

9 April 2020

## Modern Award Review

On Wednesday 8 April 2020, the Fair Work Commission varied 99 modern awards to insert a new Schedule titled '**Additional measures during the COVID-19 pandemic**'. The schedule provides an entitlement to unpaid 'pandemic leave' and the flexibility to take twice as much annual leave at half pay.

The awards that are affected for the aged care industry are:

- Nurses Award 2010
- Aged Care Award 2010
- Clerks - Private Sector Award 2010
- Health Professionals and Support Services Award 2010
- Social, Community, Home Care and Disability Services Industry Award 2010

## Unpaid Pandemic Leave

Under this new provision, an employee is now entitled to take up to two weeks' unpaid leave if they are required, by government or medical authorities or acting on the advice of a medical practitioner, to self-isolate and is consequently prevented from working, or is otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic.

As we had previously advised, employees who are required to self-isolate in line with the government guidelines are not entitled to personal leave under the National Employment Standards as they do not have an illness or injury. The FWC was made aware of this issue and in trying to facilitate a fairer outcome for employers and employees, they wanted to ensure that employees could access unpaid leave in this situation as of right rather than simply leave it to the employers' discretion.<sup>1</sup>

Some important things to note are:

- 1) The grant of leave is up to two weeks and as such may be shorter.
- 2) The leave must commence before 30 June 2020.
- 3) An employer can request evidence that would satisfy a reasonable person that the leave is taken for a reason given in the clause.
- 4) An employer may agree to give an employee more unpaid pandemic leave but is not required to.

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<sup>1</sup> Ward,N., Australian Business Lawyers & Advisors, 99 Modern Awards Varied for Unpaid Self-Isolation Leave and Double Annual Leave at Half Pay., 9 April 2020.

The proposed unpaid pandemic leave provision is as follows:

## **Schedule X—Additional measures during the COVID-19 pandemic**

X.1 Subject to clauses X.2.1(d) and X.2.2(c), Schedule X operates from 8 April 2020 until 30 June 2020. The period of operation can be extended on application.

X.2 During the operation of Schedule X, the following provisions apply:

### **X.2.1 Unpaid pandemic leave**

- a) Subject to clauses X.2.1(b), (c) and (d), any employee is entitled to take up to 2 weeks' unpaid leave if the employee is required, by government or medical authorities or acting on the advice of a medical practitioner, to self-isolate and is consequently prevented from working, or is otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic.
- b) The employee must give their employer notice of the taking of leave under clause X.2.1(a) and of the reason the employee requires the leave, as soon as practicable (which may be a time after the leave has started).
- c) An employee who has given their employer notice of taking leave under clause X.2.1(a) must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason given in clause X.2.1(a).
- d) A period of leave under clause X.2.1(a) must start before 30 June 2020, but may end after that date.
- e) Leave taken under clause X.2.1(a) does not affect any other paid or unpaid leave entitlement of the employee and counts as service for the purposes of entitlements under this Award and the National Employment Standards.

NOTE: The employer and employee may agree that the employee may take more than 2 weeks' unpaid pandemic leave.

## Annual Leave at half pay

The first version of Schedule X includes a model term providing additional flexibility in respect of annual leave.

In short it provides that an employer and employee may agree to take up to twice as much annual leave at half the rate of pay.

Members were previously advised that such a provision had recently been inserted into the *Clerks - Private Sector Award*. The term proposed is as follows:

The proposed annual leave at half pay provision is as follows:

### X.2.2 Annual leave at half pay

- a) Instead of an employee taking paid annual leave on full pay, the employee and their employer may agree to the employee taking twice as much leave on half pay.
- b) Any agreement to take twice as much annual leave at half pay must be recorded in writing and retained as an employee record.
- c) A period of leave under clause X.2.2(a) must start before 30 June 2020, but may end after that date.

**EXAMPLE:** Instead of an employee taking one week's annual leave on full pay, the employee and their employer may agree to the employee taking 2 weeks' annual leave on half pay. In this example:

- the employee's pay for the 2 weeks' leave is the same as the pay the employee would have been entitled to for one week's leave on full pay (where one week's full pay includes leave loading under the Annual Leave clause of this award); and
- one week of leave is deducted from the employee's annual leave accrual.

**NOTE 1:** A employee covered by this Award who is entitled to the benefit of clause X.2.1 or X.2.2 has a workplace right under section 341(1)(a) of the Act.

**NOTE 2:** Under section 340(1) of the Act, an employer must not take adverse action against an employee because the employee has a workplace right, has or has not exercised a workplace right, or proposes or does not propose to exercise a workplace right, or to prevent the employee exercising a workplace right. Under section 342(1) of the Act, an employer takes adverse action against an employee if the employer dismisses the employee, injures the employee in his or her employment, alters the position of the employee to the employee's prejudice, or discriminates between the employee and other employees of the employer.

**NOTE 3:** Under section 343(1) of the Act, a person must not organise or take, or threaten to organise or take, action against another person with intent to coerce the person to exercise or not exercise, or propose to exercise or not exercise, a workplace right, or to exercise or propose to exercise a workplace right in a particular way.

The FWC have considered whether to include a broader range of measures to provide greater flexibility, such as:

- the capacity for employers to direct employees to take annual leave; and
- measures to facilitate reductions in the working hours of full-time and part-time employees.<sup>2</sup>

However, they have decided to take a more limited approach at this stage in order to provide a quick response to the current crisis and in an effort to attract broad support for the measures proposed.

To view the Full Bench decision by the Fair Work Commission regarding the **Variation of awards on the initiative of the Commission**, please click [here](#).

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<sup>2</sup> [2020] FWCFB 1837, **Variation of awards on the initiative of the Commission** (AM2020/12), <https://www.fwc.gov.au/documents/decisionssigned/html/2020fwcfb1837.htm>