

RESPONDING TO COVID-19

3 April 2020

COVID-19: (Australia) Guide to JobKeeper Payments

Welcome to our guide to the Australian Government's JobKeeper Payment initiative.

The unprecedented wage subsidy is projected to cost A\$130 billion over a six month period, with eligible businesses entitled to a subsidy equivalent to A\$1,500 per fortnight for each eligible employee.

Our aim with this Guide is to:

- summarise the eligibility requirements for both employers and employees;
- provide our analysis and insights on the emerging issues; and
- identify those areas where there is present uncertainty.

We will continue to update this Guide as more information becomes available.

While this Guide sets out high level information, it is not a substitute for advice. This is particularly important at the present time as issues are evolving quickly.*

We hope you will find this Guide valuable as you navigate these important issues and we welcome your feedback on any aspect of it.

Yours sincerely



Betsy-Ann Howe

Partner

Betsy-Ann.Howe@klgates.com

+61 2 9513 2365



Matthew Cridland

Partner

Matthew.Cridland@klgates.com

+61 2 9513 2359

* This information set out in this Guide is accurate as at 12.00 pm on Friday 3 April 2020 and is subject to change as the situation evolves.

COVID-19: (Australia) Guide to JobKeeper Payments

CONTENTS

1.	Turnover Tests.....	3
2.	Eligible Employees	3
3.	Other employer eligibility requirements	3
4.	How much will employers receive?	4
5.	How and when are payments made to employers?.....	4
6.	How much will each employee receive?.....	4
7.	What is the application process?.....	4
8.	Who determines which employees are eligible?.....	4
9.	Are self-employed individuals eligible for subsidy payments?	5
10.	Are superannuation payments required?	5
11.	Will employers be required to withhold tax?	5
12.	Will employers be liable for tax on the subsidy payments?.....	5
13.	Is there a prescribed form for the notice to employees?	5
14.	Will the JobKeeper Payments impact payments from Services Australia? ..	6
15.	How is "turnover" determined?.....	6
16.	Which businesses will have monthly tax periods?	6
17.	Over what period do employers need to test eligibility?.....	6
18.	Does the Commissioner have any discretion regard eligibility?	6
19.	How will the employer eligibility tests apply to economic groups?	7
20.	How will the employer eligibility tests apply to business divisions within one entity?	7
21.	Issues for global businesses	7
22.	Do employers need to pay employees first?	8
23.	Are there any risks for employers that claim a subsidy payment?	8
24.	Can employers seek the protection of a private ruling?	8

COVID-19: (Australia) Guide to JobKeeper Payments

1. Turnover Tests

Employers will be eligible for the subsidy if their turnover has fallen below the thresholds below and they meet the other eligibility requirements set out further below.

Business Size	Turnover Reduction Threshold
Turnover less than A\$1 billion	30%
Turnover exceeding A\$1 billion	50%

Not-for-profit entities (charities) that meet the above turnover tests and other eligibility requirements also qualify.

2. Eligible Employees

Subsidy payments are restricted to eligible employees that must meet **all** of the requirements listed below.

Requirement	Comment
Date Cut-Off	The person must have been employed by the employer as at 1 March 2020.
Current Employment Status	The person must be currently employed. This can include employees stood down or rehired.
Age Limit	The employee must be at least 16 years of age.
Residency Status	Eligible employees fall within the following categories: <ul style="list-style-type: none"> • Australian Citizen • Australian Permanent Resident • Special Category (Subclass 444) Visa Holder (New Zealand Citizen).
Multiple Employers	Eligible employees that have multiple eligible employers can only receive a JobKeeper Payment from one employer.
Employment Type	The qualifying employment types are: <ul style="list-style-type: none"> • Full Time • Part Time • Long-term Casual* <p>*Employed as a casual for more than 12 months as at 1 March 2020.</p>

3. Other employer eligibility requirements

In addition to satisfying the Turnover Tests, employers must:

- Ensure eligible employees receive at least A\$1,500 per fortnight
- Notify all eligible employees they are receiving JobKeeper Payments
- Provide required information to the Australian Taxation Office on a monthly basis, including the number of eligible employees.

COVID-19: (Australia) Guide to JobKeeper Payments

4. How much will employers receive?

The payments will be a flat amount equivalent to A\$1,500 per fortnight for each eligible employee.

The payments will be available to eligible employers for a maximum of six months starting on 1 May 2020 (backdated to 30 March 2020).

5. How and when are payments made to employers?

Eligible employers will receive the subsidy payments from the Australian Taxation Office in arrears once per month.

The initial payment is expected to be made in the first week of May 2020 (ie between 4 May and 8 May 2020).

The initial payment will be backdated to 30 March 2020.

6. How much will each employee receive?

The minimum payment to each employee must be A\$1,500 per fortnight, before tax.

The impact for employees is expected to be as set out in the table below.

Normal Salary Level	Minimum Payment (before tax)
Less than A\$1,500 per fortnight	A\$1,500 per fortnight
A\$1,500 per fortnight	A\$1,500 per fortnight
More than A\$1,500 per fortnight	Normal salary Employers may use the subsidy payment to reduce the cost of the salary payment. Employers may also voluntarily elect to pass through some or all of the payment to employees as an additional amount.

7. What is the application process?

Employers can register their interest in applying for the JobKeeper Payment via the Australian Taxation Office [website](#).

8. Who determines which employees are eligible?

Employers will be responsible for identifying eligible employees and updating the Australian Taxation Office monthly.

For most businesses, the Australian Taxation Office will pre-populate the employee details using Single Touch Payroll data.

COVID-19: (Australia) Guide to JobKeeper Payments

9. Are self-employed individuals eligible for subsidy payments?

Yes, if the turnover tests applying to other businesses are met.

Information will need to be provided to the Australian Taxation Office, including:

- nomination of an eligible individual to receive payment;
- the individual's Tax File Number (TFN); and
- a declaration regarding recent business activity.

For eligible individuals, payment will be made monthly directly to their bank account.

10. Are superannuation payments required?

Present guidance from Treasury states that it will be up to employers to decide if they will pay superannuation on any additional payment made to an employee because of a JobKeeper Payment.

This suggests that for employees who have been stood down, and who would not otherwise receive any payment, employers are not required to pay superannuation in respect of the A\$1,500 fortnightly salary payment (unless they choose to do so).

For employees who are topped up to A\$1,500, employers will have normal superannuation obligations for the employee's usual salary but are not required to pay superannuation on the top-up amount (unless they choose to do so).

For employees that continue to receive their usual salary (and no additional amount), normal superannuation payment obligations will continue to apply.

11. Will employers be required to withhold tax?

The JobKeeper Payments will be passed through to eligible employees as salary and wages.

Accordingly, absent any guidance to the contrary, we expect employers will be required to withhold PAYG tax amounts prior to making payments to eligible employees.

12. Will employers be liable for tax on the subsidy payments?

There is presently no express guidance on this issue. Generally when the Government makes grants for natural disasters these are stated to be non-assessable non-exempt income and we would expect this to be the case for JobKeeper Payments. However, it is presently unclear.

13. Is there a prescribed form for the notice to employees?

At present there is no prescribed form for the notice to employees.

We expect that the notice will need to be provided in writing and addressed to each eligible employee individually.

COVID-19: (Australia) Guide to JobKeeper Payments

14. Will the JobKeeper Payments impact payments from Services Australia?

Employees who are receiving payments from Services Australia will need to notify Services Australia if they receive a JobKeeper Payment. The payment will form part of the employee's notifiable income. This may affect the employee's eligibility for payments from Services Australia.

15. How is "turnover" determined?

The most vexing questions relate to how "turnover" will be determined for the purposes of the Turnover Tests.

The latest Treasury guidance states:

"... most businesses would be expected to establish that their turnover has fallen in the relevant month or three months (depending on the natural activity statement reporting period of that business) relative to their turnover a year earlier".

A Business Activity Statement (**BAS**) is used to report GST amounts for GST registered entities. The above statement suggests that BAS(s) will be a starting point in applying the Turnover Tests for most businesses.

16. Which businesses will have monthly tax periods?

All GST registered businesses with a GST turnover exceeding A\$20 million are required to lodge a BAS on a monthly basis.

Entities with a GST turnover below A\$20 million generally lodge on a quarterly basis, unless they have elected to have monthly tax periods.

If an employer previously had quarterly tax periods, but recently changed to monthly tax periods to improve cash flow, it is likely the employer will need to compare three months of data (to align with the previous quarterly tax periods).

17. Over what period do employers need to test eligibility?

Based on the latest Treasury guidance, it appears that to be eligible, employers only need to be able to demonstrate that they have met, or will meet, the Turnover Tests for one Activity Statement period.

However, the issue is not expressly addressed in the Treasury guidance and the position may change. We will update this Guide once further information is known.

18. Does the Commissioner have any discretion regard eligibility?

In relation to the Turnover Tests, the latest Treasury guidance states:

"... the Tax Commissioner will have discretion to consider additional information that the business can provide to establish that they have been significantly affected by the impacts of the Coronavirus..."

Separately, the guidance also states that the Commissioner will have the discretion to set out alternative tests to determine eligibility in specific circumstances (which implies that the Turnover Tests may not be the sole tests relating to Coronavirus impacts). As an example, the guidance states the Commissioner may determine that eligibility is met as soon as a business has ceased or significantly curtailed operations.

COVID-19: (Australia) Guide to JobKeeper Payments

19. How will the employer eligibility tests apply to economic groups?

A key unresolved question is how the Turnover Tests (or other tests determined by the Commissioner) will apply to economic groups that comprise multiple entities (potentially including companies, trusts and partnerships).

It is unclear whether the tests will be applied on an aggregated (consolidated) basis to the whole economic group, or whether the tests will instead apply on an entity-by-entity basis. This is particularly relevant if one entity in a group has been heavily impacted and satisfies the Turnover Tests while other entities have not been as heavily impacted.

It is noted that some economic groups may have formed a GST group, in which case only one entity (the Representative Member) will lodge a BAS that reports GST for the group as a whole.

However, for other economic groups, there will not be a GST group and each entity will separately lodge its own BAS.

For many large economic groups, it is common for most (if not all) employees to be engaged through one services company which provides intra-group services to other members (the operating companies) within that economic group.

20. How will the employer eligibility tests apply to business divisions within one entity?

A similar question arises for business that are conducted through one entity, such as a company, that has a diverse range of businesses conducted through different divisions. Some divisions may be more affected by the impact of the Coronavirus than others, yet the entity viewed as a single employer may not satisfy the Turnover Tests.

This highlights that the entity structures through which different businesses operate may have a material impact on employer eligibility, including across competitors operating within the same business sector.

At present, it is expected that the employer eligibility tests will be applied to the entity as whole (across all divisions). However, these issues will be raised with Government by industry and employer groups and the position may change, particularly if the Commissioner is given additional discretions.

21. Issues for global businesses

The issues relating to economic groups will be particularly relevant for global businesses. At the present time, it is unclear whether:

- Global group turnover will be used to determine whether the employer's turnover exceeds A\$1 billion.
- Global group turnover will be used to determine whether the employer's turnover satisfies the Turnover Tests.

If the tests are applied based on solely on BAS(s), this may benefit those global business that have established subsidiary entities in Australia (rather than registering non-resident entities in Australia) as this may limit the tests to Australian turnover.

COVID-19: (Australia) Guide to JobKeeper Payments

22. Do employers need to pay employees first?

Another unresolved issue is whether employers are required to pay employees first before the employer is eligible for a JobKeeper Payment.

This will be particularly relevant for those companies that have stood down employees without payment, or have long-term casual employees that have been paid less than A\$1,500 per fortnight.

Given the policy intentions underlying the wage subsidy initiative, we expect that employers that have not paid eligible employees A\$1,500 per fortnight will be eligible for JobKeeper Payments provided back payments are made. However, the position is still developing and we will update this Guide once further information is available.

23. Are there any risks for employers that claim a subsidy payment?

The Government's focus to date has been on setting the parameters for the subsidy payments and working with relevant agencies to arrange the required legislation.

It is likely that the legislation will include some integrity measures, which may include anti-avoidance provisions. Such provisions may be directed towards employers that enter a scheme with a sole or dominant purpose of qualifying for JobKeeper Payments.

It should also be expected that the Australian Taxation Office may conduct audits, including after the payment period has concluded, to gauge whether employers were eligible for all payments received. Where repayment is necessary, penalties and interest may also apply.

24. Can employers seek the protection of a private ruling?

Taxpayers can apply to the Commissioner for a private ruling on their tax affairs. A favourable ruling is legally binding on the Commissioner (provided all required information has been supplied to the Commissioner).

It is presently unclear whether employers will be able to apply for similar rulings to confirm their eligibility for JobKeeper Payments.

While access to rulings would be highly beneficial for businesses, it may be logistically difficult for the Australian Taxation Office to offer this, particularly given the short implementation period and the timeframe over which payments will be made. Accordingly, at the present time, we are not expecting private rulings to be available.

COVID-19: (Australia) Guide to JobKeeper Payments

Contact:



Betsy-Ann Howe
Partner
Sydney
Betsy-Ann.Howe@klgates.com
+61 2 9513 2365



Matthew Cridland
Partner
Sydney
Matthew.Cridland@klgates.com
+61 2 9513 2359



Michaela Moloney
Partner
Melbourne
Michaela.Moloney@klgates.com
+61 3 9640 4430



Nick Ruskin
Partner
Melbourne
Nick.Ruskin@klgates.com
+61 3 9640 4431



Paul Hardman
Partner
Brisbane
Paul.Hardman@klgates.com
+61 7 3233 1248



James Clyne
Partner
Perth
James.Clyne@klgates.com
+61 8 9216 0902

K&L GATES

K&L Gates is a fully integrated global law firm with lawyers located across five continents. The firm represents leading multinational corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organisations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit www.klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

© 2020 K&L Gates LLP. All Rights Reserved.