

## **New Flexible Work laws commence 1 December**

The Fair Work Commission (**FWC**) as part of its 4-yearly review of modern awards introduced a new flexible working arrangements model term to be included in all modern awards in recognition of Family Friendly Work Arrangements.

The model clause will come into effect from 1 December 2018, and it will require employers to adhere to the new requirements when an employee makes a request for flexible working arrangements in accordance with section 65 of the *Fair Work Act 2009* (**Act**).

The model clause places mandatory obligations on employers after receiving a request to work flexible working arrangements which includes but is not limited to:

- a) meeting with the employee prior to a decision being made;
- b) responding in writing within 21 days to confirm the outcome of the request;
- c) specific items to be included in a written response to an employee if the employer refuses a request; and
- d) confirming in writing if a different change in working arrangements is achieved.

A copy of the model clause is provided below:

### ***XA. Requests for flexible working arrangements***

#### ***XA.1 Employee may request change in working arrangements***

*Clause XA applies where an employee has made a request for a change in working arrangements under s.65 of the Act.*

*Note 1: Section 65 of the Act provides for certain employees to request a change in their working arrangements because of their circumstances, as set out in s.65(1A).*

*Note 2: An employer may only refuse a s.65 request for a change in working arrangements on 'reasonable business grounds' (see s.65(5) and (5A)).*

*Note 3: Clause XA is an addition to s.65.*

#### ***XA.2 Responding to the request***

*Before responding to a request made under s.65, the employer must discuss the request with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances having regard to:*

*(a) the needs of the employee arising from their circumstances;*

*(b) the consequences for the employee if changes in working arrangements are not made; and*

*(c) any reasonable business grounds for refusing the request.*

*Note 1: The employer must give the employee a written response to an employee's s.65 request within 21 days, stating whether the employer grants or refuses the request (s.65(4)).*

*Note 2: If the employer refuses the request, the written response must include details of the reasons for the refusal (s.65(6)).*

### **XA.3 What the written response must include if the employer refuses the request**

*Clause XA.3 applies if the employer refuses the request and has not reached an agreement with the employee under clause XA.2.*

*(a) The written response under s.65(4) must include details of the reasons for the refusal, including the business ground or grounds for the refusal and how the ground or grounds apply.*

*(b) If the employer and employee could not agree on a change in working arrangements under clause XA.2, the written response under s.65(4) must:*

*(i) state whether or not there are any changes in working arrangements that the employer can offer the employee so as to better accommodate the employee's circumstances; and*

*(ii) if the employer can offer the employee such changes in working arrangements, set out those changes in working arrangements.*

### **XA.4 What the written response must include if a different change in working arrangements is agreed**

*If the employer and the employee reached an agreement under clause XA.2 on a change in working arrangements that differs from that initially requested by the employee, the employer must provide the employee with a written response to their request setting out the agreed change(s) in working arrangements.*

### **XA.5 Dispute resolution**

*Disputes about whether the employer has discussed the request with the employee and responded to the request in the way required by clause XA, can be dealt with under clause Y—Dispute Resolution.*

In view of the above, Employers should familiarise themselves with the new requirements and ensure that all responses for a request for flexible working arrangements from the 1 December 2018 comply with the requirements of the model clause provided above. Failure to comply with the model term may result in breach of the modern award.

**If you require any further information in relation to this, please contact the telephone advisory service on 1300 368 041.**

## **Changes to retail shiftworker Sunday penalty rates.**

The Fair Work Commission (FWC) has announced the gradual reduction to the Sunday penalty rates of shiftworkers covered by the General Retail Industry Award (GRIA).

This decision will see the Sunday penalty rate for shiftworkers decrease from 200% to 175% for full-time and part-time employees and from 225% to 200% for casual employees. The penalty rate changes will occur over a period of three years as outlined below.

### *Full time and part time shiftworkers*

- 1 November 2018 195%
- 1 July 2019 190%
- 1 July 2020 175%

### *Casual shiftworkers (inclusive of casual loading)*

- 1 November 2018 220 per cent
- 1 July 2019 215 per cent
- 1 July 2020 200 per cent

The FWC decided on this transitional arrangement to ensure that the Sunday penalty rates for both shiftworkers and non-shiftworkers are brought into alignment.

The basis for the decision was that given that both shiftworkers and non-shiftworkers experience the same extent of disutility when they are working Sunday as shiftwork or not, it was appropriate also adjust these Sunday wages.

The changes have been made to clause 30.3 of the Retail Award. The operation of the clause which is provided below is effective from 1 November 2018.

### **Clause 30.3 of the Retail Award now provides:**

#### *(c) Shiftwork performed on a Sunday*

##### *(i) From 1 November 2018 to 30 June 2019*

*Any shiftwork performed on a Sunday will be paid at the rate of 195% (220% for casuals, inclusive of the casual loading) of the ordinary time rate of pay.*

##### *(ii) From 1 July 2019 to 30 June 2020*

*Any shiftwork performed on a Sunday will be paid at the rate of 190% (215% for casuals, inclusive of the casual loading) of the ordinary time rate of pay.*

##### *(iii) From 1 July 2020*

*Any shiftwork performed on a Sunday will be paid at the rate of 175% (200% for casuals, inclusive of the casual loading) of the ordinary time rate of pay.*

**If you engage shiftworkers under the GRIA and would like more information on these changes please phone the VANA Employment Relations Line on (02) 9083 0091.**

**Award update – New payment on termination provisions employers must comply with.**

Do you pay your employees within 7 days following the termination of their employment? Probably not. It is likely that you process your final payment within your next payroll cycle to best suit the needs of your business.

The Fair Work Commission (FWC) however, has recently introduced changes to a number of Modern Awards (including the General Retail Industry Award) which now require an employer to pay an employee their final payment no later than 7 days after the day on which their employment ends.

Previously the Retail Award was silent on the time period within which termination payments must be paid. However, as of 1 November 2018 you will need to pay all wages and entitlements owing to the employee within 7 days of their employment ending.

The new requirement has been inserted into clause 23.4 of the Retail Award. The operation of the clause which is provided below is effective from the 1 November 2018.

Clause 23.4 of the Retail Award now provides:

*(a) The employer must pay an employee no later than 7 days after the day on which the employee's employment terminates:*

*(i) the employee's wages under this award for any complete or incomplete pay period up to the end of the day of termination; and*

*(ii) all other amounts that are due to the employee under this award and the NES.*

*(b) The requirement to pay wages and other amounts under paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this award or the Act.*

It is important to be aware of the changes prescribed above because the FWC may impose financial penalties for a contravention of an obligation arising under the Award.

Members are also reminded that section 117(2) of the *Fair Work Act 2009* (Cth) provides that an employer must not terminate an employee's employment unless the employer has given the employee the required minimum period of notice, or "has paid" to the employee payment instead of giving notice.

**For more information on termination payments please phone the VANA Employment Relations Line on (02) 9083 0091.**

**Modern Award update – New provisions for withholding wages where an employee fails to give the required notice.**

In addition to making changes to the timing of termination payments, the FWC has made amendments to a number of Modern Awards, including the General Retail Industry Award, which changes the employer's ability to withhold monies from employees for unworked notice.

The new requirement has been inserted into clause 14.1 of the Retail Award. The operation of the clause which is provided below is effective from the 1 November 2018.

Clause 14.1 if the Retail Award is now as follows:

**Notice of termination by an employee**

*(a) This clause applies to all employees except those identified in ss.123(1) and 123(3) of the Act.*

*(b) An employee must give the employer notice of termination in accordance with **Table 1—Period of notice** of at least the period specified in column 2 according to the period of continuous service of the employee specified in column 1.*

**Table 1—Period of notice**

<b>Column 1</b> <b>Employee's period of continuous service with the employer at the end of the day the notice is given</b>	<b>Column 2</b> <b>Period of notice</b>
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

*Note: The notice of termination required to be given by an employee is the same as that required of an employer except that the employee does not have to give additional notice based on the age of the employee.*

*(c) In paragraph (b) **continuous service** has the same meaning as in s.117 of the Act.*

*(d) If an employee who is at least 18 years old does not give the period of notice required under paragraph (b), then the employer may deduct from wages due to the employee under this award an amount that is no more than one week's wages for the employee.*

*(e) If the employer has agreed to a shorter period of notice than that required under paragraph (b), then no deduction can be made under paragraph (d).*

*(f) Any deduction made under paragraph (d) must not be unreasonable in the circumstances.*

In effect, employers can withhold the maximum of one week's wages in the event that an employee who is 18 years of age or above, does not provide the required amount of notice upon resignation of employment. The monies withheld may only be taken from wages owed. No money can be deducted

from accrued annual leave or any other statutory entitlement. It is also important to note that the amount of notice the employee is required to provide is not changed by this decision.

Employers should remember to check the updated version of the Award prior to making any decision to avoid any breach or underpayment. Further, paragraph (f) outlined above, creates uncertainty for employers with respect to the definition of unreasonable circumstances, and employers should also seek advice from the employment relations telephone advice line.

**For more information on termination payments please phone the VANA Employment Relations Line on (02) 9083 0091.**