

Changes to award annualised wage arrangements

The Fair Work Commission has made changes to some of its modern awards' annualised wage arrangements. The changes come into effect on **1 March 2020**. If you are covered by one of the affected awards and have employees under these arrangements, you will be impacted by these changes.

Which awards are affected and what are the changes?

- ✎ Banking, Finance and Insurance Award
- ✎ Broadcasting and Recorded Entertainment Award
- ✎ Clerks - Private Sector Award
- ✎ Contract Call Centres Award
- ✎ Health Professionals and Support Services Award
- ✎ Horticulture Award
- ✎ Hospitality Industry (General) Award
- ✎ Hydrocarbons Industry (Upstream) Award
- ✎ Legal Services Award
- ✎ Local Government Industry Award
- ✎ Manufacturing and Associated Industries and Occupations Award
- ✎ Marine Towage Award
- ✎ Mining Industry Award
- ✎ Oil Refining and Manufacturing Award
- ✎ Pastoral Award
- ✎ Pharmacy Industry Award
- ✎ Rail Industry Award
- ✎ Restaurant Industry Award
- ✎ Salt Industry Award
- ✎ Telecommunications Services Award
- ✎ Water Industry Award
- ✎ Wool Storage, Sampling and Testing Award

There are four "Model Clause" amendments. Model Clause 1 and Model Clause 3 are the most commonly adopted. Model Clause 2 and 4 apply only to specific classifications under the *Hospitality Industry (General) Award*, *Restaurant Industry Award* and *Marine Towage Award*.

Model Clause 1 applies to:	Model Clause 3 applies to:
✎ Banking, Finance and Insurance Award	✎ Broadcasting and Recorded Entertainment Award
✎ Clerks - Private Sector Award	✎ Horticulture Award
✎ Contract Call Centres Award	✎ Local Government Industry Award
✎ Hydrocarbons Industry (Upstream) Award	✎ Manufacturing and Associated Industries and Occupations Award
✎ Legal Services Award	✎ Oil Refining and Manufacturing Award (non-clerical employees)
✎ Mining Industry Award	✎ Pastoral Award
✎ Oil Refining and Manufacturing Award (clerical employees only)	✎ Pharmacy Industry Award
✎ Salt Industry Award	✎ Rail Industry Award
✎ Telecommunications Services Award	
✎ Water Industry Award	
✎ Wool Storage, Sampling and Testing Award	

Model Clause 1 was devised to cover employees who work reasonably stable hours ([2019] FWCFB 1289 [1]). The Commission determined that an annualised wage arrangement could be commenced

by the employer without the employee's agreement. Model Clause 3 was drafted to cover employees who work variable hours or significant amounts of overtime ([2019] FWCFB 1289 [1]). Awards with this Model Clause must obtain the employee's agreement before commencing an annualised wage arrangement.

The Model Clauses have been tweaked for each award, but are relatively consistent. Broadly speaking, the requirements under the model clauses are:¹

- ✎ These arrangements can only be applied to **full-time employees**
- ✎ The employer must make a **record of the employee's start and finish times**, and time taken for **unpaid breaks**, and have this signed (or electronically noted) by the employee "each pay period or roster cycle"
- ✎ Every 12 months, the employer must undertake a **reconciliation** of the wages paid to the employee compared with what they would have received under the award. If the employee was paid less, they must be back-paid within 14 days
- ✎ Annualised wage arrangement paid **in lieu of**:
 - Wages
 - Allowances
 - Overtime and penalty rates
 - Leave loading
- ✎ The employer must advise the employee **in writing** and **keep a record of**:
 - the annualised wage payable
 - which provisions are set off
 - how each component of the annualised wage is calculated
 - the outer limit of hours covered by the annualised wage, and how excess hours will be paid for by the employer

How will this affect business?

The record keeping requirement is the most immediate impact on employers and will be a significant impost on many businesses. Many employers avoid daily timesheets. The requirement to keep records of time worked as well as times of unpaid meal breaks may be very disruptive to business due to:

- ✎ employees may not be accustomed to recording attendance times at work. This becomes problematic when staff are travelling or working remotely;
- ✎ building employees time-keeping habits. Considerable time and resources will have to be spent educating employees and managers to make records of time worked and store those records in an orderly manner;
- ✎ good governance will require that the records be subject to some probity provisions, to ensure they are accurate. If an employee's hours of work are erroneously inflated, then in the absence of evidence of fraud, the employer will likely be required to pay the employee what they would have received under the award at reconciliation time; and
- ✎ requiring time records to be created and maintained will necessarily turn employees' minds to the time each day or shift that they are working compared to their 'contracted' hours set out in the annualised wage arrangement. This is likely to cause a cultural shift: where employees were paid a salary for performing a position, employees will see their annual salary as a payment for a specific number of hours worked, and everything else will be additional. This has been described as a culture of "clock watching" that will impact the employer's people culture strategy.

¹ According to the "[draft determinations](#)" released on 23 December 2019.

What next?

"Set Off"

Many businesses will have existing "set off" clauses in their common law contracts. These arrangements continue to have effect ([2018] FWCFB 154 [102]). A "set off" clause is an agreement by the parties that the amount paid in the contract satisfies the entitlement accrued by the employee under the award. Some award obligations, such as prescriptions about pay frequency or other non-monetary amounts, cannot be "set off".

It is important to use precise language in a set off clause to ensure that there is a "close correlation" between the award obligations and the entitlements satisfied by payment of a salary under the contract. If employers gets this right, there is no need to use the annualised wage arrangements in modern awards. That disposes of the requirement to keep attendance records.

However, even under a set off arrangement, we recommend keeping some records of employees' attendance because there is always a risk that they may claim the salary paid under the set off contract was less than the amount they are owed under the applicable award. Where employers have some records to disprove that argument, they will have a better chance at successfully defending future claims.

Compliance with award

If employers don't have a practice of utilising set off provisions in employment contracts, they need to identify if they are required to comply with the terms of the annualised salary arrangements. Obviously, this will necessitate a review to ensure that employers are compliant with the new Award requirements. It may also mean making changes to record keeping and payroll process as well as various communication and educational material to employees.

If you have award-covered employees on any kind of annualised arrangement, consider reviewing the processes you have in place to protect yourself. If you would like more information or assistance, please contact us.

This article was prepared by Kim Hodge, Partner and Tom Klaassen, Solicitor.










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Should you require any further information relating to the above decision, please contact one of the following partners on telephone (08) 9221 3110.

 Graeme Richards	Partner	 Justin Dyson	Partner
 David Burton	Partner	 Josephine Courtney	Partner
 Alex Freeman	Partner	 Kathy Melville	Partner
 Tony Basile	Partner	 Kim Hodge	Partner
 Byron Winburn-Clarke	Partner		