

Business Bulletin

January 2010

MORE ON FAIR WORK ACT...

In this bulletin, we will cover two of the most common questions we received from you on the workplace relations changes resulting from the Fair Work Act 2009.

My employee has asked to work flexible hours – what do I need to do?

Eligible Employees

From 1 January 2010, under National Employment Standards (NES), some employees i.e. parents or carers of children below school age or children under 18 with a disability – are eligible to request a flexible work arrangement.

These employees have to have been in continuous service for a minimum of 12 months. This includes some casual employees who have worked on a regular and systematic basis for a sequence of period of at least 12 months and expect their employment to be ongoing.

The employees must make their request in writing and must set out details of the change sought and reasons for the change.

Your obligation as an employer

After receiving the request, you must reply within 21 days. You may approve the request, or you may refuse it on reasonable business grounds.

If you refuse the request, your reason must be:

- on reasonable business grounds
- set out in writing
- It is important to check with professional advisors whether your reason for the refusal is “reasonable” in accordance with the Fair Work Act. Factors that may be relevant in defining reasonable business grounds could include:
 - the effect on the workplace and the employer’s business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service;
 - the inability to organise work among existing staff;
 - the inability to recruit a replacement employee;
 - the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee’s request.

You and your employee are then encouraged to discuss alternative arrangements that might satisfy the requirements of both parties.

If there is a dispute, Fair Work Australia or other parties can act as mediators if the employee’s agreement or contract of employment or other written agreement allows this.

Note that it is illegal for an employer to take adverse action against an employee for making a request seeking assistance from Fair Work Australia.

What are the minimum pay & conditions for my employees?

(i) Minimum pay rates

If you are in the national system, your employees should not be paid less than the minimum wage currently set at \$14.31 per hour or \$543.78 per week.

Minimum wages may also be set by a Modern Award. If the applicable Modern Award includes the model phasing schedule then the wages in the Modern Award will be phased in from the first pay period on or after 1 July 2010 and the pre-Modern Award rate will continue under the modern award until 1 July 2010.

For example, the General Retail Industry Award 2010 and the Clerks Private Sector award 2010 contain the phasing in provisions referred to above. Further, notwithstanding the phasing in provisions, an employee can apply to Fair Work Australia for what is called a “take home pay order” in the event that his or her pay decreases as a consequence of the Modern Award process. The effect of the take home pay order is to ensure those both existing and new employees’ rates of pay wages do not decrease during the phasing in period.

Your employee has the right to be paid no less than the Award minimum amount even if it’s higher than the national minimum wage. If you have an industrial agreement (e.g. collective agreement) it will also contain pay rates that must be paid.

You can locate an award by using the “Find an award” tool at the following site:

<http://www.fairwork.gov.au/Pay-leave-and-conditions/Awards/Pages/Find-an-award.aspx?role=employers>

You must pay the correct rate of pay for all hours your employees have to be at work, including for work meetings and training. Employees may also be entitled to other allowances or loadings, depending on what job they do. You must also pay your employees regularly and issue a pay slip within 1 day of pay day.

(ii) Leave entitlements

The NES includes minimum leave entitlements for all employees covered by national workplace laws regardless of their industrial instrument or contract of employment.

Under the NES, full-time and part-time employees are generally entitled to paid personal/carer’s leave and compassionate leave, annual leave, parental leave and related entitlements and community service leave.

Employers must generally give all permanent full-time employees at least:

- 4 weeks paid annual leave (5 weeks for shift workers)
- 10 days paid personal/carer’s leave per year (includes sick leave)
- 2 days unpaid carer’s leave (when needed)
- 2 days paid compassionate leave (when needed)
- 12 months unpaid parental leave.

Casual employees are not entitled to paid personal leave or annual leave, but are entitled to unpaid carer’s leave, unpaid compassionate leave and unpaid community service leave.

Note: Annual leave and paid personal/carer’s leave accumulates over time. Minimum entitlements to parental leave under the NES apply to all employees employed in Australia (including those covered by state industrial laws). However, if state laws are more beneficial to employees than the NES, then these will apply.

(iii) Maximum working hours

As an employer, you must not request or require an employee to work more than the following hours of work in a week, unless the additional hours are reasonable:

- for a full-time employee – 38 hours; or
- for an employee other than a full-time employee – the lesser of 38 hours and the employee’s ordinary hours of work in a week.

When calculating the number of hours an employee has worked per week, any authorised leave, such as personal leave, should be included.

An employee may refuse to work additional hours, if they are unreasonable. For additional hours to be ‘reasonable’, all relevant factors must be considered.

These factors include:

- any risk to the employee's health and safety
- the employee's personal circumstances, including family responsibilities
- the needs of the workplace or enterprise
- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration, that reflects an expectation of, working additional hours
- any notice given by the employer to work the additional hours
- any notice given by the employee that they intend to refuse to work the additional hours
- the usual patterns of work in the industry
- the nature of the employee's role, and the employee's level of responsibility
- whether the additional hours are in accordance with agreed averaging arrangements
- any other relevant matter.

(iv) Public holidays

Employees are paid for public holidays at the base rate of pay for the employee's ordinary hours of work on that day or part-day. The base rate of pay excludes incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or any other separately identifiable amounts.

However, an employee is not entitled to payment if they do not ordinarily work on that day. For example, a part-time employee is not entitled to payment if their part-time hours do not include the day of the week on which the public holiday falls.

Public holiday pay for employees who work on a public holiday depends on whether they're covered by an award or agreement that provides for penalty rates to be paid for work on public holidays.

An employer can request an employee work on any public holiday and an employee can refuse. Both the request and refusal must be reasonable. A number of factors are considered when deciding if a request or refusal is reasonable, including:

- the nature of the employer's workplace (including its operational requirements) and the nature of the work performed by the employee;
- the employee's personal circumstances, including family responsibilities whether the employee could reasonably expect that the employer might request work on the public holiday;
- whether the employee is entitled to receive overtime payments, penalty rates, additional remuneration or other compensation that reflects an expectation of work on the public holiday;
- the type of employment (eg. full-time, part-time, casual or shiftwork);
- the amount of notice given by;
- the employer when making the request;
- the employee in refusing the request
- any other relevant matter.

No single factor decides if a request or refusal is reasonable. They are used in combination.

Should you require further assistance on compliance with or require more information about the Fair Work Act, please contact Guild Lawyers on 02 9019 9999.

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CHANGES TO NON-COMMERCIAL LOSSES RULE AND HIGH INCOME INDIVIDUALS

From 1 July 2009, taxpayers with non-business (eg. salary) incomes above \$250,000 will be restricted in their ability to claim a deduction for any business activities which generate losses. The existing rules will continue to apply to those with non-business incomes of less than \$250,000 in an income year.

The ATO is seeking to restrict deductibility of business losses incurred in relation to non-profitable business activities so that excess deductions from unprofitable business activities cannot be used to reduce salary, wage and other income of high income earners. There are some exceptions to this rule including:-

- primary production or professional arts businesses;
- relief granted by the Commissioner of Taxation if there are exceptional circumstances or because the nature of the activities means that they are temporarily carrying on an unprofitable business but the activities they are undertaking are nonetheless independently assessed as commercially viable.

A new exception has also been introduced for losses solely due to deductions claimed for the small business and general business tax break in the 2009-10 and 2010-11 income years. This exception applies to all taxpayers.

The above is only a summary of the rules and exceptions. If you feel this may apply to you, please contact our office for more details.

LAND TAX THRESHOLD FOR 2010

The Valuer General has determined that the tax free threshold for land tax for the 2010 land tax year is \$376,000 (2009: \$368,000). The premium land tax threshold for the 2010 land tax year is \$2,299,000 (2009: 2,250,000). The tax rate is the same at 2%. Assessments usually issue in January & February. If you do not receive an assessment which you are expecting, or have any questions about your land tax obligations, please contact our office.

BEWARE OF SHAM MORTGAGE ARRANGEMENT

The Tax Office has issued a taxpayer alert warning people about sham arrangements promoted as 'mortgage management plans' which promise to help home owners repay their home loan sooner and claim tax deductions to which they are not entitled. Basically, it involves home owners refinancing their home loan and establishing what appears to be an investment loan to fund the purchase of shares in a bogus company. While these arrangements may appear attractive, beware that the Tax Office is increasing its scrutiny on these types of arrangements with penalties and prosecutions expected to be very severe.

We will keep you informed of further details as the Fair Work Act rolls out over the next 12 months. In the meantime, should you have any questions, please contact our office on 02 8220 1700.

DISCLAIMER: This bulletin is intended to provide a general summary only and should not be relied on as a substitute for professional advice specific to the taxpayers' circumstances. All material included in this bulletin is based on the information available at the time it was prepared and is subjected to changes..

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