

ALERT

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Changes to annual leave entitlements

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Employers are reminded that the Fair Work Commission recently introduced changes to the annual leave provisions contained in the majority of modern awards. These provisions took effect from the first pay period after 29 July 2016. A failure to comply with these provisions exposes an employer to various sanctions, including civil penalties of up to \$54,000 per breach, as well as orders for compensation for any damage suffered as a result of the breach. Importantly, the changes that have been introduced have no effect on the annual leave entitlements of employees who are not covered by a modern award.

Cashing out of annual leave

The annual leave provisions contained in the majority of modern awards have been amended to allow the cashing out of annual leave in certain circumstances. In summary, the following conditions must be met:

- the employer and employee must agree in writing to the cashing out of a particular amount of annual leave;
- the agreement must specify the amount of leave to be cashed out, the payment to be made to the employee, and when the payment will be made;
- the maximum amount of accrued annual leave that may be cashed out in any 12-month period is 2 weeks;
- an agreement must not result in the employee's remaining accrued annual leave entitlement being less than 4 weeks; and
- each cashing out of a particular amount of annual leave must be set out in a separate written agreement.

It is unlawful for an employer to exert undue influence or pressure on an employee to make, or not make, a written agreement to cash out any accrued annual leave.

Excessive annual leave

The majority of modern awards have also been amended to give employers the specified right to direct an employee to take annual leave where they have an 'excessive leave accrual', and to give employees the right to effectively unilaterally take a period of annual leave where they have an 'excessive leave accrual'. For the purposes of these provisions, an 'excessive leave accrual' is defined as where an employee has accrued more than 8 weeks' paid annual leave (or 10 weeks' paid annual leave for a shiftworker). In both cases, the employer and employee must first seek to confer with the other and genuinely try to reach agreement on how to reduce or eliminate the excessive leave accrual before exercising their rights.

Granting annual leave in advance

The majority of modern awards have been amended to include new provisions for the taking of annual leave in advance. Under the provisions, annual leave may only be taken in advance by written agreement between the employer and employee. The agreement must state the amount of leave to be taken in advance and when the leave is to be taken. If, on the termination of the employee's employment, the employee has not accrued an entitlement to a period of annual

leave already taken, the employer may deduct from any money due to the employee on termination an amount equal to the amount already paid to the employee for the leave taken in advance.

What should employers do?

Employers should consider whether any of their employees are covered by a modern award if they have not done so already and, if they are covered, ensure that their written contracts of employment and any written policies and procedures in place comply with the new provisions. From a practical perspective, if employers are considering granting annual leave in advance, directing an employee to take a period of annual leave, or cashing out a period of annual leave for any award-covered employee, they should carefully review the terms of the applicable award to ensure the necessary conditions for doing so will be satisfied. Employers may wish to obtain legal advice in this regard. A copy of any written agreement entered into with an employee for the cashing out of annual leave or the taking of leave in advance must be kept by the employer for at least 7 years.

Should you have any queries in relation to this alert, please contact



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