

COVID-19 and its Impact on Industrial and Employment Law, Awards and Enterprise Agreements

JOSEPH D'ABACO

BARRISTER

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Variations to specific Awards

1. Hospitality (Industry) General Award 2010
2. Restaurant Industry Award 2010
3. Clerks – Private Sector Award 2010

Hospitality and Restaurant Industry Awards

1. Hospitality Award – covers hotels, caterers, function centres, pubs and serviced apartments.
2. Restaurant Industry Award – covers restaurants and cafes.
3. Hospitality Award – variation effective 24 March 2020;
Restaurant Industry Award – variation effective 31 March 2020.
4. Variations only operate until 30 June 2020 (however, that date may be extended on application).

Effect of the Variations

Duties of Employees

1. Employees can be directed to perform duties outside the scope of their classification level i.e. enhance workplace flexibility. Provided that:
 - a) Duties are within employee's skills and competency;
 - b) Duties are safe and employee is licensed and/or qualified to perform those duties;
 - c) Higher duties allowances payable (if duties are in a higher classification than employee's normal classification).

Effect of the Variations

Reduction of employee hours of work

1. Full-time employees (38 hours per week):
 - a) Hours of work can be reduced to a minimum of 22.8 hours per week (i.e 3 working days);
 - b) Only paid for hours worked.
2. Part-time employees (working less than 38 hours per week):
 - a) Hours of work can be reduced to a minimum of 60% of their regular part-time hours of work;
 - b) Only paid for hours worked.
3. Consultation
 - a) Employers are obliged to consult with employees affected and United Workers Union (if employer is aware that employees are members) before issuing direction to work reduced hours.
4. Accrual of leave entitlements
 - a) Entitlements to annual leave and personal leave continue to accrue at employee's regular hours of work i.e. not based on the reduced number of hours worked.

Effect of the Variations

Annual Leave

1. Employers can direct employees to take annual leave on 24 hours notice. Ordinarily, annual leave is taken at times agreed between employer and employee.
2. Annual leave at half pay
 - a) Employer and employee can agree to take annual leave at half pay – increases flexibility and period of income for an employee not working.

Clerks Award

1. Covers a multitude of employers in different industries – in respect of employees engaged in clerical and administrative duties.
 - a) Not managerial employees
2. Variation effective 23 March 2020.
 - a) Operative until 30 June 2020 (again, may be varied on application)
3. Effect of the Variations:

Working from Home

1. Employees may be directed to work from home.
2. If employees are directed to work from home and do so:
 - a) Part-time and casual employees can be rostered to work a minimum shift of 2 hours (ordinarily, 3 hours – clauses 11.5 and 12.4 of Award);
 - b) Full-time employees: employer and employees can agree to increase the spread within which ordinary hours can be worked (to provide increased flexibility);
 - i. Ordinarily – 7:00am to 7:00pm (Monday-Friday), 7:00am to 12:30pm Saturday;
 - ii. Can be varied to 6:00am to 11:00pm (Monday – Friday);

Clerks Award

Temporary reduction in ordinary hours

1. Any reduction in ordinary hours must be agreed between the employer and full-time and part-time employees in the workplace.
 - a) Employer cannot simply direct employees to work reduced hours.
2. At least 75% of full-time and part-time employees must agree to any reduction in ordinary hours.
 - a) Reduction permitted to a minimum of 75% of the hours ordinarily worked by the full-time and part-time employees.
3. A vote must be conducted.
 - a) Notification requirements – Australian Services Union (if employees are members) and Fair Work Commission must be notified of any vote;
 - b) Procedural requirements must be satisfied.
4. Accrual of annual leave and personal leave entitlements.
 - a) Accrue based on ordinary hours worked by full-time and part-time employees – not the reduced hours worked.

Clerks Award

Annual Leave

1. Employer may direct employees to take paid annual leave. Ordinarily, annual leave taken at times agreed between employer and employee, with exception of annual shut downs etc.
2. Employer and employees can agree to take annual leave on half pay.
 - a) Increased flexibility – provide for some income over a longer period of time.

Variation of 99 Modern Awards

1. FWC, of its own initiative varied 99 modern awards effective 8 April 2020.
2. Variation applies to almost all employees in Australia covered by awards.
3. Variation provides for:
 - a) Unpaid pandemic leave;
 - b) Annual leave at half pay.

Unpaid Pandemic Leave

1. Employees can take up to 2 weeks unpaid pandemic leave if:
 - a) Employee is required by government or medical authorities, or acting on medical advice, to self-isolate; or
 - b) Prevented from working due to COVID-19 measures.
2. Unpaid Pandemic Leave counts as service for all entitlements such as annual leave, personal leave etc.

Annual leave at Half Pay

1. Employer and employee may agree to take annual leave at half pay:
 - a) Agreement must be recorded in writing;

Observations

1. The variations are very much 'tinkering at the edges'.
2. For small/medium-sized employers in the private sector who have experienced a drastic effect on their business because of COVID-19, the variations are of limited assistance.
3. May be some assistance to larger employers, to accommodate a small disruption to their business because of COVID-19.

Variation of Enterprise Agreements

1. An employer may request employees covered by an enterprise agreement to approve the proposed variation at a vote – s.208 *Fair Work Act 2009* (Cth):
 - a) The approval can be sought at a ballot, or electronically;
 - b) Variation takes effect when a majority of employees who cast a valid vote approve of the variation – s.209(1) FW Act.
2. Ordinarily, employees must have access to the proposed variation for at least 7 calendar days before they can vote on it – s.180(4) FW Act. This period is known as the “access period”.
3. Effective 17 April 2020, the “access period” has been reduced from 7 days to 1 day - Fair Work Amendment (Variation of Enterprise Agreement) Regulations 2020.
 - a) The reduction of the access period is for a period of 6 months – expires 16 October 2020.

Variations of Enterprise Agreements

4. FWC must still approve the variation for it to have effect.
 - a) The existing requirements for approval of an enterprise agreement apply;
 - b) Critically, FWC must still be satisfied that the BOOT (Better Off Overall Test) is satisfied;
 - c) Cannot undermine existing Award terms and conditions.

5. May be useful to employers to obtain agreement from employees as part of a “quid pro quo” to maintain their employment and not retrench staff. e.g.:
 - a) Defer wage increases provided in enterprise agreements;
 - b) Alter spans of ordinary working hours;
 - c) Provide for specific workplace changes required by employer as a result of COVID-19 e.g. manning levels; increase flexibility of duties which employees can perform; shorten minimum engagement periods.

Stand Down

1. Traditionally, awards and agreements contained 'stand down' provisions.
2. Enabled employers to require employees not to attend work (and not required to pay employees) – if the employee could not be 'usefully employed' for a variety of different reasons:
 - a) Industrial action;
 - b) Breakdown of machinery or equipment;
 - c) Stoppage of work for any cause 'for which the employer cannot reasonably be held responsible'.
3. Now, enshrined in legislation – s.524 *Fair Work Act 2009* (Cth).
 - a) However, if an employment contract/enterprise agreement contains a stand down provision – it applies, rather than s.524 (s.524(2) FW Act).

Stand Down

4. For employer to stand down employees because of COVID-19, two requirements must be satisfied:
- a) First – employee cannot be ‘usefully employed’. A question of fact. If there is some work which employee can perform – then can be usefully employed.
See Townsend v General Motors Holden Ltd (1971)17 FLR 330
Australian Iron & Steel Ltd re: Stand down of Bricklayers (No.1) (1972) AR (NSW) 285
 - i. Simply because it is convenient/suits employer not to require employee to work is not sufficient
 - b) Second – a cause for which the employer cannot reasonably be held responsible.
 - i. Generally accepted – any Government direction to cease trading/ make trading economically non-viable – will be sufficient;
 - ii. However, a mere reduction in work would ordinarily not be sufficient. In these extraordinary times, however, in practice employees are being stood down because of impact on business occasioned by COVID-19.
 - c) FWC may resolve disputes about stand downs – see s.526 FW Act

Stand Down

5. In practice: stand downs are being used as an alternative to termination of employment.
 - a) If employment is terminated, notice requirements and obligations to pay redundancy pay (employers with 15 or more employees) apply;
 - b) Redundancy pay: applies if employer wants the job performed by an employee to no longer be performed by anyone;
 - i. Elimination of positions due to reduction of work – classic redundancy situation;
 - ii. Employer may apply to FWC to have obligation to pay redundancy pay varied based on incapacity to pay - s.120 FW Act;
 - A high threshold – few applications succeed;
 - Must establish incapable of paying – high debt levels, poor trading conditions insufficient.