

Case Alert

Shaping the future of insurance law

JobKeeper legislation – new risks for EPL insurers

9 APRIL 2020

AT A GLANCE

- The new JobKeeper legislation, which was passed by the Federal Government on 8 April 2020, confers an extraordinary amount of flexibility on employers to restructure their workforce during the coronavirus crisis.
- The power to use a JobKeeper enabling direction overrides any restriction in a Modern Award, Enterprise Bargaining Agreement or contract of employment.
- However, with these new opportunities for employers come a range of new risks for EPL insurers.
- The new JobKeeper benefits will also add a new level of risk to unfair dismissal claims.

OVERVIEW

The *Fair Work Act 2009 (Cth)* (FWA) has now been amended giving employers the power to issue “JobKeeper enabling directions”. Those directions include giving the employer the right to direct employees to:

- work reduced hours or days
- undertake alternative duties
- work at an alternative location
- not to work on a day or days on which the employee would usually work
- work for a lesser period than the period that the employee would ordinarily work on a particular day or days, and
- work a reduced number of hours, compared with the employee’s ordinary hours of work, including reducing hours to nil.

An employer can also request that an employee (and the employee cannot unreasonably refuse):

- work alternative days or hours of work
- take accrued annual leave, and/or
- take annual leave at half pay.

The legislation does not allow a reduction of an employee’s rate of pay.

The new provisions only apply to businesses that qualify for the JobKeeper payment, being:

- a business with a turnover of less than \$1 billion that has suffered a reduction in turnover of at least 30%, or
- a business with a turnover of \$1 billion or more that has suffered a reduction turnover of 50%.

The ATO will soon publish guidelines to work out how to assess the relevant loss of turnover.

The power to use a JobKeeper enabling direction overrides any restriction in a Modern Award, Enterprise Bargaining Agreement or contract of employment. For example, if an employee's contract of employment specifies that they are engaged on a full-time basis at 38 hours per week, an employer can issue a JobKeeper enabling direction for that employee to work 20 hours a week and that direction will override the terms of the contract. This means that an employer can unilaterally impose the change without the consent of the employee, which would usually be required to lawfully vary a contract.

Accordingly, the new legislation gives an extraordinary ability for employers to make a wide range of directions which, in normal times, would likely expose the employer to breach of contract and/or breach of industrial instrument claims.

NEW RISKS FOR EPL INSURERS

Most EPL policies provide coverage for claims arising out of the "adverse change to terms and conditions of employment". While there is now increased flexibility for employers in managing their workforce, the changes also create several new risks.

The first is the risk of employers issuing JobKeeper enabling directions when their businesses are not eligible for the JobKeeper payment. A business doing so may find it is exposed to claims for breaches of the FWA and/or the employment contract.

The legislation mandates that any JobKeeper enabling direction must not be "unreasonable" in all of the circumstances. That means the employer must comply with the new consultation obligations, which requires an employer to give at least three days' written notice of its intention to issue the direction and to consult with the employee before giving the direction.

A new offence has been inserted into the legislation, which exposes an employer to a pecuniary penalty if it purports to give a JobKeeper enabling direction that is not properly authorised under the legislation and the employer knew that this was the case.

The employee has the right to agree or disagree with performing duties on different days or at different times or to take paid leave. These are new "workplace rights", which means "adverse action" cannot be taken against the employee if they lawfully refuse the request.

An employee will also have the right to bring a claim in the Fair Work Commission regarding any dispute arising out of a JobKeeper direction.

IMPACT ON UNFAIR DISMISSAL CLAIMS

The new JobKeeper benefits will add a level of risk to unfair dismissal claims.

For employers contemplating redundancies, the FWC will likely expect that the employer give proper consideration to the possibility of standing down employees and paying them JobKeeper benefits as an alternative to redundancy.

Similarly, where employees have been terminated for misconduct or performance, the FWC may rule that the dismissal in the current environment is "harsh" as it will deprive the employee of access to JobKeeper payments.

IMPLICATIONS FOR EPL INSURERS

It is unlikely many employees will feel that they are able to actively protest against any adverse changes while the crisis is at its highest. However, as the situation settles and business returns to normal, we anticipate that EPL insurers will start seeing a new range of claims from disgruntled employees who have been subjected to adverse changes. Those claims are likely to proceed as constructive dismissal, wrongful demotion or wrongful adverse change to terms of employment claims.

Before the introduction of the legislation, many employers had already moved to make significant changes to employment conditions. Employers that acted unilaterally and without proper "consultation" remain exposed to a claims for unlawful adverse changes to the terms and conditions of employment.

The recent *Auscript* case (see our update of 7 April 2020) serves as a cautionary tale to those employers who proceed with undue haste in implementing changes where they have not properly complied with their consultation obligations.

Employers who now issue JobKeeper directions when they are not entitled to do so or do so without meeting the notice and consultation prerequisites also create new risks for EPL insurers. Any insured who has the benefit of the JobKeeper provisions should act cautiously to ensure that the process they follow is within the boundaries of the legislation.

With unfair dismissal claims, EPL insurers should prepare for arguments by dismissed employees that their dismissal was unfair because it deprived them of JobKeeper benefits.

NEED TO KNOW MORE?

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