

# Changes to rules regarding individual flexibility agreements

## Workplace Relations Update

In the recent decision *Modern Awards Review 2012 — Award Flexibility [2013]* FWCFB 2170 (15 April 2013) (**Award Flexibility Decision**), the Full Bench of the Fair Work Commission (**FWC**) decided to alter the model flexibility clause contained in all modern awards. The model flexibility clause allows an employer and an individual employee to enter into an individual flexibility agreement (**IFA**).

The proposed changes, which have not yet taken effect, will have a number of practical implications for all employers who have previously, or who may in the future, enter into an IFA with an employee. In particular, employers and employees will not be able to enter into an IFA until the employee has commenced employment, and the notice period to terminate an IFA will be 13 weeks.

### What is an IFA?

Modern awards set out the minimum terms and conditions of employment for groups of employees performing similar tasks. IFAs allow employers and individual employees to vary the effect of an applicable modern award to meet the genuine needs of the employer and that individual employee. However, the employer is required to ensure the employee covered by the IFA is better off overall on the IFA compared to the modern award. This is referred to as the "Better Off Overall Test" (**BOOT**).

Considering whether the employee is better off overall means comparing the employee's financial benefits under the IFA and the employee's personal circumstances with the financial and non-financial benefits under the applicable modern award.

Employers and employees may choose to enter into an IFA for a wide variety of reasons. For example, employees can negotiate flexible arrangements which better accommodate their personal circumstances. It has also been suggested that IFAs can encourage improved productivity and efficiency through greater job satisfaction, motivation, retention of staff and reduced absenteeism.

### Who does this affect?

- All employers who have previously, or who may in the future, enter into an IFA with an employee.

### Article Highlights

- Employers and employees cannot enter into an IFA before employment commences. Therefore, employers cannot make an offer of employment conditional on entering into an IFA.



### IFAs not to be entered into before employment commences

The most important aspect of the Full Bench decision was to amend the model flexibility clause to expressly clarify that an IFA can only be made after the relevant employee has commenced employment. This change was made on the basis that Parliament never intended for IFAs to be made pre-employment because it is extremely unlikely that an employee will genuinely agree to an IFA in such circumstances. That is, they will be unable to properly engage in an assessment of the potential worth of benefits foregone pre-employment, and the potential employee may feel he or she has no real choice other than to accept employment on the terms offered.

Therefore, when the changes take effect, employers will not be able to require employees to sign an IFA as a condition of commencing employment. Those employees will instead commence employment subject to the full terms and conditions in the applicable modern award (save for where an enterprise agreement applies).

Accordingly, many employers who have used IFAs in the past will need to change their usual practices, and will need to ensure they are familiar with and comply with their obligations under the applicable modern award. This may cause some administrative difficulties for employers, as new employees will have different entitlements to existing employees who are on an IFA, and new employees may be less willing to enter into an IFA which alters the entitlements they have become accustomed to receiving.

If an employer fails to ensure that an IFA is properly made in accordance with the *Fair Work Act 2009* (Cth), which will include not entering into an IFA before employment commences, the employer may be liable to significant penalties (up to \$51,000 per breach for a corporation). We recommend employers who routinely use IFAs, and any employers who are intending to use IFAs in the future, seek legal advice to ensure they understand and comply with legal obligations.

### Extension of the period of notice required to terminate an IFA

The Full Bench also addressed one of the key issues faced by employers using IFAs by increasing the notice period required for either party to terminate an IFA from 4 weeks to 13 weeks. The proposed amendment to the model flexibility term will provide greater certainty for employers who bear the expense of negotiating and preparing an IFA, making IFAs a more attractive option for employers.

### IFAs can only vary certain clauses of modern awards and the employee must be better off overall

Currently, the flexibility terms within modern awards only allow IFAs to vary modern award entitlements relating to the following matters:

- arrangements for when work is performed;
- overtime rates;
- penalty rates;
- allowances; and

For further information or assistance in dealing with individual flexibility agreements:

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In the Award Flexibility Decision, the Full Bench rejected applications to expand the subject matter that IFAs can vary. However, the Full Bench did accept that greater clarity was required on the meaning of the phrase “arrangements for when work is performed” and on what entitlements can therefore be varied, but decided that this clarity should be provided on an award by award basis.

The Full Bench also indicated that the model flexibility term will be amended to make it clear that the BOOT is assessed only at the time the IFA is made. That is, the requirement to meet the BOOT is not a continuing obligation over the life of the IFA.

### **When will the changes take effect?**

The date on which the amendments described above will take effect is not yet clear, as the determination will only be finalised after another Full Bench hears and determines the applications made to vary the annual leave aspects of the model flexibility clause. We will notify you when the changes are due to take effect.

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