



Annualised salary changes to Modern Awards

In 2019, the Fair Work Commission (**FWC**) released a decision that confirmed a substantial change would affect 23 of the Modern Awards in respect of full-time employees paid by way of an annualised wage. This decision is following a major review of the effectiveness of Modern Awards undertaken by the FWC, and this latest change will take effect on **1 March 2020**.

The decision confirmed that one of four similar versions of a model annualised wage clause for full-time employees will be inserted into 23 Modern Awards, some of which apply to the Retail industry, including the:

- *Clerks – Private Sector Award 2010 (Clerks Award)*; and
- *Restaurant Industry Award 2010 (RIA)*.

Paying annualised salaries is an industry standard across the retail industry and is often a tool used to avoid meticulous compliance with Award provisions relating to the hours of work, overtime, and penalty rates. However, despite the reliance on such arrangements, these changes are coming and will take effect from **1 March 2020**.

This means that employers impacted by the decision must be compliant come 1 March 2020, even if this falls midway through a pay cycle. We recommend that you consider implementing the changes for the start of the pay cycle **before 1 March 2020** to minimise disruption to payroll and timekeeping systems.

While most businesses are familiar with the existing annualised salary requirements of the Awards applicable to their workforce, the changes will place significantly more onerous obligations on employers in respect of contractual terms and maintaining employee records. Taking the time to appropriately and effectively plan for these changes will be the key to ensuring compliance. Non-compliance could see employers exposed to penalties of up to \$63,000 per contravention, potential underpayment claims, and significant reputational damage. With the start date looming and the likelihood of industry disruption high, the time to consider what operational and contractual changes need to be made is now.

Clerks Award – Annualised Wage Arrangements

A link to the draft determination of the FWC for the *Clerks Award* can be found [here](#).

If your employees are covered by the *Clerks Award*, to comply with the new annualised wage clause from 1 March 2020 in respect of any full-time employees who are paid under such arrangements, you will generally need to:



1. Advise the employee in writing regarding:
 - (a) the value of the annualised wage they will be paid;
 - (b) which provisions of the applicable award will be satisfied by the annualised wage;
 - (c) the method by which the annualised wage has been calculated (including specification of each separate component, and any overtime or penalty assumptions used in the calculation);
 - (d) the outer limit number of ordinary hours attracting penalties and the outer limit number of overtime hours which an employee may be required to work in a pay period/roster cycle without being entitled to additional remuneration; and
 - (e) that where the employee works over the outer limit of hours, they will be remunerated in addition to the annualised wage following the Clerks Award.
2. Keep a record of all matters in (1);
3. Ensure the annualised wage is no less than the amount that employee would have received under the award, assessed over a year (although if the employment ends earlier than the full year, the assessment must be made in respect of the period worked);
4. On a 12 month basis (on the anniversary of the entering into the annualised wage arrangements), perform a calculation to ensure the annualised wage is no less than the employee would have earned if they were paid an hourly wage according to the applicable award;
5. Make a top-up payment of any shortfall identified in (4) within 14 days;
6. Keep records of the employee's starting and finishing times of work, and any unpaid breaks taken; and
7. Ensure the records in (6) are signed by the employee or acknowledged as correct in writing (including digitally) each pay period/roster cycle.

RIA – Annualised Wage Arrangements

The provisions of the *RIA* Model Clause will look slightly different from that of the *Clerks Award*, with more onerous provisions in place relating to overtime and ordinary hours.

A link to the draft determination of the FWC for the RIA can be found [here](#).

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Rather than advising the employee in writing of the annualised salary arrangements, the employee and employer must enter into a **written agreement**, which stipulates that the amount to be paid will be a certain percentage above the minimum weekly wages as prescribed under the Award.

An employee must also not be required in any pay period or roster cycle to work above a certain amount of overtime per week or a certain number of hours that would attract a penalty under the Award.

Currently, the FWC's draft determination specifies that the annualised salary must be at least 25% above the applicable minimum wages; however, the FWC has not yet received submissions concerning the "outer limit" number of hours that should apply concerning the *RIA*. Once submissions are received on this matter, the exact percentage and outer limit on hours within the draft determination may change. The Model Clause in the draft determination reflects the FWC's **provisional** conclusions; however, it is expected the clause will be finalised before 1 March 2020.

Under the new clause in the *RIA*, employers will need to do the following:

1. Enter into a written agreement with the employee that includes the following:
 - (a) The annualised salary that is payable;
 - (b) Which provisions the Award will be satisfied by payment of the annualised wage; and
 - (c) The outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount over the annualised wage (the FWC will further clarify this point in due course).
2. Give the employee a copy of the agreement and keep the agreement as a time and wages record.
3. Ensure that if the agreement is terminated, it is terminated in the following manner:
 - (a) by the employer or the employee giving 12 months' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or
 - (b) at any time, by written agreement between the employer and the individual employee.



4. Ensure the annualised wage is no less than the amount that employee would have received under the Award, assessed over a year (although if the employment ends earlier than the full year, the assessment must be made in respect of the period worked);
5. On a 12 month basis (on the anniversary of the entering into the annualised wage arrangements), perform a calculation to ensure the annualised wage is no less than the employee would have earned if they were paid an hourly wage according to the Award;
6. Make a top-up payment of any shortfall identified in (4) within 14 days;
7. Keep records of the employee's starting and finishing times of work, and any unpaid breaks taken; and
8. Ensure the records in (7) are signed by the employee or acknowledged as correct in writing (including digitally) each pay period/roster cycle.

It's not surprising that many businesses are daunted by these requirements and the threat they pose regarding non-compliance with an Award, particularly in the retail and hospitality industries where 'all-up' salaries are commonplace and hours of work may be difficult to measure. Even the knowledge that it will have industry-wide effect offers little reassurance to employers who are suddenly wondering how they can record employees' hours of work.

But there is more to these clauses than initially meets the eye. Firstly, note that the annualised wage clauses are limited to full-time employees, meaning that these requirements will not capture part-time employees.

Secondly, it is worth remembering that you are already required to keep and maintain hours of work records for several employees under the Modern Awards and the Fair Work Regulations 2009 (Cth), including but not limited to casual and irregular part-time employees paid by way of hourly rates, employees who are paid overtime, and employees who are covered by an Award to assess whether their salaries are sufficient. These new clauses may require you to go a step further and obtain employee sign off.

For further information on these upcoming changes, or to discuss how to prepare for them in your business, please don't hesitate to contact the ARA Employment Relations Advisory Team on 1300 368 041.

The ARA's Employment Relations Advisory Team provides a free telephone consulting service for members on all employment matters and offers free online resources such as contracts and templates, as well as member rates for legal services specialising in Employment matters.

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