

# ALERT

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## Award flexibility decision

The Fair Work Commission (**Commission**) has handed down its decision to:

- vary the terms of the model flexibility term in modern awards so that an individual flexibility arrangement (**IFA**) cannot be entered into before the individual employee has commenced employment; and
- adopt the Fair Work Act Review Panel's recommendations to extend the notice period for terminating IFAs.

The decision was made as part of the two-yearly transitional review of modern awards and (when the amendments come into effect) may have significant implications for employers, particularly for employers who utilise a standard agreement that includes an IFA.

The Commission said the evidence suggested that a significant proportion of IFAs were entered into prior to the individual employee commencing employment and that this was 'contrary to the intent of the model flexibility term and the Act'.

As the law currently stands, an employer cannot make an offer of employment conditional on a prospective employee entering into an IFA. However, this is arguably different from simply offering an IFA at the outset of employment. This decision seems to add an unnecessary level

of complexity and restriction to the freedom of both parties to negotiate the terms of employment upfront (including varying the application of the award and offering certainty to both parties through the use of for example an annual salary in satisfaction of the loading, penalty, allowance and overtime provisions of the award).

This decision will effectively mean that an IFA cannot be negotiated prior to the start of employment.

The model flexibility term contained in all modern awards also currently provides that an IFA may be terminated by either party upon giving the other party 4 weeks' written notice of termination. The full bench ruling means that this will likely be extended to 13 weeks.

A number of other significant changes were proposed, including:

- clarifying the expression 'arrangements for when work is performed' by identifying the specific provisions in the modern award that fall within the expression; and
- clarifying that the better off overall test is to be assessed only at the time the IFA is made.

We will be keeping a close watch on the progress of the proposed amendments.



**For further information, please contact:**

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