

# COVID-19: PEOPLE: FLEXIBILITY PROVISIONS IN MODERN AWARDS (AUSTRALIA)

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Legal Briefings - By **Nicholas Ogilvie, Eloise O'Brien and Lucy Boyd**

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Over the past week, the Fair Work Commission (**FWC**) has made determinations to vary the *Clerks - Private Sector Award 2010* (the **Clerks Award**), the *Hospitality Industry (General) Award 2010* (the **Hospitality Award**) and the *Restaurant Industry Award 2010* (the **Restaurant Industry Award**), to address and respond to the impact of COVID-19 on employees and employers covered by these awards.

These amendments are intended to provide more flexibility in award provisions relating to leave, ordinary hours and duties, and to enable employers and employees to adapt to rapidly changing operational requirements and employment conditions in the context of COVID-19.

While many businesses will not be affected by these changes if they do not have employees covered by these awards, it is expected that similar amendments will be made to other modern awards in the coming weeks in response to increasing disruption across many industries.

We have outlined some of the key changes to these awards below. A short summary of these changes is also available [here](#).

## CLERKS AWARD

On 28 March 2020, the FWC made a determination varying the Clerks Award and inserting a temporary schedule: [Schedule I - Award Flexibility during the COVID-19 Pandemic](#). The provisions contained in Schedule I will be in effect from 28 March 2020 until 30 June 2020 (unless otherwise extended by the FWC).

The key changes introduced by Schedule I include:

## 1. Duties - operational flexibility

- Employers can direct employees to perform any duties that are within their skill and competency, regardless of the employee's classification, with no reduction in the employee's pay, provided that the duties are safe and the employee has the necessary licenses and qualifications to perform them.

## 2. Hours of work when working from home

- A permanent employee can, by agreement with their employer, work from home between 6.00am and 11.00pm, Monday to Friday, and between 7.00am and 12.30pm on Saturday.
- For casual and part-time employees who have agreed to work from home, the minimum engagement can be reduced to 2 consecutive hours per shift.

## 2. Agreed temporary reduction in ordinary hours

- An employer and their permanent employees can agree to temporary reductions in ordinary hours of up to 75%.
- The Schedule mandates a process for reaching agreement which requires at least 75% of the relevant employees to approve the reduction through a valid voting

process.

- The voting process requires that the following steps are taken:
  - i. if any employees are known union members, the employer must let the union know about the vote;
  - ii. employees must be provided with the details of the Australian Services Union (**ASU**);
  - iii. the FWC must be provided with the employees' email addresses so that employees can be provided with the ASU COVID-19 Information Sheet; and
  - iv. the vote must be held at least 24 hours after these steps are taken.
- If employees' hours are reduced, their ordinary hourly rate will be maintained but their weekly wage will be reduced by the same proportion. In addition, if hours are reduced:

i. employers cannot unreasonably refuse an employee's request to engage in reasonable secondary work; and

2. **Annual leave** Employers must consider reasonable requests for professional development, training or study leave.

- Employers can direct an employee to take any accrued annual leave provided the employer gives at least **1 weeks'** notice (or less by agreement) and considers the employees' personal circumstances.

- Employers and employees can agree that an employee can take up to twice as much annual leave at a proportionally reduced rate of pay for all or part of a period of leave.

2. **Close down**

- Employers can close down operations (or a part of operations) and direct employees to take annual leave, or unpaid leave if the employee does not have enough accrued leave by giving **1 weeks'** notice (or less by agreement).

## HOSPITALITY AWARD

On 24 March 2020, the FWC varied the Hospitality Award by inserting a temporary schedule: [Schedule L - Award Flexibility During the COVID-19 Pandemic](#). The provisions contained in Schedule L will be in effect from 24 March 2020 until 30 June 2020 (unless otherwise extended by the FWC).

The key changes introduced by Schedule L include:

## 1. Change in duties

- A flexibility provision regarding change of duties which is in similar terms to the Clerks Award flexibility provision described above.

## 2. Hours of work

- Employers can reduce hours of work for their permanent workforce to:
  - for full-time employees: between 22.8 and 38 ordinary hours each week; and
  - for part-time employees: between 60% and 100% of their guaranteed hours per week or over the roster cycle
- Before making a direction for reduced hours, an employer must:

- comply with their consultation obligations concerning changes to rosters or hours of work under the Hospitality Award; and
- if the affected employee/s are members of the United Workers Union, notify the union of its intention to implement these arrangements.
- Employees working reduced hours can be paid on a pro-rata basis but will continue to accrue leave based on their ordinary hours prior to the temporary reduction.
- Employees directed to take leave will be paid their ordinary wage or salary for the employee's ordinary hours prior to any temporary reduction in hours.

## 2. **Annual leave**

- Employers can direct an employee to take annual leave provided the employer gives at least **24 hours'** notice and considers the employees' personal circumstances.
- Employees and employers can agree that an employee can take twice as much annual leave at a proportionally reduced rate of pay for all or part of a period of leave.

# **RESTAURANT INDUSTRY AWARD**

On 31 March 2020, the FWC made a determination varying the Restaurant Industry Award 2010 by inserting a temporary schedule: [Schedule I—Award Flexibility during the COVID-19 Pandemic](#). The provisions contained in Schedule I will be in effect from 31 March 2020 until 30 June 2020 (unless otherwise extended by the FWC).

The changes introduced by Schedule I largely mirror the changes to the Hospitality Award in respect of Operational Flexibility, Hours of Work and Annual Leave (described above). In addition, Schedule I includes a Close Down provision which is in the same terms as this provision in the Clerks Award variation (described above).

## EBA COVERED EMPLOYEES

The temporary schedules will not apply to any employees covered by an enterprise agreement, rather than one of the impacted modern awards. However, employers will need to take into account the requirements and entitlements of the temporary schedules if they are conducting a BOOT analysis for any new enterprise agreement negotiated whilst the temporary schedules are in effect.

If you have any questions, please don't hesitate to contact us.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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