

The Fair Work Commission has just handed down the first [major decision](#) in its four yearly review of modern awards.

## What is the review of modern awards?

Under the *Fair Work Act 2009*, the Commission is required to conduct a comprehensive review of modern awards every [four years](#). This is the first four yearly review.

## The effect of the annual leave decision

The decision deals with a number of 'common issue' applications to vary annual leave provisions. The Commission has decided to introduce a number of important flexibilities into annual leave provisions. A summary of the decision can be found [here](#).

## Who does this affect?

This decision affects all employees who a modern award applies to (award employees). It will not impact on enterprise agreement covered employees unless the enterprise agreement incorporates a modern award.

## Operational date

This is only a test case decision. This means that the Commission has decided that the decision will apply broadly, although the actual provisions have not been finalised. These provisions are currently in draft form for comment. The provisions will not be operational in specific awards until specific orders are made and could be subject to award-specific variations. There is no set date for the changes to take effect, although it is anticipated that these will be made soon.

Employers should check the Fair Work Commission's [modern awards listings](#) to see if (and how) a particular award has been varied.

## What are the key changes?

### Excess accrued annual leave

Many modern awards do not permit an employer to direct an employee to take excessive accrued leave. Under the National Employment Standards (NES) and employer cannot direct an award employee to take leave unless the award permits it. This has meant employers have been prevented from effectively managing leave balances, causing considerable cash-flow issues.

The Commission's [model clause](#) proposes to permit an employer to issue a written direction to an employee to take leave accrued in excess of 6 weeks, subject to there being at least 8 weeks' notice, and the capacity for the employee to negotiate around the request.

### Cashing out of annual leave

Similar to directing an employee to take leave, the NES prohibits an award employee to cash out annual leave unless the award permits it. The Commission has decided to introduce a [model clause](#) into all modern awards permitting an employee to elect to cash out up to two weeks per year, provided they retain a minimum balance of at least four weeks and the employer agrees to it and subject to a number of safeguards, especially for employees who are under 18.

## Annual leave in advance

The Commission has also granted an application to include a [model clause](#) in a number of modern awards to permit annual leave to be taken in advance of the accrual. This would permit an employer to grant annual leave in advance and also to deduct it from entitlements on termination if their employment ends before accrual. Provisions of this nature already exist in many awards.

## Payment during leave

The Commission also granted a variation to ensure an employer who pays by EFT can continue to pay the employee on their usual payday, rather than paying the full amount in advance.

## Record keeping

An important feature of all of the proposed model provisions are strict record keeping obligations. Failing to keep the appropriate records exposes a business to a breach of award (maximum penalty \$51,000 for a corporation, \$10,200 for non-corporate employers and persons 'involved in' a contravention). Employers may consider making an enterprise agreement to include similar provisions while streamlining record keeping obligations.

## Upcoming reviews

The Commission held several matters in suspense, including variations to require annual leave loading to be paid on termination and 'purchased leave' (giving an employee additional leave instead of paying overtime). These will be decided at a later stage.

In addition, there are a number of other significant test case ('[common issue](#)') proceedings before the Commission that could have significant effects, including a union claim for domestic violence leave, strengthened family friendly practices, changes to part-time and casual engagements and an employer claim for a 'micro business' schedule containing streamlined provisions for very small business. Fair Work Lawyers will provide information on these matters when they arise.

## Need more information

If you would like further information about these changes, or to discuss how enterprise agreements can reduce red-tape, please contact the team at Fair Work Lawyers.



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