

Article Information

Authors: Tim Capelin, Emily Setter

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COVID-19 changes - modern award variations and amendments to the Long Service Leave Act 1955 - How these changes could help your business

On Wednesday 25 March 2020, the Fair Work Commission determined to vary the Hospitality Industry (General) Award 2010 (the Hospitality Award) on application by the Australian Hotels Association and the United Workers' Union. On Saturday 28 March 2020, the Fair Work Commission determined to vary the Clerks - Private Sector Award 2010 (the Clerks Award) on application by the Ai Group and the Australian Chamber of Commerce and Industry. Separately, amendments have also been made to the Long Service Leave Act 1955 (NSW), which came into effect on 25 March 2020.

You can find an overview of the amendments to the Clerks Award in this recent article by Chris Hartigan and Hannah Linossier: [Urgent update on COVID-19 Industrial Issues - Commission allows changes to the Clerks Award in response to COVID-19 industry worries](#).

(a) Changes to the Hospitality Award

The Commission determined to insert a Schedule L into the Hospitality Award. The schedule operates from 24 March 2020 until 30 June 2020, but may be extended on application to the Commission. In summary, the schedule provides:

- Where necessary and so directed, employees must perform any duties that are within their skill and competency (including lesser or higher duties), regardless of their classification (so long as the employee is licensed and qualified, and noting that higher duties rates apply if the employee is engaged in duties that carry a higher rate than their ordinary classification);
- After consulting with the affected employees in accordance with clause 8A of the Hospitality Award and notifying the United Workers' Union of its intention (if affected employee(s) are members of the UWU), an employer can:
 - direct a full-time employee to work an average of between 22.8 and 38 ordinary hours per week, and pay the employee on a pro-rata basis; and
 - direct a part-time employee to work an average of between 60% and 100% of their guaranteed hours per week, or an average of between 60% and 100% of their guaranteed hours per week over the roster cycle.

In either case, employees given such a direction will continue to accrue annual leave and personal leave, and any other applicable accruals under the Hospitality Award, based on their hours of work before the schedule commenced. Similarly, if an employee who has been directed to work reduced hours takes a period of paid annual leave or personal leave, the payment for that leave will be based on the employee's ordinary hours of work before the schedule commenced.

- An employer can, subject to considering an employee's personal circumstances, direct an employee to take annual leave with 24 hours' notice (noting that an employer and employee can still agree to an employee taking annual leave at any time).
- An employer and an employee may agree to the employee taking twice as much annual leave at half the rate of pay

for all or part of any period of leave.

(b) Implications of the changes to the Hospitality Award and Clerks Award for businesses

Although these award changes appear to be a welcome reprieve for many employers, businesses should still give consideration to whether individual employment contracts constrain the business from acting in the manner contemplated by the applicable award. For example, even if a reduction of hours is contemplated by the newly-inserted schedule to the modern award, employers will be bound to comply with any more restrictive terms contained in an employee's employment contract. Employers should seek appropriate legal advice if they consider this may be the case.

(c) Amendments to the *Long Service Leave Act 1955* (NSW)

The Long Service Leave Act was amended pursuant to the [Treasury Legislation Amendment \(COVID-19\) Bill 2020 \(NSW\)](#). The amendments permit an employer to give a worker a period of long service leave that is less than one month, in advance of the worker accruing an entitlement to all or part of the leave, by agreement. The amendments also allow an employer to give a worker less than one month's notice to take long service leave, if the employee agrees to the lesser period of notice.

The amendments commence on and end on the day that is 6 months after the commencement, or a later day, which is not more than 12 months after the commencement, as prescribed by the Regulations to the Act.

In conclusion

The variations to the Hospitality Award and the Clerks Award, although on their face a welcome reprieve for employers, should be treated with caution, as employers remain bound by the terms of each employee's employment contract.

In relation to the amendments to the *Long Service Leave Act*, employers in New South Wales can take comfort in the fact that agreement can be reached between an employer and employee to give shorter notice of long service leave, or to take shorter periods of long service leave wholly or partly in advance, in accordance with the needs of the business.

Key takeaways

- The variations to the Hospitality Award and Clerks Award are largely directed to providing targeted flexibility in relation to: the range of duties employees can be required to perform; the hours of work of full-time and part-time employees; and the taking of annual leave.
- Employers should carefully consider constraints in employment contracts before acting in reliance upon the variations. If an employee's contract is more restrictive than the applicable award, the employer may not be able to change conditions without seeking the employee's consent.
- The variations don't preclude an employer and an individual employee from agreeing to vary an employee's hours of work as a matter of contract. Depending upon the terms of an employee's contract, this may be required regardless.
- The amendments to the *Long Service Leave Act 1955* (NSW) provide much needed flexibility for employers and employees concerning the required notice for taking long service leave wholly or partly in advance and the duration of long service leave taken by an employee.

For advice on how these changes will affect your business please contact a member of Piper Alderman's Employment Relations team.