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Global Tax Alert

Australian Jobkeeper new rules, ATO guidance and extensions require urgent action

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Executive summary

New Australian Jobkeeper Payment (JKP) rules and guidance, issued on 1 May 2020, provide:

- A narrow alternative decline in turnover test for Group Employer Entities (GEEs)
- Further guidance regarding integrity measures in a new Practical Compliance Guide PCG 2020/4 (PCG)
- Continued requirement that payments must be made to all eligible employees by 8 May 2020

GEEs must have as their **principal activity, supplying employee labor services** to group entities within its Australian tax consolidated, consolidatable or Goods and Services Tax (GST) group.

EY Australia questioned the need for this narrow approach and put this view forward to Treasury during the consultation process. The policy reasons for the approach taken are unclear.

Those with **GEEs** need to urgently consider questions such as:

- What are the various activities of your GEEs?
- What does the exclusionary "operating entity" concept mean?

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- Does acting as a financing company and/or a holding subsidiary company impact eligibility?
- What is the scope of allowable incidental activities?
- Could the Commissioner of Taxation (Commissioner) make a determination that the new GEE rule does not apply to your business?

GEEs that include an operating business are unlikely to be eligible for this new test. These groups should urgently review the existing decline in turnover rules having regard to the Practical Compliance Guideline (PCG). The PCG allows some ability to adjust intercompany charges that reflect changed external conditions to assist in meeting the decline in turnover tests.

New rules were also introduced on 1 May 2020 that impact full-time students, charities, religious practitioners, universities and international aid organisations. The rules also confirm the "all in" rule for all eligible employees, including new notifications.

Our recent EY Jobkeeper webcast on 5 May 2020 considered in detail the impact of these developments and the practical implications. To hear a replay, link here and register.

Detailed discussion

Extensions for employer enrollment and employee deadlines for the first two JKP fortnights

8 May 2020 is currently the critical date in an entity's ability to claim the JKP for the first two fortnights (covering the period 30 March to 26 April):

- The "wage condition" which requires minimum AU$1,500 payments per fortnight per eligible employee must be met.
- Before making top-up payments to eligible employees, eligible employers will practically need to have the employee nominations completed.
- Because payrolls need advance notice to process payments, both the nomination and payment process must be managed based on a tight timeline.

Enrollment with the Australian Taxation Office (ATO) can be completed together with notification of eligible employees by 31 May 2020.

With these new rules being released after close of business on 1 May 2020, there are less than five working days to take the most urgent actions by 8 May 2020. EY has approached the ATO and policymakers requesting they urgently consider a deferral of the payment condition to 31 May 2020 in line with the other extensions granted recently but it remains to be seen whether this will be granted.

The date of 8 May 2020 is also the effective end of the third JKP fortnight, so the reconciliation and payments required to meet the wage condition for the third fortnight should factor this in.

Modified eligibility rules for some GEEs but issues for others

The Treasurer issued additional JKP rules late on 1 May 2020, to introduce for some but not all GEEs a modified way of measuring their decline in GST turnover (modified GEE decline in turnover rule).

However, the restrictive drafting of the modified GEE rule will mean that some significant employers will be ineligible to use the rule and will also not satisfy the other decline in turnover rules. This is despite extensive input and consultation provided to Treasury during the drafting stage.

The modified GEE decline in turnover rule adds a third option for an employer entity in addition to the:

- Basic decline in turnover test which looks to the turnover of the entity itself
- Alternative decline in turnover rules introduced by the Commissioner using his power under the rule to specify additional tests by way of legislative instruments

The modified rule (here) applies only to a GEE which satisfies all of the following conditions:

- It is a member of an Australian tax consolidated, consolidatable or GST group (satisfying any one of these three grouping requirements is sufficient).
- Its principal activity is supplying employee labor services to members of that Australian group whose principal activity is making supplies to entities outside the group.
- It does not supply the labor services outside the group (disregarding incidental supplies).

An eligible GEE measures decline in the GST turnover test by reference to the combined GST turnover of all group entities receiving the labor services (not its own GST turnover).

The principal activity requirement requires a GEE to have the principal activity of supporting other operational entities by providing employee services.

Implications for some GEEs

The final rules which are designed to extend JKP payments to employers whose employees are engaged in the businesses of related entities will remain challenging for many groups, such as:

- Limiting the concept of group entities to Australian tax consolidated, consolidatable or existing GST groups means that many common employment service entities won't qualify notwithstanding a close economic or family connection between the employer entity and the business entity.
- Imposing a principal activity test on the employer entity will limit access to JKP payment support for employees who are working for an adversely affected operating entity, but legally employed by the employer entity if it is carrying on an operating business.
- Holding companies which also act as group employers will need to carefully evaluate their activities to carefully assess whether they meet the principal activity requirement, particularly in the context of any financing, management, investment and oversight or stewardship activities that they might also carry on.
- Requiring aggregation of the GST turnover of all operating entities receiving labor services from the GEE means that some employees working in adversely affected businesses won't qualify due to the measurement of combined GST turnover with other less impacted group entities.

These and other limitations may mean that the Government does not achieve its desired coverage of the JKP scheme.

Adversely affected groups may consider adjusting the payments made to their GEEs in order for them to otherwise qualify. However, it is important that any such adjustments be reasonably proportionate and appropriate considering the business turnover of the business entities being served. The ATO's PCG, discussed below, indicates there is a low risk of ATO compliance review where intra-group fee alterations are reflective of external turnover declines.

These issues are significant given the ATO has the power to deny a group's use of the modified GEE rule if in the circumstances it is "unsuitable" or would risk the integrity of the administration of the JKP. This is in addition to the JKP anti-avoidance rule introduced in March. This new power is significant where groups seek to comply with the GEE rule.

While we welcome the Government's changes to facilitate the use of GEEs, in the current tight economic environment jobs are in the balance and accordingly, this is not the time for laws which are unclear or have restrictive elements where the spirit of the JKP entitlement has been met. It is disappointing to have to deal with a series of minute and obscure technical issues outlined above such as what is a "principal activity" or "operating entity" or "incidental services."

Actions for groups with GEEs

Careful and detailed consideration will immediately be required by impacted groups.

The narrow drafting of this modified GEE rule requires attention by any groups which have an entity providing employee labor services to associated or related entities, specifically:

1. The GEE needs to identify if it has provided any services to affiliates not being its Australian tax consolidated, consolidatable or GST group members. If it has, then it will not qualify unless such services can be deemed "merely incidental."
2. If the employer entity carries on other activities of its own in addition to supplying employee labor services to affiliated entities, it will need to analyze if the supply of labor services is the principal activity of the entity. As noted, holding entity stewardship, financial or other shared services might be relevant.
3. The group should review whether the relevant intra-group charges are reasonably adjusted so that the income derived by the employing entity declines in a proportionate manner to the businesses they serve. Such actions will need to be well documented, given the ATO practical compliance guide.

ATO compliance and anti-avoidance law approach for group employment entities

On 1 May 2020, the ATO released PCG 2020/4 on how the ATO:

- Will apply its compliance resources to schemes to obtain access to the JKP or an increased amount of a JKP.
- May apply the specific JKP integrity rules enacted in March 2020.

The PCG and examples state that ATO actions are likely where entities reduce turnover by:

- Delaying invoicing to unrelated customers so as to reduce turnover in a test period.
- Accelerating invoicing to unrelated customers so as to reduce turnover in a test period.
- Transferring out valuable income-producing assets to reduce turnover.
- Adjusting parent company internal management charges not "significantly affected by external factors beyond its control and the scheme is not entered into in response to any such factors."

Further examples suggest the ATO is likely to accept reduced charges to related operating companies, and will not treat this as contrived, where:

- The group can show the operating entity turnover declines.
- The GEE has reduced its employment.
- The group has documented financial difficulties.
- Management charges are adjusted in response to the significant impact of the external operating environment, beyond the group's control.

In effect, the ATO will accept changes in intra-group charges as the basis for meeting turnover decline tests where this is reflective of an external decline in turnover. However, this will only assist groups where the employing entity in question was in receipt of such income in the prior period. In a consolidated environment this may be difficult to demonstrate.

Additional rule changes

Additional rules cover the other announcements of 24 April 2020 including:

- Full-time students aged 16 and 17 years old on 1 March 2020 are now excluded from the JKP unless they are financially independent.
- Adjustments have been made which will affect the eligibility of charities, universities, international aid organizations and religious practitioners.
- All eligible employees must be given the opportunity to agree to be nominated to be covered by the employer's JKP participation, with new employee notification requirements specified.

Students

Full-time students who are 16 or 17 years old and who are not financially independent will no longer be eligible for the JKP. The meaning of the terms "financially independent" and "full-time study" are taken from the *Social Security Act 1991*.

This change applies prospectively to JKP fortnights commencing 11 May 2020 onwards. JKPs to 16 and 17 years old which have already been processed will not be disturbed and such payments will still be required for the first three JKP fortnights.

This will introduce an additional step for employers with employees aged 16 or 17 years, with new employee nomination notice questions to address these issues.

Universities

Universities will need to include income from Commonwealth-supported places (e.g., funded by HECS-HELP) and research grant income in turnover tests. However, if full fee-paying students (including international students) are a significant source of income, a university may demonstrate a turnover decline that enables it to qualify. The turnover test period is the six months commencing 1 January 2020, i.e., universities are required to consider projected turnover in this period as opposed to a month or quarter and compare it to the corresponding period in 2019.

Many universities have wholly-owned entities which should also assess turnover on a standalone basis.

Charities

ACNC-registered charities will be provided with the ability to elect to apply a modified turnover rule which will disregard many grants and make it easier for charities to establish they have satisfied the 15% decline in turnover test where non-grant funding such as gifts and donations has declined. Charities which have already enrolled have until 8 May 2020 to notify the ATO of the election to apply the modified approach.

Modifications may apply to employee eligibility where charities have employees whose salary and wages are fully funded by government grants.

Giving effect to the "one-in, all-in" test

While mechanisms in the Fair Work legislation require employers to pay individuals who would otherwise be eligible but who are not receiving wages in a JKP fortnight, this was not clear within the JKP rules. A new process has been introduced to require employers to notify all potentially eligible employees that their consent to be nominated is sought, including information about the steps the individual can take to give the entity the nomination notice. Breaching this notification requirement will be a breach of tax law while failing to meet the payment condition will breach the *Fair Work Act*.

Employers who have already enrolled for JKP with the ATO will have until 8 May 2020 to comply. Employers who enroll after 1 May 2020 will have seven days from the date of enrollment to provide the notice.

However, the notice does not need to be given to an individual if the entity reasonably believes that the individual does not satisfy the 1 March 2020 requirements to be an eligible employee. This would apply where the entity reasonably believes that the individual:

- Was not an employee of the entity
- Did not meet the minimum age, study and independence test requirements
- Did not meet the relevant residency requirements
- Was a casual employee other than a long-term casual employee

In substance, employers who have already commenced or completed the nomination process should have satisfied this requirement as long as they gave all employees, including those stood down or on unpaid leave, the opportunity to nominate for JKP. If this did not occur, action should be taken immediately to contact those employees and, if they provide their nomination consent, to pay them by 8 May 2020.

Action required for employers claiming JKP

The AU$130 billion JKP requires urgent attention for businesses. This includes:

- Due diligence and evidence to ensure eligibility so the company's position can be defended in ATO reviews – including the modified GEE rules
- Boards with visibility of tax governance processes document oversight and monitoring of JKP actions
- Significant procedural work each JKP fortnight to anticipate ATO review

Action for JKP compliance

EY's detailed JKP work program and practical approach can support business in managing this tight timeframe.

Our multidisciplinary approach addresses tax and legal requirements while also addressing the intricacies of employee communications and the interaction with the ATO reporting.

Processes where we can assist include:

- Assessing entity eligibility – including with our **EY Jobkeeper GST Turnover Calculator**
- Assessing employee eligibility – including using the **EY-JET (JobKeeper Eligibility Tool)**
- Employee onboarding and communications
- Payroll and ATO reporting
- Reconciling JKP payments received to initial claim
- Addressing Fair Work Act requirements
- Critically assessing workforce planning and the interaction with JKP.

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