client alert | explanatory memorandum

September 2020

CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 21 August 2020.

JobKeeper changes: turnover test and employment start date

Prime Minister Scott Morrison announced further changes to JobKeeper on 7 August 2020. The changes are intended to ensure that eligibility for the revised JobKeeper scheme – to commence on 28 September 2020 – will be based on a single quarter tax period, rather than multiple quarters as previously announced. Employees hired as at 1 July 2020 will now also be eligible to receive JobKeeper.

Treasury has updated its JobKeeper factsheets as at 7 August 2020 to incorporate the PM's announcements.

Background

The JobKeeper rules implemented in March 2020 in response to the COVID-19 pandemic were due to finish on 27 September 2020. The Government then announced on 21 July 2020 that the scheme would be extended for six months (ie until 28 March 2021), albeit in an amended form.

As a reminder, the key highlights of JobKeeper Version 2 – to start on 28 September – are that:

- the extended scheme will apply at a top rate of $1,200 per employee (down from the current $1,500) per JobKeeper fortnight from 28 September 2020 until 3 January 2021, then drop to $1,000 until 28 March 2021;
- lower rates will apply for part-time and casual employees; and
- businesses will be required to re-test their eligibility for the payment scheme to access the extension.

Changes to turnover test

The latest changes relate to the eligibility test announced in JobKeeper Version 2.

JobKeeper Version 2 originally required that, from 28 September 2020, businesses and not-for-profits seeking to claim JobKeeper payments would have to meet a further decline in turnover test for each of the two periods of extension, as well as meeting the other existing eligibility requirements. That is, at that time businesses would have been required to reassess their eligibility for the JobKeeper extension with reference to their actual turnover in the June and September quarters 2020.

The precise details of JobKeeper Version 2 were as follows:

- In order to be eligible for the first JobKeeper Payment extension period of 28 September 2020 to 3 January 2021, businesses and not-for-profits would have needed to demonstrate that their actual GST turnover had significantly fallen in both the June quarter 2020 (April, May and June) and the September quarter 2020 (July, August and September) relative to comparable periods (generally the corresponding quarters in 2019).
- For the second JobKeeper Payment extension period of 4 January to 28 March 2021, businesses and not-for-profits would have needed to demonstrate that their actual GST turnover had significantly fallen in each of the June, September and December 2020 quarters relative to comparable periods (generally the corresponding quarters in 2019).

Amendments to turnover test and employment start date

The PM has eased the proposed changes to turnover tests (discussed above) for businesses Australia-wide (ie not just for Victoria).

The changes mean that businesses will now only be required to show the requisite actual decline in turnover for the September quarter alone, rather than for both the June and September quarters (for the period to 3 January 2021, ie the December quarter). Similarly, businesses will only need to demonstrate a decline in turnover for the December 2020 quarter, rather than each of the June, September and December 2020 quarters (for the period to 28 March 2021, ie for the March quarter).

The Treasurer also announced a change for the start date for employees, with those hired as of 1 July to be eligible for JobKeeper Version 2 from 3 August. Previously, employees had to be on the books as at 1 March 2020.

Source: www.pm.gov.au/media/more-support-more-businesses-and-workers; https://treasury.gov.au/coronavirus/jobkeeper.

JobKeeper reference date now 1 July 2020: Statutory Rules made

The Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No 7) 2020, registered on 14 August 2020, changed the JobKeeper employment reference date to 1 July 2020 (from 1 March 2020) for determining employee eligibility, with effect from 3 August 2020. The amending rules commenced on 15 August 2020 and apply to JobKeeper fortnights that began on or after 3 August 2020; that is, they are retrospective.

General observations

The changes do not affect any entitlements payable under the existing JobKeeper rules, ie for JobKeeper fortnights ending on or before 2 August 2020.

Although the reference date is now 1 July 2020, there is scope for certain employees who have been or will be re-engaged by the same employer after that date to nevertheless qualify for JobKeeper (see under the heading "re-employed employees"). This does open the door for certain employees to be re-engaged and their employer to receive JobKeeper for the wages it pays.

Eligible employers that have employees who become eligible under the revised rules had to notify the newly eligible employees by 22 August 2020. The employer then had until 31 August to satisfy the requisite wage condition.

The other changes that have previously been announced will be dealt with in separate amendments, namely:

- the extension of JobKeeper payments to 28 March 2021 (the end date otherwise being 27 September 2020);
- changes to the turnover test (ie from projected turnover (ie prospective) to actual turnover (retrospective)); and
- the two-tiered payment system.

The extension and changes to the rules bring the estimate of JobKeeper payments overall to $101.3 billion.

Overall purpose

For JobKeeper fortnights beginning on or after 3 August 2020, the reference date for determining certain employee eligibility conditions is changed from 1 March 2020 to 1 July 2020. The Explanatory Statement says that the purpose of this change is to extend the scope of JobKeeper so that "it also benefits employers of more recently engaged employees".

Importantly, the amending rules preserve the existing eligibility of employees for JobKeeper payments; that is, those for whom employers are currently receiving JobKeeper. Under the amendments, these are termed "1 March 2020 employees", meaning those employees who satisfied the rules as at that date.

As a result, for JobKeeper fortnights beginning on or after 3 August 2020, an individual can be an eligible employee if they:

- meet the eligibility requirements with reference to the new 1 July 2020 date; or
- qualify as a 1 March 2020 employee.

Newly eligible employees

The later reference date provides the opportunity for qualifying employers to access JobKeeper for those employees who they engaged after 1 March 2020 and who were in an employment relationship as at 1 July 2020. That is, for new employees engaged after 1 March.

The changes also allow employers to qualify for JobKeeper payments for those employees who do not qualify as 1 March 2020 employees, but became eligible by meeting the conditions under the new 1 July 2020 reference date. These include employees who:

- were not considered eligible 1 March 2020 employees because they did not meet the definition of a long-term casual employee as at 1 March 2020, but have since so qualified (ie as at 1 July 2020);
- were not considered eligible 1 March 2020 employees because they were not aged 16 years, but have since become aged 16 years and over by 1 July 2020 (ie they have had a birthday!);
- are aged 16 or 17 years and were living independently or not undertaking full-time study on 1 July 2020; and

- were residents or holders of a Subclass 444 (Special Category) visa on 1 July 2020.

Currently qualifying employees (1 March 2020 employees)

The amending rules make no changes to the existing eligibility of employees who are already covered by JobKeeper; that is, those for whom the employer has been receiving the benefit based on their status as at 1 March 2020. In other words, eligible 1 March 2020 employees do not need to retest (and potentially lose) their eligibility for their employer due to the introduction of the 1 July 2020 date, or satisfy any new nomination requirements.

Despite the status of 1 March 2020 employees being preserved, such employees must continue to meet the ongoing requirements under the rules – including, somewhat obviously, that they are actually employed by the employer, but also that they are not excluded from being an eligible employee (eg because they are in receipt of parental leave pay or dad and partner pay, or entitled to a workers' compensation payment).

Although employees do not qualify as 1 March 2020 employees if their employment has ceased since 1 March, they may qualify for JobKeeper if they are engaged by another employer as at 1 July 2020. Further, if 1 March 2020 employees are made redundant by an employer and are later re-employed by the same employer (including after 1 July 2020), there is scope for them to qualify without further testing (as follows).

Employees who have changed employers since 1 March

The new rules allow individuals who had nominated as an eligible employee with one employer as at 1 March 2020 to re-nominate as an eligible employee of another employer as at 1 July 2020. An individual who re-nominates as an eligible employee of a new employer is excluded from being an eligible employee of the old employer (this is to avoid "double dipping"). A key condition is that the individual must have ceased their employment with the first employer before 1 July 2020 and commenced their employment with the new employer by 1 July 2020.

The reason for the cessation of employment is not relevant – the employee could have had their employment terminated, they could have resigned, or the employer may have ceased to exist.

Put simply, being employed by 1 July 2020 is the key determinant (ie satisfying the requirements as at that date). The status of the employee as at 1 March 2020 is not relevant to that employee or the new employer for these purposes.

Re-employed employees (by the same employer)

Eligible 1 March 2020 employees who are re-employed by their former employer may qualify for JobKeeper without the need to retest their eligibility under the 1 July 2020 reference date (since their eligibility under the former 1 March 2020 requirements and nomination requirements continues to be preserved).

This is intended to provide support to employers that have re-employed their former employees who had been let go because of the impacts of COVID-19.

Under the rules, where there is a break in the employment relationship between the employer and an individual who was an eligible employee for any JobKeeper fortnight ending on or before 2 August 2020, the eligibility of that individual is generally preserved for JobKeeper fortnights beginning on or after 3 August 2020. Once an individual is no longer employed by their former employer, the former employer is no longer entitled to receive the JobKeeper payment in relation to the individual (because the payment only applies to employees). The eligibility of an individual re-employed by the same employer is not preserved if the individual re-nominated for another employer.

It is worth reproducing the example in the Explanatory Statement to illustrate the intended operation of these changes.

Example

HYLT Pty Ltd qualified for JobKeeper payments for four eligible employees for the JobKeeper fortnight beginning 30 March 2020 and later fortnights.

After the end of the third JobKeeper fortnight, one of the eligible employees, Rosie, left HYLT Pty Ltd due to the lack of business for HYLT Pty Ltd and to pursue another opportunity. During this later time, HYLT Pty Ltd qualified for JobKeeper payments for only three eligible employees.

On 28 July 2020, Rosie returned to HYLT Pty Ltd and resumed ongoing full time employment. Further, Rosie was not eligible to renominate as an eligible employee of another qualifying entity.

For JobKeeper fortnights beginning on or after 3 August 2020, despite Rosie not meeting the 1 July 2020 requirements, HYLT Pty Ltd can qualify for the JobKeeper payment in respect of Rosie as a 1 March 2020 employee under the Rules. This is because Rosie's eligibility based on the 1 March 2020 requirements was preserved since she was an eligible employee of HYLT Pty Ltd for a JobKeeper fortnight ending on or before 2 August 2020 and she did not qualify as an eligible individual of another qualifying entity.

Notification requirements for employees re-employed after 1 July 2020

Eligible 1 March 2020 employees who are re-employed by their former employer after 1 July 2020 must provide a notice to the re-employing employer if all of the following circumstances apply:

- the individual was an eligible employee of the qualifying employer as a 1 March 2020 employee of the employer;
- the individual had ceased to be employed by the qualifying employer after 1 March 2020 but before 1 July 2020; and
- the individual was re-employed by the qualifying employer after 1 July 2020.

The notice that must be provided to the employer is one that states if the individual had provided a nomination notice to another employer under the new 1 July 2020 reference date. This notice will enable an employer that re-employs a 1 March 2020 employee to determine whether or not it can rely on the original nomination notice that was provided to it before the individual ceased their employment. In the event that an individual does not comply with the obligation to notify, the Explanatory Statement "cautions" the employer to obtain a statement from the individual before claiming an entitlement to the JobKeeper payment in relation to the employee.

Employer obligations

Employers that are already participating in the JobKeeper program are required to give a notice to all employees about the revised JobKeeper reference date, other than:

- employees to whom the employer has previously given a notice in writing advising that the employer has elected to participate in the JobKeeper scheme;
- employees who had previous provided the employer with a nomination form in relation to the JobKeeper scheme;
- individuals who the employer reasonably believes do not satisfy the 1 July 2020 requirements; and
- employers that are ACNC-registered charities that have elected to disregard certain government and related supplies and the individual's wages and benefits are funded from such government and related sources.

This is designed to ensure that newly qualified employees are given the same notification details that applied when JobKeeper was first introduced, without the need to give it to those employees for whom the employer is already receiving JobKeeper (as their status has been preserved).

This notification must have occurred within seven days of the commencement of the Statutory Rules (ie by 22 August 2020).

Further, to be eligible for the JobKeeper payment for any newly eligible employees under the 1 July 2020 reference date, a qualifying employer must provide notice to the ATO of information about that employee and their nomination. Where an employer has provided this notification to the ATO for entitlement to receive JobKeeper payments in respect of the eligible employee, the employer must notify the employee within seven days.

For those employers entering JobKeeper for the first time, the notification requirement will apply to all of their employees.

The ATO states that employers should have started paying new eligible employees a minimum of $1,500 per fortnight from the JobKeeper fortnight 10, which commenced on 3 August (ie in order to qualify). However, for the fortnights commencing on 3 August 2020 and 17 August 2020, the ATO has allowed employers until 31 August 2020 to meet this wage condition for all new eligible employees included in the JobKeeper scheme under the 1 July eligibility test. In other words, the money must have been received by the employee(s) by 31 August.

It also states that employers can commence claiming for the JobKeeper reimbursement for the new eligible employees from 1 September, when they can lodge their August monthly declaration claim. The business monthly declaration for August is due to be lodged by 14 September, and new employees should be included in that form.

Source: www.legislation.gov.au/Details/F2020L01021; www.legislation.gov.au/Details/F2020L00419; www.ato.gov.au/Media-centre/Media-releases/More-employees-now-able-to-access-JobKeeper/.

PM announces pandemic leave disaster payment for Victoria

Prime Minister Scott Morrison announced on 3 August 2020 a "disaster payment" in the form of a pandemic leave disaster payment. The payment will be one-off amount of $1,500, available to workers in Victoria who have no sick leave available who have to self-isolate for 14 days as a result of an instruction by a public health officer.

It will only apply to workers in Victoria, where the Government has declared a “state of disaster” and imposed Stage 4 lockdowns, which are expected at this point to run until mid-September.

The Victorian Government has already announced that it will provide a disaster payment, principally made to those on short-term visas; that is, those who are not permanent residents or citizens of Australia who otherwise wouldn’t have accessed Commonwealth payments. The Federal Government will provide its payment to those who fall outside that scope and who don’t have leave available to them because it has been used up.

To this end, the Government has registered the Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No 4) Regulations 2020, which establish the legislative authority for the Government to make pandemic leave disaster payment grants.

In response to questions from journalists, the PM advised:

- the Federal Government payment will not apply to states other than Victoria (although there is scope to extend it if other states are forced to declare a state of disaster);
- it will continue for as long as the Government says there is a state of disaster;
- it will only apply while the Victorian Stage 4 restrictions are operative; and
- the payment is only for the fortnight that a worker is to self-isolate – it is not a recurring fortnightly payment while the state of disaster declaration remains in force.

Accessing the Federal Government payment

Services Australia has provided further details on its website. It states that, to get this payment, the applicant must:

- be at least 17 years old;
- live in Victoria; and
- have no income from paid work, including sick leave entitlements.

In addition, the Victorian Department of Health and Human Services must also have told the applicant to self-isolate or quarantine. They must have done this because the applicant:

- has COVID-19;
- has been in close contact with a person who has COVID-19;
- cares for a child, aged 16 years and under, who has COVID-19; and/or
- cares for a child, aged 16 years and under, who has been in close contact with a person who has COVID-19.

If a person has to self-isolate more than once, they can claim this payment each time. However, a person cannot get this payment if they already receive:

- an income support payment, ABSTUDY Living Allowance, Paid Parental Leave or Dad and Partner Pay;
- the JobKeeper payment; or
- the Victorian Coronavirus (COVID-19) Worker Support Payment.

Coronavirus Worker Supplement Payment (Victoria)

The Victorian Government announced its Coronavirus Worker Supplement Payment on 30 July.

To be eligible for a one-off $1,500 Coronavirus (COVID-19) Worker Support payment, the claimant must have been instructed by the Department of Health and Human Services:

- to self-isolate or quarantine at home because they are either diagnosed with coronavirus (COVID-19) or are a close contact of a confirmed case; or
- that a child aged aged under 16 in the claimant’s care needs to self-isolate or quarantine at home because they are either diagnosed with coronavirus (COVID-19) or are a close contact of a confirmed case.

To receive the payment, the claimant must:

- be 17 years and over;
- be currently living in Victoria (including people on Temporary Protection Visas and Temporary Working Visas 457 and 482);
- be likely to have worked during the period of self-isolation or quarantine and are unable to work as a result of the requirement to stay at home;
- not be receiving any income, earnings or salary maintenance from work;

- have exhausted sick leave entitlements, including any special pandemic leave; and
- not be receiving the JobKeeper payment or other forms of Australian Government income support.

Workers include those that are permanent, casual, part-time, fixed-term and self-employed. There is no requirement for a claimant to be a citizen or permanent resident to be eligible.

Source: www.pm.gov.au/media/press-conference-australian-parliament-house-act-3aug20; www.legislation.gov.au/Details/F2020L00994/Download; www.servicesaustralia.gov.au/individuals/news/pandemic-leave-disaster-payment-victoria; www.dhhs.vic.gov.au/covid-19-worker-support-payment.

Loans put on hold and debt forgiveness: ATO's views

The ATO has "clarified" its position on loans put on hold during COVID-19. The ATO will consider a debt to be forgiven for tax purposes if:

- the debtor is somehow relieved from the legal obligation to repay it; or
- there is evidence that the creditor won't insist on repayment or rely on the obligation for repayment.

A debt is not considered to be forgiven if a creditor only postpones an amount payable and the debtor acknowledges the debt – unless there is evidence that the creditor will no longer rely on the obligation for repayment.

The Div 7A implications are specifically spelt out (as a debt forgiven by a private company can be treated as a deemed dividend). For these purposes, a debt is forgiven if a reasonable person would conclude a creditor will not insist on payment or rely on the borrower's obligation to pay. However, simply allowing more time to repay a debt due to COVID-19 will not result in the debt being treated as forgiven.

Source: www.ato.gov.au/Business/Business-bulletins-newsroom/General/Loans-put-on-hold-during-COVID-19/.

Residency and source of income in the COVID-19 era

The ATO has issued an update on residency and source of income. It deals with issues from the perspectives of an Australian resident and a foreign resident in the context of a change of residency due to COVID-19.

In terms of Australian residents, the update addresses those who are temporarily overseas and those who have had to return to Australia early from certain foreign service. The latter may involve the "91 days of continuous foreign service" test.

Where the update is interesting regards what it says about foreign residents who are stuck in Australia because of the COVID-19 pandemic. The ATO acknowledges that "COVID-19 has created a special set of circumstances that must be taken into account when considering the source of the employment income earned by a foreign resident who usually works overseas but instead performs that same foreign employment in Australia".

Whether salary or wages earned from continuing foreign employment working remotely while in Australia temporarily is assessable depends on:

- whether it is from an Australian or a foreign source; and
- whether a double tax agreement (DTA) applies.

Where the remote working arrangement is short-term (three months or less), the ATO readily accepts that income from that employment won't have an Australian source. Unfortunately, COVID-19 has no end in sight and the travel restrictions are set to last much longer than three months.

So, for working arrangements longer than three months, the ATO says that individual circumstances need to be examined to determine if a person's employment is connected to Australia. This includes whether:

- the terms and conditions of the employment contract change;
- the nature of the job changes;
- a person starts performing work for an Australian entity affiliated with his or her employer;
- the economic impact or result of work shifting to Australia;
- the person's "economic employer" is in Australia (ie the entity for which the person is providing services: as per Taxation Ruling TR 2013/1);
- work is performed with Australian clients;
- the performance of work is wholly or to a significant degree dependent on the person being physically present in Australia to complete it;
- Australia becomes the person's permanent place of work; and

- the person's "intention towards Australia" changes.

However, the ATO also notes that "in some limited situations your employment income may not have an Australian source". (It is worth noting the use of the term "limited situations" here). This may be the case if all the following apply:

- the only thing that has changed about the person's employment is that they are now doing it from Australia as a result of COVID-19;
- there are no other connections to Australia; and
- the person intends to leave Australia as soon as possible.

The update goes on to provide two examples and to discuss DTAs.

Source: www.ato.gov.au/General/COVID-19/Support-for-individuals-and-employees/Residency-and-source-of-income/; www.ato.gov.au/law/view/view.htm?docid=%22AFS%2F23AG-COVID-19%2F00001%22

ATO's employees guide for work expenses updated

The ATO has updated its employees guide for work expenses for 2019–2020. The document is designed to assist employees to determine whether incurred expenses are tax deductible, and outlines the substantiation requirements.

It explains:

- how to determine if an expense is deductible against employment income;
- how to apportion partly deductible expenses;
- outright deduction versus amortisation; and
- requisite records.

The following are highlighted as being new for 2019–2020:

- The additional method for calculating running expenses incurred as a result of working from home (the "shortcut method" allowing an 80 cents per hour deduction) was introduced to help employees working from home during the COVID-19 pandemic. This method was initially only available to use from 1 March 2020 to 30 June 2020, but has now been extended to 30 September 2020.
- Taxation Ruling TR 2020/1 *Income tax: employees: deductions for work expenses under s 8-1 of ITAA* has been released. This ruling provides guidance on when an employee can claim a deduction for a work expense.

The employees guide highlights (and tries to debunk) what it terms "common myths" about expenses – for example, the myths that everyone can automatically claim $150 for clothing and laundry, 5,000 km of travel under the cents per kilometre method for car expenses, or $300 for work-related expenses, even if they didn't spend the money, or that employees can claim gym membership if they need to be fit for work. There are others, such as television subscriptions and the usual chestnuts of uniforms and educational courses.

The guide is broken down into the following categories:

- Part A – Claiming a deduction: the basic conditions;
- Part B – Apportioning work-related expenses;
- Part C – Commonly claimed expenses;
- Part D – Substantiation requirement;
- Part E – Exceptions and relief from substantiation; and
- Part F – Decline in value under the capital allowance provisions.

Changes applicable to 2019–2020 or relating to COVID-19 can be found at the end of each part of the guide. Of possible interest is Part C, which contains new details on:

- the "shortcut method" available to calculate running expenses for a defined period of time relating to COVID-19, and additional examples showing the operation of the method;
- protective items that may have been purchased as a result of COVID-19;
- sunscreen and the requirement to have an Australian Register of Therapeutic Goods (ARTG ID) number displayed on the product.

Source: www.ato.gov.au/law/view/view.htm?docid=%22SAV%2FEGWE%2F00001%22.

FBT: cars garaged at employees' homes during COVID-19

The ATO has published a fact sheet to assist employers in determining if they have an FBT liability where cars are garaged at employees' homes because of COVID-19.

The fact sheet states that the ATO will accept that an employer isn't holding a car for the purposes of providing fringe benefits where the car isn't being driven at all, or is only being driven for maintenance purposes. Provided that the employer elects to use the operating cost method and maintains odometer records, the employer will not have an FBT liability for a car. Without electing to use the operating cost method or not having odometer records, the statutory formula method applies and an FBT liability will arise as the car garaged at the employee's home is taken to be available for private use.

Where a home-garaged car is being driven by an employee for business purposes, the ATO says the employer may be able to reduce the taxable value of the car fringe benefit by taking into account the business use, provided the employer has logbook records and odometer records for the period in question. Logbook records will need to be for at least:

- 12 continuous weeks; or
- until the car stops being garaged at home, if this is less than 12 weeks.

The fact sheet also provides information on logbook requirements for car fringe benefits and options for employers to consider where COVID-19 has impacted driving patterns.

Example: logbook impacted by COVID-19

An employer uses the operating cost method to value their car fringe benefits, and the 2020 FBT year is a logbook year. They begin maintaining a logbook on 2 February 2020, meaning the logbook must run for at least a 12-week continuous period to 26 April 2020.

However, from early April, in response to the COVID-19 pandemic, the employees' car usage changes significantly, and there are few or no business journeys for the final four weeks of the logbook period.

When estimating the business use for the 2020 FBT year, the ATO says the employer may adjust their estimate to reflect the business journeys recorded in the period of the logbook before COVID-19 impacted driving patterns, to ensure it is a reasonable estimate of the business use across the FBT year.

Source: www.ato.gov.au/law/view/view.htm?docid=%22AFS%2FCAR-FBT-COVID-19%2F00001%22.

Thomson Reuters would like to hear from you

Subscribers are invited to submit topics for articles for future publication. Information should be sent to:

Publisher – **Client Alert**

Thomson Reuters (Professional) Australia Limited ABN 64 058 914 668
PO Box 3502, Rozelle NSW 2039

Tel: 1800 074 333

Email: contentfeedback@thomsonreuters.com

Website: www.thomsonreuters.com.au