legacy employers is NOT the same as applied under JobKeeper 1.0.

4.1 What are the stand down provisions that apply to legacy employers and employees?

The new stand down provisions which apply to legacy employers and employees on JobKeeper allow an employer to give a **direction** (called a JobKeeper enabling stand down direction) to an employee to:

- Work a reduced number of hours or days to a **minimum of 60%** of an employee's **ordinary hours** (as assessed on 1 March 2020).
- **BUT cannot** result in an employee working **less than two consecutive hours** in a day that they work (minimum engagement requirement).

An employer can give this direction so long as:

- The employee cannot be **"usefully employed"** for the employee's normal days or hours because of changes to the business attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 (explained at 4.3).
- The direction can be implemented **safely**, having regard to the nature and spread of COVID-19.
- The **hourly rate of pay guarantee** (explained at 4.4) is met.
- The direction is **reasonable** in all the circumstances, including (but not limited to) considering the employee's caring responsibilities and if the direction will have a disparate effect on a category of employees over others who are subject to the same direction.

4.2 What are an employee's "Ordinary Hours as at 1 March 2020"?

An employee's ordinary hours are not the hours the employee did or did not work on 1 March 2020 specifically. Rather, 'ordinary hours' are the quantum of hours the employee is contracted to work, as set out in the employee's industrial instrument or contract of employment. To be clear, ordinary hours does not include the specific days an employee might normally perform those hours, it is just the number of hours.

For example, an employee's ordinary hours as assessed at 1 March 2020 might be 38 hours per week.

Casual employees do not have 'ordinary hours' because, by virtue of the nature of casual employment, they are free to accept or refuse work, and their employers are free to offer work or not.

Regulations will be issued to deal with employees for whom ordinary hours as at 1 March 2020 cannot be calculated for example because the employee was not employed on 1 March 2020 or was on parental leave then.

4.3 How does an employer know if an employee cannot be "usefully employed"?

This situation arises when an employee has no **useful work** available to perform because of the COVID-19 pandemic or because of the Public Health Orders and Directions (however described in each State and Territory) imposing restrictions on individuals and businesses.

Useful work does not have to be the work that the employee ordinarily performs but needs to be genuine productive work that provides a "net benefit" to the employer. Employers should be able to demonstrate that the impacts of the virus or the Government's measures to deal with it have caused the fact that there is no useful work available for the period the employee is stood down.

4.4 What is the "hourly rate of pay guarantee" and how does an employer ensure that the hourly rate of pay guarantee is met?

Reducing the hours/days an employee works **cannot** reduce an employee's "hourly base rate of pay" (the hourly rate the employee earned before the reduction in hours/days).

An employee **must** still be paid their "hourly base rate" for any work they perform during the fortnight.

An employee's "hourly base rate" does not include any additional allowances, loadings or penalties added.

Calculating an employee's hourly base rate

If an employee is not paid hourly, the hourly base rate of pay will generally be determined by:

- The provisions of any applicable industrial instrument (e.g. a modern award or enterprise agreement).
- Where no industrial instrument applies, dividing the payment made in each pay cycle by the number of ordinary hours in the period (again, minus any additional allowances, loadings or penalties added).

Further advice should be sought regarding this issue where unique payment arrangements exist with varying numbers of ordinary hours in each pay cycle.

Employee performing different duties

For an employee performing new duties (see section 6) their hourly base rate is either:

- The employee's new hourly rate for the new duties being performed if they attract a higher rate of pay OR
- The employee's old hourly rate if the new hourly rate for the new duties is lower than the old rate (prior to the direction to change duties).

4.5 Can a direction to work reduced hours/days apply when an employee is on leave (annual, personal etc.)?

If an employee is taking paid or unpaid leave (such as annual leave) or is otherwise entitled to be absent from work (such as on a public holiday), the direction DOES NOT apply.

This means that when an employee is on leave or it's a public holiday, their rate of pay will be their pay according to their ordinary hours of work (as if the direction had not been given).

4.6 If an employee's hours/days of work are reduced as a result of a direction from an employer what happens to the accrual of their leave entitlements?

Employees continue to accrue leave entitlements as if the direction had not been given.

4.7 Does the period when an employee is stood down count towards continuity of service?

Yes, it counts for the purpose of continuity of service for the purposes of redundancy and pay in lieu of notice.

4.8 What requests can an employee make while stood down as a result of a JobKeeper direction to reduce hours/days of work?

An employee may request for permission to engage in any of the following for the duration of the stand down:

- Secondary employment
- Training; or
- Professional development.

Employers must consider these requests and cannot unreasonably refuse them.

Examples of a reasonable refusal might include a request to engage in secondary employment where:

- The request would involve the employee working for a clear competitor.
- The secondary employment would lead to a disclosure of confidential information belonging to the employer.
- It would pose a risk to the employee's health and safety.

Penalty for unreasonably refusing - up to \$12,600 for an individual and \$63,000 for a business.

5. Direction: to change location of work

5.1 When can an employer direct an employee to change their location of work?

A legacy employer may give a **direction** (called a JobKeeper enabling stand down direction) to an employee who previously received JobKeeper payments to perform their duties at a place different to their normal workplace including the employee's home provided that:

- The place is **suitable** for the employee's duties.
- The location is **safe** considering the nature and spread of COVID-19.
- The performance of duties at the new location is reasonably within the **scope** of the employer's business operations.
- The direction is **reasonable** in all the circumstances, including (but not limited to) considering the employee's caring responsibilities and if the direction will have a disparate effect on a category of employees over others who are subject to the same direction.
- The employer has information before them that leads them to **reasonably believe** that this JobKeeper direction is **necessary** to maintain the employment of the employee (explained at 5.2).

5.2 When will the changing of an employee's location be considered "necessary" to maintain the employment of the employee?

The employer needs to have actual factual information before them that leads them to reasonably believe that it is necessary.

"**Necessary**" is best thought of as something more than desirable or preferred. We suggest in considering whether something is "necessary" employers apply the following test to their thinking:

- = "But for" directing the employee to perform different duties the employee would be made redundant.





EXAMPLE: DIRECTION TO WORK REDUCED HOURS/DAYS

Justin works as a receptionist in Chrishell's gym. He is engaged under the Fitness Industry Award 2010 at Level 3. On 1 March 2020, Justin was employed as a full-time employee. This means that at the requisite time, his ordinary hours under the Fitness Industry Award 2010 were 38 hours per week.

In late March 2020, Chrishell's gym closed due to government restrictions aimed at slowing the spread of Coronavirus, and Chrishell consequently qualified for the JobKeeper scheme in relation to Justin.

When restrictions were eased in June 2020, Chrishell reopened the gym, but for reduced hours. She gave Justin a JobKeeper enabling stand down direction reducing his hours from 38 to 15 per week until 27 September 2020.

By 28 September 2020, Chrishell's business has started to recover financially and will not qualify for the extended JobKeeper payment from this date. The actual GST turnover of Chrishell's gym in the June 2020 quarter was at least 10% below the business' actual GST turnover in the June 2019 quarter, and Chrishell has obtained a certificate from an eligible financial service provider to this effect.

Chrishell wants Justin to continue to work reduced hours because the gym still hasn't returned to its normal opening times. The existing direction that applies to Justin cannot continue automatically because Chrishell is a legacy employer. The terms of the existing direction also reduced Justin's hours to below 60% of his ordinary hours on 1 March 2020, which is not permitted by legacy employers after 28 September 2020.

Chrishell gives Justin a new JobKeeper enabling stand down direction under section, which applies from 28 September 2020 and requires Justin to work a minimum of 22.8 hours per week (60% of his ordinary hours on 1 March 2020), with at least 2 consecutive hours on each day Justin works – he works 5 hours on Monday, Tuesday and Wednesday, 7.84 hours on Thursday, and no hours on Friday. Chrishell gives Justin seven days written notice of her intention to give this direction, consults Justin about the direction during the seven days prior to making the direction and keeps a written record of this consultation.

The new direction can apply from 28 September 2020 until 27 October 2020. Once the September quarter is complete, Chrishell must obtain a new 10% decline in turnover certificate for the September 2020 quarter. She will need to notify Justin before 28 October 2020 that the JobKeeper enabling stand down direction will not cease to apply to him on that date. If she does so, the direction can apply until 27 February 2021.

Once the December 2020 quarter is complete, Chrishell must again obtain a new 10% decline in turnover certificate for the December 2020 quarter. She must again notify Justin before 28 February 2021 that the JobKeeper enabling direction will not cease to apply to him on that date. If she does so, the direction can then continue to apply until the start of 29 March 2021. If in the September or December 2020 quarters the business recovers, and no longer satisfies the 10% decline in turnover test (and can therefore not get the certificate), Chrishell will not be eligible to give her employees a JobKeeper enabling direction for the subsequent period. She would need to notify Justin before 28 October 2020 (if the gym no longer satisfies the 10% decline in turnover test for the September 2020 quarter) or before 28 February (if the gym no longer satisfies the test for the December 2020 quarter) that the JobKeeper enabling direction will cease to apply to him on that date (whichever applies).

Justin's base rate of pay under the Fitness Industry Award 2010 is \$21.54 per hour, which cannot be reduced for his hours of work, regardless of the actual number of hours he works.

6. Direction: to alter usual duties

6.1 When can an employer direct an employee to change their usual work duties?

A legacy employer may give a **direction** (called a JobKeeper enabling stand down direction) to an employee who previously received JobKeeper payments to change their normal duties to provided that:

- The modified duties are within the employee's **skill and competence** and the employee holds any necessary license or qualification required to perform the duties.
- The duties are **safe** considering the nature and spread of COVID-19.
- The duties are **reasonably within the scope** of the employer's business operations.
- The direction is **reasonable** in all the circumstances, including (but not limited to) considering the employee's caring responsibilities and if the direction will have a disparate effect on a category of employees over others who are subject to the same direction AND
- the employer has information before them that leads them to **reasonably believe** that this JobKeeper direction is **necessary** to maintain the employment of the employee (explained at 6.2).

6.2 When will changing an employee's duties be considered "necessary" to maintain the employment of the employee?

The employer needs to have actual factual information before them that leads them to reasonably believe that it is necessary.

"**Necessary**" is best thought of as something more than desirable or preferred.

We suggest in considering whether something is "necessary" employers apply the following test to their thinking:

- = "But for" directing the employee to perform different duties the employee would be made redundant.

6.3 Pay rates for employee performing different duties

Employers must pay an employee performing new duties **the higher** of:

an hourly base rate which is either:

- The base hourly pay rate that applies to their previous duties (prior to the direction to change duties); OR
- The base rate that applies to the new duties the employee is performing.

7. Request: to work different days / times of work

IMPORANT: The ability to request employees to work different hours or days for legacy employers is NOT the same as applied under JobKeeper 1.0.

7.1 When can an employer request an employee alter their days/time of work?

A legacy employer can **request** an employee who previously received JobKeeper payments to perform their duties on different days and/or at different times compared to the employee's normal ordinary days /hours of work provided that:

- the performance of the duties on those days is generally safe considering the nature and spread of COVID-19.
- the performance of the duties on those days is reasonably within the scope of the employer's business operations.
- The agreement does not have the effect of reducing the employee's number of hours of work compared to the employee's ordinary hours of work.
- The agreement does not have the effect of requiring the employee to work less than 2 consecutive hours in a day that they do work (minimum engagement requirement).

An employee **cannot unreasonably** refuse such a request.

Employees must be paid in full for the days/time they work including any applicable penalty rates, loadings or other allowance which might apply to their alternative days/times of work.

7.2 Requests and general protections

An employee's ability to agree or disagree to perform duties on different days or at different times at the request of an employer is a workplace right for the purposes of general protections under the Fair Work Act. Adverse action cannot be taken against an employee because of the employee's workplace right.



8. Notification and consultation requirements BEFORE a direction/request is given

To assist legacy employers in meeting the notification and consultation obligations covered in this section see the Annexures at the end of this guide for checklists and template letters when giving a JobKeeper enabling direction as a legacy employer.

A direction given by a legacy employer WILL NOT apply to an employee unless the employer provides notice and takes the following steps to consult at least 7 days before the direction is to be given (or less if the employee agrees) and keeps a written record of the consultation:

- **provide written notice** of the employer's intention to give the direction
 - this can be by electronic means
 - this notice may be required to be in a prescribed form set out in regulation, none has yet been published/prescribed
- **provide the employee or their appointed representative (if any) with information** about the proposed direction. This may include for example:
 - information about the nature of the direction;
 - information about when the direction is to take effect;
 - information about the expected effects of the direction on the employee

Note: employers are NOT required to disclose confidential or commercially sensitive information to the employee.
- **Invite the employee or their appointed representative (if any) to give their views** about the impact of the proposed direction on the employee (including any impact in relation to family or caring responsibilities).
 - Employers must give prompt and genuine consideration to these views.

Employers must recognize an employee's representative in the consultation process if an employee advises them of one. If this occurs midway through consultation, an employer must recongise the representative for the remainder of the consultation.

Note: If an employee (or their representative, if any) gives views about a proposed direction and the employer in considering those views modifies the proposed direction to take account of their view, the employer does not have to repeat the notice and consultation requirements to give the modified direction.

EXAMPLE: NOTIFICATION & CONSULTATION

Alyssa works as a retail assistant in Cody's pet accessories boutique. Cody's business qualified for the JobKeeper scheme prior to 28 September 2020. His business is starting to recover so he will not requalify for the extended JobKeeper scheme, though he has still satisfied the 10% decline in turnover test for the June 2020 quarter. Cody has obtained a certificate from an eligible financial service provider to this effect.

Alyssa was given a valid JobKeeper enabling stand down direction in April 2020 that will cease at the start of 28 September 2020 (because Cody's business will no longer qualify for the JobKeeper scheme). As a legacy employer, Cody can give Alyssa a JobKeeper enabling stand down direction. All of the requirements of this section have been met, and Cody wants to give Alyssa a new JobKeeper enabling stand down direction on 28 September 2020 with effect from that day.

On 14 September 2020, Cody gives Alyssa notice of her intention to give the new direction (more than the statutorily required seven days' notice).

On 16 September 2020, Cody decides to start consultation. Cody sends Alyssa an email in which she sets out information about the proposed new direction, including that it is a JobKeeper enabling stand down direction that proposes to direct Alyssa to work 70% of her ordinary hours as at 1 March 2020. The email states the proposed direction would take effect from 28 September 2020 and sets out a proposal for how Alyssa's normal days and times of work would be reduced to give effect to the fewer hours. The email invites Alyssa to give her views on the impact of the proposed JobKeeper enabling stand down direction.

On 18 September 2020, Alyssa decides to appoint Emily, her friend, to be her representative for the purposes of this consultation. Alyssa tells Cody she has appointed Emily. Emily asks Cody if they can have a phone call to discuss the proposed direction, and they agree on a call on 23 September 2020. During the call, Emily conveys Alyssa's concern that Cody's proposal for how Alyssa's normal days and times of work would be reduced will make it harder to arrange care for her young child because she would work shorter shifts each day. Alyssa would prefer to work her normal length shifts on fewer days, instead.

On 24 September 2020, Cody considers his full staffing availability and rosters to see whether he can accommodate Alyssa's request, which she determines that she can. Cody emails Emily and Alyssa to tell them this and sets out the new proposal for Alyssa's reduced hours. Emily replies noting that Alyssa prefers the new proposal, and Cody confirms this arrangement will be reflected in the direction she gives. Cody does not have to repeat the notice and consultation requirements for the reformulated direction as she has already done this for the original proposal.

On 26 September 2020, Cody gives Alyssa the direction reflecting the agreed days and times Alyssa will work, to take effect from 28 September 2020. The effect of this direction can continue until 27 October 2020. After 27 October 2020 it will depend on whether Cody's business satisfies the 10% decline in turnover test for the September 2020 quarter, obtaining the necessary 10% decline in turnover certificate and notifying Alyssa of the direction continuing (or ceasing if no certificate).



9. Ongoing notification requirements for subsequent periods

To assist legacy employers in meeting the notification obligations covered in this section, see the Annexures at the end of this guide for checklists and template letters when giving a JobKeeper enabling direction as a legacy employer.

As explained in 7.3 legacy employers **MUST** obtain a 10% decline in turnover certificate/self-certify for each subsequent quarter in order to continue to be eligible to use the Fair Work Act flexibilities:

- **28 September and 27 October:** 10% decline in turnover certificate for June quarter
- **28 October and 27 February 2021:** 10% decline in turnover certificate for September quarter
- **28 February and 28 March 2021:** 10% decline in turnover certificate for December quarter

This means after originally qualifying on 28 September employers will need to get a new turnover certificate/self-certification at the start of each test time (on 28 October 2020 and on 28 February 2021) if they are to continue to qualify to use the legacy employer Fair Work Act flexibilities.

TEST TIME: The first day of each subsequent new period requiring a new certificate:

- **28 October 2020** (September quarter certificate required) and
- **28 February 2021** (December quarter certificate required).

Employers **MUST** also notify employees before Test Time (before 28 October 2020 and 28 February 2021) as to whether a direction/request currently in operation will either:

- continue to apply as a result of the employer obtaining a relevant certificate OR
- will cease to apply as a result of the employer not obtaining the relevant certificate.

A direction/request automatically ceases to lawfully operate if an employer does not hold the relevant certificate at the Test Time.

EXAMPLE: NOTIFICATION OF DIRECTION CEASING

If an employer has given an employee a JobKeeper enabling stand down direction to reduce an employee's hours of work between 28 September and 27 October 2020, but the employer does not obtain the certificate for the September 2020 quarter before 28 October 2020, that reduction in hours direction will cease at the start of 28 October 2020.

The employer must therefore notify the employee in writing before 28 October 2020 informing them that the direction will cease from 28 October 2020.

EXAMPLE: NOTIFICATION OF DIRECTION CONTINUING

If an employer has given an employee a JobKeeper direction to work from an alternative location between 28 October 2020 and 27 February 2021, and the employer does obtain the certificate for the December 2020 quarter before 28 February 2021, that direction will continue on and after 28 February 2021 (until the provisions repeal at the start of 29 March 2021).

The employer must therefore notify the employee in writing before 28 February 2021 that the direction will continue.

9.1 Are there any penalties that apply if an employer fails to notify an employee?

If an employer fails to properly notify an employee on more than one occasion, they may face civil penalties.

To be clear more than one occasion' covers the failure to notify different employees at different times.

10. Disputes

The Fair Work Commission can deal with disputes between employers and employees about the directions/requests by legacy employers.

As explained at 3.10 a dispute can only be brought before the Fair Work Commission about whether an employer holds a 10% decline in turnover certificate for a relevant period, or whether the certificate was issued by an eligible financial service provider. The Fair Work Commission cannot otherwise consider the 10% decline in turnover test.

The Fair Work Commission may arbitrate the dispute and will impose a decision on the employer and employee.

Arbitration – a formal process, where if the parties are not able to agree to a solution the Commission can sometimes decide for them what the solution should be. This decision would only be made after the parties have had a chance to present their evidence and arguments.

The Fair Work Commission can also mediate, conciliate, make a recommendation or express an opinion. In dealing with the dispute, the Fair Work Commission must take into account fairness between the parties in dispute.

10.1 Who can bring a dispute about a JobKeeper direction to the Fair Work Commission?

An application (Form F13A) to the Fair Work Commission to deal with a JobKeeper dispute may be made by:

- an employee or a union; or
- an employer or an employer organisation.

10.2 What orders can the Fair Work Commission make?

In making a decision about JobKeeper, the Fair Work Commission can:

- Make an order that the Commission considers desirable to give effect to a JobKeeper employer direction.
- Make an order setting aside a JobKeeper employer direction.
- Make an order substituting a different JobKeeper employer direction for the one made.
- Make any other order that the Commission considers appropriate.

10.3 What is the penalty for failing to follow a decision imposed by the Fair Work Commission regarding JobKeeper?

Up to **\$12,600** for an individual and **\$63,000** for a business.



11. Where and who to contact for further information and assistance?

11.1 Key resources

The following are links to government websites and information on the JobKeeper payment.

Australian Tax Office – [JobKeeper Payment](#)

Business.gov.au – [JobKeeper Payment for employers and employees](#)

Treasury – [JobKeeper Payment](#)

8.1.1 Key Forms

ATO - [JobKeeper Employee Nomination Notice](#)

Fair Work Commission – [Form F13A – Application for the Commission to deal with a JobKeeper dispute \(coronavirus economic response\)](#)

11.2 Key Contacts

Have a question or situation that isn't covered by this guide? The Australian Chamber of Commerce and Industry network is here to help and answer any questions you might have. A list of ACCI member organisations in each state and territory and representing major industries can be accessed [here](#), or you can call ACCI on (03) 9668 9950 to be referred to our members.

[Key ACCI Contacts for the Guide](#)

Tamsin Lawrence

Deputy Director – Workplace Relations

Ingrid Fraser

Senior Advisor – Workplace Relations



Annexures: checklist & template letters

To assist legacy employers in meeting the notification obligations that apply under the JobKeeper provisions of the Fair Work Act we have developed checklists and template letters for each of the JobKeeper enabling directions that legacy employers may seek to utilise.

Annexure 1 – Direction to reduce an employee’s hours/days of work

- Checklist
- Template Letter A - June quarter notification & consultation letter
- Template Letter B - Issuing direction letter
- Template Letter C - September quarter notification letter
- Template Letter D - December quarter notification letter

Annexure 2 – Direction to change an employee’s location of work

- Checklist
- Template Letter A - June quarter notification & consultation letter
- Template Letter B - Issuing direction letter
- Template Letter C - September quarter notification letter
- Template Letter D - December quarter notification letter

Annexure 3 – Direction to alter an employee’s usual duties

- Checklist
- Template Letter A - June quarter notification & consultation letter
- Template Letter B - Issuing direction letter
- Template Letter C - September quarter notification letter
- Template Letter D - December quarter notification letter

Annexure 1 | Legacy employer checklist & template letters to reduce employee hours/days of work

Preliminary matters

- **Establish Eligibility:** Are you eligible as a legacy employer:
 - ✓ You previously qualified for JobKeeper 1.0
 - ✓ You have obtained a 10% decline in turnover certificate (or self-certification if applicable) for the relevant quarter (June, September or December)
 - ✓ The employee you wish to give the direction to previously received JobKeeper payments
- **Check pre-requisites:** Have you met all the pre-requisites which allow you to issue the direction?
 - The employee cannot be usefully employed for their normal days or hours because of changes to the business that are attributable to the coronavirus pandemic or government initiatives to slow the transmission of coronavirus.
 - The implementation of the direction is safe (including considering the nature and spread of COVID-19).
 - The employee's hours/days are not being reduced below 60% of the employee's ordinary hours (as assessed on 1 March 2020).
 - The reduction in hours/days will not result in the employee working less than two consecutive hours in a day that they work (minimum engagement requirement).
- **Ensure the direction is 'reasonable':** Ensure the direction is reasonable, in all the circumstances.



This requires you to take into account all the circumstances, including the employee's caring responsibilities and if the direction will have a disparate effect on a category of employees over others who are subject to the same direction. If a direction is unreasonable, it does not apply to an employee.

Before issuing a JobKeeper enabling direction to reduce employee hours/days of work

- **Give written notice:** Give the employee at least 7 days' written notice before giving the JobKeeper enabling direction (or less if the employee agrees)
 - Provide the employee or their appointed representative (if any) with written information about the proposed direction. This may include for example:
 - information about the nature of the direction;
 - information about when the direction is to take effect;
 - information about the expected effects of the direction on the employee



You are NOT required to disclose confidential or commercially sensitive information to the employee or their representative. This notice can be given by electronic means



SEE TEMPLATE LETTER A

Employers should use this template letter to notify employee in writing of an intention to give a direction at least 7 days before issuing the direction (unless the employee genuinely agrees to a shorter timeframe).

If an employer currently has a JobKeeper direction in place but the employer will not qualify for JobKeeper 2.0 and will instead qualify as a legacy employer from 28 September 2020, the existing direction will automatically cease at the start of 28 September 2020 unless you ensure a current direction meets the prerequisites, give notice to your employee that you are re-issuing the direction as a legacy employer before 22 September 2020 (unless a later date is agreed), consult with them (or their representative if any) and re-issue the direction.

- **Consult:** Consult with the employee/s (or their representative) about the direction
 - Invite the employee or their appointed representative (if any) to give their views about the impact of the proposed direction on the employee (including any impact in relation to family or caring responsibilities).
 - You must give prompt and genuine consideration to these views.
- **Keep records:** Keep a written record of the consultation
- **Notify:** Notify the employee of your decision following consultation



SEE TEMPLATE LETTER B

After consulting with the employee (or their representative) use this template letter to issue the direction to your employee to change their location of work.

Ongoing notification requirements for subsequent periods

- **Notify before 28 October 2020** (if direction still in operation): Notify the employee as to whether the direction will either:
 - Continue to apply as a result of you obtaining a September quarter certificate OR
 - Will cease to apply as a result of you not obtaining a September quarter certificate.



SEE TEMPLATE LETTER C

Employers should use this template letter to notify an employee in writing before 28 October 2020 as to whether the direction will either continue or cease.

In order for the direction to continue to apply an employer must have a new turnover certificate/self-certification at the start of 28 October 2020 for the September quarter.

A direction automatically ceases to lawfully operate if an employer does not hold a September quarter certificate/self-certification.

- **Notify before 28 February 2021** (if direction still in operation): Notify the employee as to whether the direction will either:
 - Continue to apply as a result of you obtaining a December quarter certificate OR
 - Will cease to apply as a result of you not obtaining a December quarter certificate.



SEE TEMPLATE LETTER D

Employers should use this template letter to notify an employee in writing before 28 February 2020 as to whether the direction (if currently still in operation) will either continue or cease.

In order for the direction to continue to apply an employer must have a new turnover certificate/self-certification at the start of 28 February 2020 for the December quarter.

A direction automatically ceases to lawfully operate if an employer does not hold a September quarter certificate/self-certification.

! How to use the template letters

The template letters contains **highlighted** text which indicates areas which you simply need to replace the writing with what applies to your employee's situation. Explanatory information is shown in *blue italics* to assist you and should be deleted once you have finalized the letter. **Ensure all highlighted text and explanatory information has been completed or deleted, as appropriate, before issuing a letter to any employee.**

These documents are intended as a guide only and do not provide or purport to provide legal advice to any person or business. Individuals and businesses should obtain independent legal advice specific to their circumstances.

TEMPLATE LETTER A – JUNE QUARTER NOTIFICATION & CONSULTATION LETTER

<Insert company letterhead>

<Insert Date>

Private and confidential

<Insert employee's full name>

<Insert employee's address>

Dear <Employee>

Notice of intention to issue legacy employer JobKeeper enabling stand down direction to reduce hours or days of work

As a result of [the COVID-19 pandemic OR government initiatives to slow the transmission of COVID-19] we are considering changes to support the continued operation of the business which we reasonably consider will necessary in order to maintain employment.

As a part of these changes I am writing to notify you that I intend to give you a JobKeeper stand down direction to [reduce your hours/days of work] from [insert start date] in regards to your employment as a [insert position] with [insert company name].

[Explanatory information – please delete before issuing letter: Employees must be given at least SEVEN days' notice before the direction takes effect, unless an employee genuinely agrees to a shorter notice period. Employers should ensure the proposed start date listed here meets this criteria.]

I intend to reduce your hours/days of work as follows:

- [insert details of how the employee's hours and/or days of work have been reduced e.g. 'from 38 hours a week to 32 hours a week'].

[Explanatory information – please delete before issuing letter: An employee's hours cannot be reduced below 60% of the employee's ordinary hours as at 1 March. Ordinary hours are not the hours the employee did or did not work on 1 March 2020 specifically. Rather, 'ordinary hours' are the quantum of hours the employee is contracted to work, as set out in the employee's industrial instrument or contract of employment e.g. 38 hours per week.]

Meeting to discuss this letter

I would like to consult with you and your representative (if you wish to appoint one) about my intention to issue this direction.

You are invited to attend a [meeting/phone call/zoom meeting] on [insert date of proposed meeting] at [insert time/place] where I would like to hear your views and any concerns you have about the above proposed changes.

Please contact me on [insert phone number] to confirm your availability to attend the proposed meeting or to advise if this time is not convenient so a new time can be scheduled.

Why are my [hours and/or days] being reduced?

[insert the business/company name] has qualified as a legacy employer under the amended JobKeeper related provisions of the Fair Work Act. We intend to temporarily reduce your hours because you cannot be usefully employed for your normal hours because of changes to our business attributable to [the COVID-19 pandemic OR government initiatives to slow the transmission of COVID-19].

How will my pay be affected during this period?

For the period of this intended direction, you will be paid your usual pay for any hours that you work [insert payment of wages details i.e. 'the relevant pay under the <insert award or agreement>'] for any hours that you work. Your hourly base pay rate will not be reduced during this period.

You will continue to accumulate leave as normal during your period of reduced hours. While you are taking a authorised paid or unpaid leave (such as an annual leave) or are otherwise entitled to be absent from work (such as on a public holiday), the intended direction won't apply. During these periods, you will be paid as normal.

If you have any questions about the matters raised above, please do not hesitate to contact me on [insert contact details].

Thank you for your understanding during this difficult time.

Yours sincerely,

<Insert name>

<Insert position>

TEMPLATE LETTER B – ISSUING DIRECTION LETTER

<Insert company letterhead>

<Insert Date>

Private and confidential

<Insert employee's full name>

<Insert employee's address>

Dear <Employee>

Legacy employer JobKeeper enabling direction to reduce employee hours or days of work

I am writing to inform you that as of [insert date] I am directing you to reduce your [hours and/or days] of work from [insert start date] in regards to your employment as a [insert position] with [insert company name].

As part of these changes, on [insert date] we gave you notice of [insert company name] intention to give you a JobKeeper enabling direction to reduce your [hours and/or days].

[Option 1 Explanatory information: *Include the below if this JobKeeper enabling direction is the same as the proposed JobKeeper enabling direction you originally notified the employee about]*

On [insert date], I discussed this direction with you [and insert names of any other parties involved in discussions if relevant i.e. and your representative]. We discussed [insert details of discussion].

[Option 2 Explanatory information: *Include if this JobKeeper enabling direction is a different JobKeeper enabling direction than the one you originally proposed to issue to the employee]*

On [insert date], I discussed with you [and insert names of any other parties involved in discussions if relevant i.e. and your representative] an earlier direction. We discussed [insert details of discussion].

This direction is now different to the original written notification I gave you on [insert date] as in reaching the decision to issue this direction, I have considered your views as expressed in our earlier discussion.

Your [hours and/or days] of work have been reduced as follows:

- [insert details of how the employee's hours and/or days of work have been reduced e.g. from 38 hours a week to 32 hours a week]

Why are my [hours and/or days] being reduced?

[insert the business/company name] has qualified as a legacy employer under the amended JobKeeper related provisions of the Fair Work Act. We intend to temporarily reduce your hours because you cannot be usefully employed for your normal hours because of changes to our business attributable to [the COVID-19 pandemic OR government initiatives to slow the transmission of COVID-19].

How will my pay be affected during this period?

For the period of this intended direction to change your duties, you will be paid [insert payment of wages details i.e. 'the relevant pay under the <insert award or agreement>] for any hours that you work. Your hourly base pay rate will not be reduced during this period.

[Explanatory information – please delete before issuing letter. An employee's base pay rate can't be reduced while a direction to change usual duties is in place. If the temporary new duties attract a higher base pay rate (for example, under an applicable award or enterprise agreement), the employee needs to be paid the higher pay rate.]

[Delete sentence if not relevant] As the intended temporary duties will attract a higher base rate of pay under the [insert award or agreement details], you will be paid the higher pay rate during this period of [insert pay rate] per hour and any other applicable entitlements at this higher rate during this period.

Thank you for your understanding during this difficult time. If you have any question about this letter, please do not hesitate to contact on [insert contact details].

Yours sincerely,

<Insert name>

<Insert position>

TEMPLATE LETTER C – SEPTEMBER QUARTER NOTIFICATION LETTER

<Insert company letterhead>

<Insert Date>

Private and confidential

<Insert employee's full name>

<Insert employee's address>

Dear <Employee>

Legacy employer JobKeeper enabling direction to reduce employee hours or days of work

[Option 1 Explanatory information: Include the below if you have given a JobKeeper enabling stand down direction to reduce an employee's hours and/or days of work and you have obtained a September quarter certificate before 28 October confirming that you continue to satisfy the 10% decline in turnover test required]

I am writing to inform you that the direction given to you on [insert date] to reduce your [hours and/or days] of work in regards to your employment as a [insert position] with [insert company name] will continue to apply to you on and after 28 September 2020 until 28 February 2021 as [insert company name] has obtained a September quarter [certificate/self-certification] confirming that we continue to satisfy the 10% decline in turnover test required.

Your [hours and/or days] of work will remain reduced at:

- [insert details of how the employee's hours and/or days of work have been reduced e.g. from 38 hours a week to 32 hours a week]

Thank you for your continued understanding during this difficult time.

[Option 2 Explanatory information: Include the below if you have given a JobKeeper enabling stand down direction to reduce an employee's hours and/or days of work but you have NOT obtained a September quarter certificate confirming that you continue to satisfy the 10% decline in turnover test required before 28 October meaning that the direction will cease to operate on 28 October 2020]

I am writing to inform you that the direction given to you on [insert date] to reduce your [hours and/or days] of work in regards to your employment as a [insert position] with [insert company name] will cease to apply to you on and after 28 September 2020 as [insert company name] has not obtained a September quarter [certificate/self-certification].

Your [hours and/or days] of work from 28 September 2020 will therefore revert back to [insert original hours and/or days of work].

If you have any questions about this matter, please do not hesitate to contact me on [insert contact details].

Yours sincerely,

<Insert name>

<Insert position>

TEMPLATE LETTER D – DECEMBER QUARTER NOTIFICATION LETTER

<Insert company letterhead>

<Insert Date>

Private and confidential

<Insert employee's full name>

<Insert employee's address>

Dear <Employee>

Legacy employer JobKeeper enabling direction to reduce employee hours or days of work

[Option 1 Explanatory information: Include the below if you have given a JobKeeper enabling stand down direction to reduce an employee's hours and/or days of work and you have obtained a December quarter certificate before 28 February confirming that you continue to satisfy the 10% decline in turnover test required]

I am writing to inform you that the direction given to you on [insert date] to reduce your [hours and/or days] of work in regards to your employment as a [insert position] with [insert company name] will continue to apply to you on and after 28 February 2020 until 28 March 2020 as [insert company name] has obtained a December quarter [certificate/self-certification] confirming that we continue to satisfy the 10% decline in turnover test required.

Your [hours and/or days] of work will remain reduced at:

- [insert details of how the employee's hours and/or days of work have been reduced e.g. from 38 hours a week to 32 hours a week]

Thank you for your continued understanding during this difficult time.

[Option 2 Explanatory information: Include the below if you have given a JobKeeper enabling stand down direction to reduce an employee's hours and/or days of work but you have NOT obtained a December quarter certificate confirming that you continue to satisfy the 10% decline in turnover test required before 28 February meaning that the direction will cease to operate on 28 February 2020]

I am writing to inform you that the direction given to you on [insert date] to reduce your [hours and/or days] of work in regards to your employment as a [insert position] with [insert company name] will cease to apply to you on and after 28 February 2020 as [insert company name] has not obtained a December quarter [certificate/self-certification].

Your [hours and/or days] of work from 28 February 2020 will therefore revert back to [insert original hours and/or days of work].

If you have any questions about this matter, please do not hesitate to contact me on [insert contact details].

Yours sincerely,

<Insert name>

<Insert position>

Annexure 2 | Legacy employer checklist & template letters to change employee location of work

Preliminary matters

- **Establish Eligibility:** Are you eligible as a legacy employer:
 - ✓ You previously qualified for JobKeeper 1.0
 - ✓ You have obtained a 10% decline in turnover certificate (or self-certification if applicable) for the relevant quarter (June, September or December)
 - ✓ The employee you wish to give the direction to previously received JobKeeper payments

- **Check pre-requisites:** Have you met all the pre-requisites which allow you to issue the direction?
 - you have information before you that leads you to reasonably believe that the direction is necessary to maintain the employment of one or more employees.
 -  *The direction won't apply to the employee unless the employer reasonably believes that the direction is necessary to continue the employment of 1 or more employees.*
 - the change of work location is safe (including considering the nature of spread of COVID-19).
 - the new location is suitable for the employee's duties.
 - the performance of the duties at the new location is reasonably within the scope of the business's operation.
 - the new location is within a reasonable travelling distance.

- **Ensure the direction is 'reasonable':** Ensure the direction is reasonable, in all the circumstances.
 -  *This requires you to take into account all the circumstances, including the employee's caring responsibilities and if the direction will have a disparate effect on a category of employees over others who are subject to the same direction. If a direction is unreasonable, it does not apply to an employee.*

Before issuing a JobKeeper enabling direction to change location of work

- **Give written notice:** Give the employee at least 7 days' written notice before giving the JobKeeper enabling direction (or less if the employee agrees)
 - Provide the employee or their appointed representative (if any) with written information about the proposed direction. This may include for example:
 - information about the nature of the direction;
 - information about when the direction is to take effect;
 - information about the expected effects of the direction on the employee

-  *You are NOT required to disclose confidential or commercially sensitive information to the employee or their representative. This notice can be given by electronic means*



SEE TEMPLATE LETTER A

Employers should use this template letter to notify employee in writing of an intention to give a direction at least 7 days before issuing the direction (unless the employee genuinely agrees to a shorter timeframe).

If an employer currently has a JobKeeper direction in place but the employer will not qualify for JobKeeper 2.0 and will instead qualify as a legacy employer from 28 September 2020, the existing direction will automatically cease at the start of 28 September 2020 unless you ensure a current direction meets the prerequisites, give notice to your employee that you are re-issuing the direction as a legacy employer before 22 September 2020 (unless a later date is agreed), consult with them (or their representative if any) and re-issue the direction.

- **Consult:** Consult with the employee/s (or their representative) about the direction
 - Invite the employee or their appointed representative (if any) to give their views about the impact of the proposed direction on the employee (including any impact in relation to family or caring responsibilities).
 - You must give prompt and genuine consideration to these views.
- **Keep records:** Keep a written record of the consultation
- **Notify:** Notify the employee of your decision following consultation



SEE TEMPLATE LETTER B

After consulting with the employee (or their representative) use this template letter to issue the direction to your employee to change their location of work.

Ongoing notification requirements for subsequent periods

- **Notify before 28 October 2020** (if direction still in operation): Notify the employee as to whether the direction will either:
 - Continue to apply as a result of you obtaining a September quarter certificate OR
 - Will cease to apply as a result of you not obtaining a September quarter certificate.



SEE TEMPLATE LETTER C

Employers should use this template letter to notify an employee in writing before 28 October 2020 as to whether the direction will either continue or cease.

In order for the direction to continue to apply an employer must have a new turnover certificate/self-certification at the start of 28 October 2020 for the September quarter.

A direction automatically ceases to lawfully operate if an employer does not hold a September quarter certificate/self-certification.

- **Notify before 28 February 2021** (if direction still in operation): Notify the employee as to whether the direction will either:
 - Continue to apply as a result of the you obtaining a December quarter certificate OR
 - Will cease to apply as a result of you not obtaining a December quarter certificate.



SEE TEMPLATE LETTER D

Employers should use this template letter to notify an employee in writing before 28 February 2021 as to whether the direction (if currently still in operation) will either continue or cease.

In order for the direction to continue to apply an employer must have a new turnover certificate/self-certification at the start of 28 February 2021 for the December quarter.

A direction automatically ceases to lawfully operate if an employer does not hold a December quarter certificate/self-certification.

! How to use the template letters

The template letters contains **highlighted** text which indicates areas which you simply need to replace the writing with what applies to your employee situation. Explanatory information is shown in *blue italics* to assist you and should be deleted once you have finalized the letter. **Ensure all highlighted text and explanatory information has been completed or deleted, as appropriate, before issuing a letter to any employee.**

These documents are intended as a guide only and do not provide or purport to provide legal advice to any person or business. Individuals and businesses should obtain independent legal advice specific to their circumstances.

TEMPLATE LETTER A – JUNE QUARTER NOTIFICATION & CONSULTATION LETTER

<Insert company letterhead>

<Insert Date>

Private and confidential

<Insert employee's full name>

<Insert employee's address>

Dear <Employee>

Notice of intention to issue legacy employer JobKeeper enabling direction to change your location of work

As a result of [the COVID-19 pandemic OR government initiatives to slow the transmission of COVID-19] we are considering changes to support the continued operation of the business which we reasonably consider will necessary in order to maintain employment.

As a part of these changes I am writing to notify you that I intend to give you the following JobKeeper enabling direction to change your location of work from [insert start date] in regards to your employment as a [insert position] with [insert company name].

[Explanatory information – please delete before issuing letter: Employees must be given at least SEVEN days' notice before the direction takes effect, unless an employee genuinely agrees to a shorter notice period. Employers should ensure the proposed start date listed here meets this criteria.]

I intend to change your location of work as follows:

- Your current location of work will be changed from [insert details of original address] to [insert new address].

Meeting to discuss this letter

I would like to consult with you and your representative (if you wish to appoint one) about my intention to issue this direction.

You are invited to attend a [meeting/phone call/zoom meeting] on [insert date of proposed meeting] at [insert time/place] where I would like to hear your views and any concerns you have about the above proposed changes.

Please contact me on [insert phone number] to confirm your availability to attend the proposed meeting or to advise if this time is not convenient so a new time can be scheduled.

Why has my work location been changed?

[insert the business/company name] has qualified as a legacy employer under the amended JobKeeper related provisions of the Fair Work Act. We intend to temporarily change your location so we can keep employing as many people as we can during this difficult time.

How will my pay be affected during this period?

For the period of this intended direction to change your location, you will be paid [insert payment of wages details ie. 'the relevant pay under the <insert award or agreement>] for any hours that you work. Your hourly base pay rate will not be reduced during this period.

[Explanatory information – please delete before issuing letter. An employee's base pay rate can't be reduced while a direction to change location is in place.]

If you have any questions about the matters raised above, please do not hesitate to contact me on [insert contact details].

Thank you for your understanding during this difficult time.

Yours sincerely,

<Insert name>

<Insert position>

TEMPLATE LETTER B – ISSUING DIRECTION LETTER

<Insert company letterhead>

<Insert Date>

Private and confidential

<Insert employee's full name>

<Insert employee's address>

Dear <Employee>

Legacy employer JobKeeper enabling direction to alter employee work location

I am writing to inform you that as of [insert date] I am directing you to change your location of work from [insert start date] in regards to your employment as a [insert position] with [insert company name].

As part of these changes, on [insert date] we gave you notice of [insert company name] intention to give you a JobKeeper enabling direction to alter your location of work.

[Option 1 Explanatory information: Include the below if this JobKeeper enabling direction is the same as the proposed JobKeeper enabling direction you originally notified the employee about]

On [insert date], I discussed this direction with you [and insert names of any other parties involved in discussions if relevant i.e. and your representative]. We discussed [insert details of discussion].

[Option 2 Explanatory information: Include if this JobKeeper enabling direction is a different JobKeeper enabling direction than the one you originally proposed to issue to the employee]

On [insert date], I discussed with you [and insert names of any other parties involved in discussions if relevant i.e. and your representative] an earlier direction. We discussed [insert details of discussion].

This direction is now different to the original written notification I gave you on [insert date] as in reaching the decision to issue this direction, I have considered your views as expressed in our earlier discussion.

Your current location of work will be changes from [insert original address] to [insert new address]

How will my pay be affected during this period?

For the period of this intended direction to change your location, you will be paid [insert payment of wages details i.e. 'the relevant pay under the <insert award or agreement>] for any hours that you work. Your hourly base pay rate will not be reduced during this period.

[Explanatory information – please delete before issuing letter. An employee's base pay rate can't be reduced while a direction to change usual location is in place.]

If you have any questions about this letter, please do not hesitate to contact me on [insert contact details].

Thank you for your understanding during this difficult time. If you have any question about this matter, please do not hesitate to contact me.

Yours sincerely,

<Insert name>

<Insert position>

TEMPLATE LETTER C – SEPTEMBER QUARTER NOTIFICATION LETTER

<Insert company letterhead>

<Insert Date>

Private and confidential

<Insert employee's full name>

<Insert employee's address>

Dear <Employee>

Legacy employer JobKeeper enabling direction to alter employee work location

[Option 1 Explanatory information: Include the below if you have given a JobKeeper enabling direction to alter an employee's location of work and you have obtained a September quarter certificate before 28 October confirming that you continue to satisfy the 10% decline in turnover test required]

I am writing to inform you that the direction given to you on [insert date] to perform change your location of work in regards to your employment as a [insert position] with [insert company name] will continue to apply to you on and after 28 September 2020 until 28 February 2021 as [insert company name] has obtained a September quarter [certificate/self-certification] confirming that we continue to satisfy the 10% decline in turnover test required.

Your location of work will therefore remain at [insert details of employee altered location of work].

Thank you for your continued understanding during this difficult time.

[Option 2 Explanatory information: Include the below if you have given a JobKeeper enabling direction to alter an employee's location of work but you have NOT obtained a September quarter certificate confirming that you continue to satisfy the 10% decline in turnover test required before 28 October meaning that the direction will cease to operate on 28 February 2021]

I am writing to inform you that the direction given to you on [insert date] to change your location of work in regards to your employment as a [insert position] with [insert company name] will cease to apply to you on 28 February 2021 as [insert company name] has not obtained a September quarter [certificate/self-certification].

Your location of work from 28 February 2021 will therefore revert back to [insert original address].

If you have any questions about this matter, please do not hesitate to contact me on [insert contact details].

Yours sincerely,

<Insert name>

<Insert position>

TEMPLATE LETTER D – DECEMBER QUARTER NOTIFICATION LETTER

<Insert company letterhead>

<Insert Date>

Private and confidential

<Insert employee's full name>

<Insert employee's address>

Dear <Employee>

Legacy employer JobKeeper enabling direction to alter employee work location

[Option 1 Explanatory information: Include the below if you have given a JobKeeper enabling direction to alter an employee's location of work and you have obtained a December quarter certificate before 28 February confirming that you continue to satisfy the 10% decline in turnover test required]

I am writing to inform you that the direction given to you on [insert date] to perform change your location of work in regards to your employment as a [insert position] with [insert company name] will continue to apply to you on and after 28 February 2021 until 28 March 2021 as [insert company name] has obtained a December quarter [certificate/self-certification] confirming that we continue to satisfied the 10% decline in turnover test required.

Your location of work will therefore remain at [insert details of employee altered location of work].

Thank you for your continued understanding during this difficult time.

[Option 2 Explanatory information: Include the below if you have given a JobKeeper enabling direction to alter an employee's location of work but you have NOT obtained a December quarter certificate confirming that you continue to satisfy the 10% decline in turnover test required before 28 February meaning that the direction will cease to operate on 28 February 2021]

I am writing to inform you that the direction given to you on [insert date] to change your location of work in regards to your employment as a [insert position] with [insert company name] will cease to apply to you on 28 February 2021 as [insert company name] has not obtained a December quarter [certificate/self-certification].

Your location of work from 28 February 2021 will therefore revert back to [insert original address].

If you have any questions about this matter, please do not hesitate to contact me on [insert contact details].

Yours sincerely,

<Insert name>

<Insert position>

Annexure 3 | Legacy employer checklist & template letters to alter an employee's usual duties

Preliminary matters

- **Establish Eligibility:** Are you eligible as a legacy employer:
 - ✓ You previously qualified for JobKeeper 1.0
 - ✓ You have obtained a 10% decline in turnover certificate (or self-certification if applicable) for the relevant quarter (June, September or December)
 - ✓ The employee you wish to give the direction to previously received JobKeeper payments

- **Check pre-requisites:** Have you met all the pre-requisites which allow you to issue the direction?
 - you have information before you that leads you to reasonably believe that the direction is necessary to maintain the employment of one or more employees.
 -  *The direction won't apply to the employee unless the employer reasonably believes that the direction is necessary to continue the employment of 1 or more employees.*
 - the employee's new duties are within their skill and competency
 - the employee's new duties are safe (including having regard to the nature and spread of coronavirus)
 - the employee has any required licences and/or qualifications to perform the new duties; and
 - the employee's new duties are reasonably within the scope of your business operations. For example, you cannot direct an employee to do odd jobs unrelated to the operation of the business.

- **Ensure the direction is 'reasonable':** Ensure the direction is reasonable, in all the circumstances.
 -  *This requires you to take into account all the circumstances, including the employee's caring responsibilities and if the direction will have a disparate effect on a category of employees over others who are subject to the same direction. If a direction is unreasonable, it does not apply to an employee.*

Before issuing a JobKeeper enabling direction to change duties

- **Give written notice:** Give the employee at least 7 days' written notice before giving the JobKeeper enabling direction (or less if the employee agrees)
 - Provide the employee or their appointed representative (if any) with written information about the proposed direction. This may include for example:
 - information about the nature of the direction;
 - information about when the direction is to take effect;
 - information about the expected effects of the direction on the employee

-  *You are NOT required to disclose confidential or commercially sensitive information to the employee or their representative. This notice can be given by electronic means*



SEE TEMPLATE LETTER A

Employers should use this template letter to notify employee in writing of an intention to give a direction at least 7 days before issuing the direction (unless the employee genuinely agrees to a shorter timeframe).

If an employer currently has a JobKeeper direction in place but the employer will not qualify for JobKeeper 2.0 and will instead qualify as a legacy employer from 28 September 2020, the existing direction will automatically cease at the start of 28 September 2020 unless you ensure a current direction meets the prerequisites, give notice to your employee that you are re-issuing the direction as a legacy employer before 22 September 2020 (unless a later date is agreed), consult with them (or their representative if any) and re-issues the direction.

- **Consult:** Consult with the employee/s (or their representative) about the direction
 - Invite the employee or their appointed representative (if any) to give their views about the impact of the proposed direction on the employee (including any impact in relation to family or caring responsibilities).
 - You must give prompt and genuine consideration to these views.
- **Keep records:** Keep a written record of the consultation
- **Notify:** Notify the employee of your decision following consultation



SEE TEMPLATE LETTER B

After consulting with the employee (or their representative) use this template letter to issue the direction to your employee to alter their duties

Ongoing notification requirements for subsequent periods

- **Notify before 28 October 2020** (if direction still in operation): Notify the employee as to whether the direction will either:
 - Continue to apply as a result of the you obtaining a September quarter certificate OR
 - Will cease to apply as a result of you not obtaining a September quarter certificate.



SEE TEMPLATE LETTER C

Employers should use this template letter to notify an employee in writing before 28 October 2020 as to whether the direction (if currently still in operation) will either continue or cease.

In order for the direction to continue to apply an employer must have a new turnover certificate/self-certification at the start of 28 October 2020 for the September quarter.

A direction automatically ceases to lawfully operate if an employer does not hold a September quarter certificate/self-certification.

- **Notify before 28 February 2021** (if direction still in operation): Notify the employee as to whether the direction will either:
 - Continue to apply as a result of the you obtaining a December quarter certificate OR
 - Will cease to apply as a result of you not obtaining a December quarter certificate.



SEE TEMPLATE LETTER D

Employers should use this template letter to notify an employee in writing before 28 February 2021 as to whether the direction (if currently still in operation) will either continue or cease.

In order for the direction to continue to apply an employer must have a new turnover certificate/self-certification at the start of 28 February 2021 for the December quarter.

A direction automatically ceases to lawfully operate if an employer does not hold a December quarter certificate/self-certification.

! How to use the template letters

The template letters contains **highlighted** text which indicates areas which you simply need to replace the writing with what applies to your employee situation. Explanatory information is shown in *blue italics* to assist you and should be deleted once you have finalized the letter. **Ensure all highlighted text and explanatory information has been completed or deleted, as appropriate, before issuing a letter to any employee.**

These documents are intended as a guide only and do not provide or purport to provide legal advice to any person or business. Individuals and businesses should obtain independent legal advice specific to their circumstances.

TEMPLATE LETTER A – JUNE QUARTER NOTIFICATION & CONSULTATION LETTER

<Insert company letterhead>

<Insert Date>

Private and confidential

<Insert employee's full name>

<Insert employee's address>

Dear <Employee>

Notice of intention to issue legacy employer JobKeeper enabling direction to undertake alternative duties

As a result of [the COVID-19 pandemic OR government initiatives to slow the transmission of COVID-19] we are considering changes to support the continued operation of the business which we reasonably consider will necessary in order to maintain employment.

As a part of these changes I am writing to notify you that I intend to give you the following JobKeeper enabling direction to perform alternative duties from [insert start date] in regards to your employment as a [insert position] with [insert company name].

[Explanatory information – please delete before issuing letter: Employees must be given at least SEVEN days' notice before the direction takes effect, unless an employee genuinely agrees to a shorter notice period. Employers should ensure the proposed start date listed here meets this criteria.]

I intend to change your duties as following:

- [insert details of how the employee's duties have been changed i.e. 'from current duties as a Regional manager to new duties as a Sales assistant']

Meeting to discuss this letter

I would like to consult with you and your representative (if you wish to appoint one) about my intention to issue this direction.

You are invited to attend a [meeting/phone call/zoom meeting] on [insert date of proposed meeting] at [insert time/place] where I would like to hear your views and any concerns you have about the above proposed changes.

Please contact me on [insert phone number] to confirm your availability to attend the proposed meeting or to advise if this time is not convenient so a new time can be scheduled.

Why have my duties been changed?

[insert the business/company name] has qualified as a legacy employer under the amended JobKeeper related provision under the Fair Work Act. We intend to temporarily change your duties so we can keep employing as many people as we can during this difficult time.

How will my pay be affected during this period?

For the period of this intended direction to change your duties, you will be paid [insert payment of wages details i.e. 'the relevant pay under the <insert award or agreement>] for any hours that you work. Your hourly base pay rate will not be reduced during this period.

[Explanatory information – please delete before issuing letter. An employee's base pay rate can't be reduced while a direction to change usual duties is in place. If the temporary new duties attract a higher base pay rate (for example, under an applicable award or enterprise agreement), the employee needs to be paid the higher pay rate.]

[Delete sentence if not relevant] As the intended temporary duties will attract a higher base rate of pay under the [insert award or agreement details], you will be paid the higher pay rate during this period of [insert pay rate] per hour and any other applicable entitlements at this higher rate during this period.

If you have any questions about the matters raised above, please do not hesitate to contact me on [insert contact details].

Thank you for your understanding during this difficult time.

Yours sincerely,

<Insert name>

<Insert position>

TEMPLATE LETTER B – ISSUING DIRECTION LETTER

<Insert company letterhead>

<Insert Date>

Private and confidential

<Insert employee's full name>

<Insert employee's address>

Dear <Employee>

Legacy employer JobKeeper enabling direction to alter employee duties

I am writing to inform you that as of [insert date] I am directing you to perform alternative duties from [insert start date] in regards to your employment as a [insert position] with [insert company name].

As part of these changes, on [insert date] we gave you notice of [insert company name] intention to give you a JobKeeper enabling direction to alter your duties of work.

[Option 1 Explanatory information: Include the below if this JobKeeper enabling direction is the same as the proposed JobKeeper enabling direction you originally notified the employee about]

On [insert date], I discussed this direction with you [and insert names of any other parties involved in discussions if relevant i.e. and your representative]. We discussed [insert details of discussion].

[Option 2 Explanatory information: Include if this JobKeeper enabling direction is a different JobKeeper enabling direction than the one you originally proposed to issue to the employee]

On [insert date], I discussed with you [and insert names of any other parties involved in discussions if relevant i.e. and your representative] an earlier direction. We discussed [insert details of discussion].

This direction is now different to the original written notification I gave you on [insert date] as in reaching the decision to issue this direction, I have considered your views as expressed in our earlier discussion.

Your duties at work are changing as follows:

- [insert details of how the employee's duties have been changed i.e. 'from current duties as a Regional manager to new duties as a Sales assistant']

How will my pay be affected during this period?

For the period of this direction to change your duties, you will be paid [insert payment of wages details i.e. 'the relevant pay under the insert award or agreement'] for any hours that you work. Your hourly base pay rate will not be reduced during this period.

[Explanatory information – please delete before issuing letter. An employee's base pay rate can't be reduced while a direction to change usual duties is in place. If the temporary new duties attract a higher base pay rate (for example, under an applicable award or enterprise agreement), the employee needs to be paid the higher pay rate.]

[Delete sentence if not relevant] As the temporary duties will attract a higher base rate of pay under the [insert award or agreement details], you will be paid the higher pay rate during this period of [insert pay rate] per hour and any other applicable entitlements at this higher rate during this period

Thank you for your understanding during this difficult time. If you have any questions about this matter, please do not hesitate to contact me on [insert contact details].

Yours sincerely,

<Insert name>

<Insert position>

TEMPLATE LETTER C – SEPTEMBER QUARTER NOTIFICATION LETTER

<Insert company letterhead>

<Insert Date>

Private and confidential

<Insert employee's full name>

<Insert employee's address>

Dear <Employee>

Legacy employer JobKeeper enabling direction to alter employee duties

[Option 1 Explanatory information: Include the below if you have given a JobKeeper enabling direction to alter an employees duties and you have obtained a September quarter certificate before 28 October confirming that you continue to satisfy the 10% decline in turnover test required]

I am writing to inform you that the direction given to you on [insert date] to perform alternative duties in regards to your employment as a [insert position] with [insert company name] will continue to apply to you on and after 28 October 2020 until 28 February 2021 as [insert company name] has obtained a September quarter [certificate/self-certification] confirming that we continue to satisfied the 10% decline in turnover test required.

Your duties at work will remain as follows:

- [insert details of the employee's changes duties]

Thank you for your continued understanding during this difficult time.

[Option 2 Explanatory information: Include the below if you have given a JobKeeper enabling direction to alter an employees duties but you have NOT obtained a September quarter certificate confirming that you continue to satisfy the 10% decline in turnover test required before 28 October meaning that the direction will cease to operate on 28 October 2020]

I am writing to inform you that the direction given to you on [insert date] to perform alternative duties in regards to your employment as a [insert position] with [insert company name] will cease to apply to you on 28 October 2020 as [insert company name] has not obtained a September quarter [certificate/self-certification].

Your work duties from 28 October 2020 will therefore revert back to [insert details of how the employee's duties have been changes i.e 'from current duties as a Sales assistant back to your usual duties as a Regional manager].

If you have any question about this matter, please do not hesitate to contact me on [insert contact details].

Yours sincerely,

<Insert name>

<Insert position>

TEMPLATE LETTER D – DECEMBER QUARTER NOTIFICATION LETTER

<Insert company letterhead>

<Insert Date>

Private and confidential

<Insert employee's full name>

<Insert employee's address>

Dear <Employee>

Legacy employer JobKeeper enabling direction to alter employee duties

[Option 1 Explanatory information: Include the below if you have given a JobKeeper enabling direction to alter an employee's duties and you have obtained a December quarter certificate before 28 February confirming that you continue to satisfy the 10% decline in turnover test required]

I am writing to inform you that the direction given to you on [insert date] to perform alternative duties in regards to your employment as a [insert position] with [insert company name] will continue to apply to you on and after 28 February 2021 until 28 March 2021 as [insert company name] has obtained a December quarter [certificate/self-certification] confirming that we continue to satisfy the 10% decline in turnover test required.

Your duties at work will remain as follows:

- [insert details of the employee's changes duties].

Thank you for your continued understanding during this difficult time.

[Option 2 Explanatory information: Include the below if you have given a JobKeeper enabling direction to alter an employee's duties but you have NOT obtained a December quarter certificate confirming that you continue to satisfy the 10% decline in turnover test required before 28 February meaning that the direction will cease to operate on 28 February 2021]

I am writing to inform you that the direction given to you on [insert date] to perform alternative duties in regards to your employment as a [insert position] with [insert company name] will cease to apply to you on 28 February 2021 as [insert company name] has not obtained a December quarter [certificate/self-certification].

Your work duties from 28 February 2021 will therefore revert back to [insert details of how the employee's duties have been changes i.e 'from current duties as a Sales assistant back to your usual duties as a Regional manager].

If you have any question about this matter, please do not hesitate to contact me on [insert contact details].

Yours sincerely,

<Insert name>

<Insert position>

This guide was written and edited by Tamsin Lawrence and Ingrid Fraser.

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