

## Employee Relations News

Edition 47

25 May 2016



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### FWC Hands down draft Annual Leave model clause for comment

As part of its four yearly review of Modern Awards, the FWC has released a draft annual leave model clause for comment. See [2016] FWCFB 3177 for details.

The model clause applies to most awards, (eg Clerks – Private Sector), but there are exceptions (see decision).

The model annual leave clause deals with:

- Cashing out of annual leave;
- Electronic funds transfer and paid annual leave;
- Granting annual leave in advance; and
- Excessive annual leave.

#### Plain language re-drafts of the annual leave model terms

##### 1.1 Annual leave in advance

- (a) An employer and employee may agree in writing to the employee taking a period of paid annual leave before the employee has accrued an entitlement to the leave.
- (b) An agreement must:
  - (i) state the amount of leave to be taken in advance and when it is to be taken; and
  - (ii) be signed by the employer and employee.
- (c) The employer must keep a copy of any agreement under clause 1.1 as an employee record.
- (d) If, on the termination of the employee’s employment, the employee has not accrued an entitlement to a period of paid annual leave already taken in accordance with an agreement under clause 1.1, the employer may deduct from any money due to the employee on termination an amount equal to the amount already paid to the employee in respect of that annual leave taken.

##### 1.2 Cashing out of annual leave

- (a) Paid annual leave must not be cashed out except in accordance with an agreement under clause 1.2.
- (b) Each cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under clause 1.2.
- (c) An employer and an employee may agree in writing to the cashing out of a particular amount of accrued paid annual leave by the employee.

- (d) An agreement under clause 1.2 must state:
  - (i) the amount of leave to be cashed out and the payment to be made to the employee for it; and
  - (ii) when the payment is to be made.
- (e) An agreement under clause 1.2 must be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.
- (f) The payment must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made.
- (g) An agreement must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.
- (h) The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is 2 weeks.
- (i) The employer must keep a copy of any agreement under clause 1.2 as an employee record.

Note 1: Under section 344 of the Act, an employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause 1.2.

Note 2: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 1.2.

### **1.3 Excessive leave accruals: general provision**

NOTE: Clauses 1.3 to 1.5 contain provisions, additional to the National Employment Standards, about the taking of paid annual leave as a way of dealing with the accrual of excessive paid annual leave. See Part 2.2, Division 6 of the Fair Work Act.

- (a) An employee has an excessive leave accrual if the employee has accrued more than 8 weeks' paid annual leave (or 10 weeks' paid annual leave for a shiftworker, as defined by clause 1.x).
- (b) If an employee has an excessive leave accrual, the employer or the employee may seek to confer with the other and genuinely try to reach agreement on how to reduce or eliminate the excessive leave accrual.
- (c) Clause 1.4 sets out how an employer may direct an employee who has an excessive leave accrual to take paid annual leave.
- (d) Clause 1.5 sets out how an employee who has an excessive leave accrual may require an employer to grant paid annual leave requested by the employee.

### **1.4 Excessive leave accruals: direction by employer that leave be taken**

- (a) If an employer has genuinely tried to reach agreement with an employee under clause 1.3(b) but agreement is not reached (including because the employee refuses to confer), the employer may direct the employee in writing to take one or more periods of paid annual leave.
- (b) However, a direction by the employer under paragraph (a):
  - (i) is of no effect if it would result at any time in the employee's remaining accrued entitlement to paid annual leave being less than 6 weeks when any other paid leave arrangements (whether made under clause 1.3, 1.4 or 1.5 or otherwise agreed by the employer and employee) are taken into account; and
  - (ii) must not require the employee to take any period of paid annual leave of less than one week; and
  - (iii) must not require the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the direction is given; and
  - (iv) must not be inconsistent with any leave arrangement agreed by the employer and employee.
- (c) The employee must take paid annual leave in accordance with a direction under paragraph (a) that is in effect.

- (d) An employee to whom a direction has been given under paragraph (a) may request to take a period of paid annual leave as if the direction had not been given.

NOTE 1: Paid annual leave arising from a request mentioned in paragraph (d) may result in the direction ceasing to have effect. See clause 1.4(b)(i).

NOTE 2: Under section 88(2) of the Fair Work Act, the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

### **1.5 Excessive leave accruals: request by employee for leave**

- (a) If an employee has genuinely tried to reach agreement with an employer under clause 1.3(b) but agreement is not reached (including because the employer refuses to confer), the employee may give a written notice to the employer requesting to take one or more periods of paid annual leave.
- (b) However, an employee may only give a notice to the employer under paragraph
- (c) (a) if:
- (i) the employee has had an excessive leave accrual for more than 6 months at the time of giving the notice; and
  - (ii) the employee has not been given a direction under clause 1.4(a) that, when any other paid leave arrangements (whether made under clause 1.3, 1.4 or
  - (iii) 1.5 or otherwise agreed by the employer and employee) are taken into account, would eliminate the employee's excessive leave accrual.
- (d) A notice given by an employee under paragraph (a) must not:
- (i) if granted, result in the employee's remaining accrued entitlement to paid annual leave being at any time less than 6 weeks when any other paid leave arrangements (whether made under clause 1.3, 1.4 or 1.5 or otherwise agreed by the employer and employee) are taken into account; or
  - (ii) provide for the employee to take any period of paid annual leave of less than one week; or
  - (iii) provide for the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the notice is given; or
  - (iv) be inconsistent with any leave arrangement agreed by the employer and employee.
- (e) An employee is not entitled to request by a notice under paragraph (a) more than 4 weeks' paid annual leave (or 5 weeks' paid annual leave for a shiftworker, as defined by clause 1.x) in any period of 12 months.
- (f) The employer must grant paid annual leave requested by a notice under paragraph (a).

#### **Commentary**

I suggest that all leave policies be reviewed to conform with this decision; noting that the accrual of 8 weeks annual leave would appear to be set in stone. Employers may wish to consider the "paying-out" provisions to reduce annual leave liability.

*Until next time...*

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