

Alert

EMPLOYMENT LAW

COVID-19: Flexibility Comes to the Clerks Modern Award

By Ben Duggan

At a special sitting in late March the Fair Work Commission approved an application made by business groups and supported by the union movement for temporary variations to the *Clerks – Private Sector Modern Award (Clerks Modern Award)*. This decision was made in recognition of the need for employers to make immediate changes to their workforce to ease the effects of the ongoing crisis on normal business operations and protect jobs.

The temporary measures - which are contained in a new schedule (Schedule I - Award Flexibility) and set out below in full - provide greater flexibility for employers to; introduce work from home, require employees to take annual leave, change employees duties, hours of work and pay.

The measures will operate until 30 June 2020 unless they are extended further by the Fair Work Commission because of the continued adverse impact of the COVID-19.

The new flexibilities under the Clerks Modern Award

The requirements introduced by Federal and State Governments to control the spread of COVID-19,

including social distancing, have had a dramatic impact on the amount and nature of work available in large sections of the private sector.

Reduce hours of work

An employer, under these new measures, will now have the flexibility to reduce the hours of work for their permanent part-time or full-time staff on a temporary basis. A pre-requisite is that the employer must reach an agreement, either collectively or individually with a permanent employee that they are prepared to reduce their hours of work.

The collective agreement, under which hours may be reduced by up to 25%, requires a minimum of 75% of the workforce or section of the workplace voting in favour of the proposed temporary reduction in hours of work.

An employer is required to consult with the Fair Work Commission about the vote, including providing details of the relevant employees email addresses so that they may be provided with information about the vote. A relevant union must also be consulted about the vote for the collective agreement. In a situation where an individual

agreement with a relevant employee can be made that is not as restrictive in terms of the agreed reduction in the hours of work, employers are not required to enter the consultation process with the Fair Work Commission and the relevant union.

We anticipate that the majority of employers in South Australia that seek to take advantage of this flexibility will do so by way of an individual agreement with employees in their workforce.

Modified duties

The other major flexibility in recognition of the changing nature of workloads is the ability for an employer to require their employees to perform any duties that are within their skillset and competency. However, the modified duties, as provided, must be safe to perform, and the employee must have the necessary licences. With this temporary measure, the employer is not required to change an employee's rate of pay.

Working from home

To provide greater flexibility for working from home, an agreement may be reached with a day

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employee to change the span of their ordinary hours of work to the following:

- 6am and 11pm, Monday to Friday.
- 7am and 12.30pm, Saturday.

The increased span of hours for day employees will enable ordinary hours of work to be performed over a greater span, including later at night. This will be convenient for some employers, particularly where their employees are parents that will need to manage the homeschooling of their children when schools implement this measure next term in South Australia.

Leave

The temporary measures also provide greater flexibility for employers requiring their employees to take annual leave because of the reduction or absence of work.

An employer is normally required to provide an employee with at least four weeks notice to take annual leave because of a close-down of its operations (think Christmas vacation period). The ability of an employer to require an employee with excessive annual leave to take such leave is even more restrictive with the need to provide at least eight weeks in such circumstances.

In recognition of the need for employers to be able to respond rapidly to the impact on workflows due to the restrictions imposed by Governments, these notice periods have been shortened temporarily. The notice employers must now

provide to employees of the need to take annual leave as part of a close-down of its operations has been reduced to one week. Additionally, an employer and the employee may agree to an even shorter period of notice for the taking of annual leave in a close-down situation. An employer who utilises this option must provide an employee with unpaid leave if they do not have sufficient annual leave to cover the entire period of the close-down. Similarly, the notice that an employer is now required to provide to an employee who has excessive annual leave has been reduced to one week. Employers that take advantage of this flexibility and direct employees to use their excessive annual leave are unable to leave them with an annual leave balance of less than two weeks.

An ability to take 'partial' annual leave is also available under these temporary measures. This will be attractive to many private sector employers whose cash flows have been adversely impacted by the requirements introduced by Governments to control the spread of COVID-19.

We anticipate that many South Australian employers will take advantage of this temporary measure over the next few months because of the overall reduction and fluctuation of workflows.

Conclusion

The temporary measures introduced to the Clerks Award, which covers a large number of employees in South Australia, has been welcomed by the Government, business groups and the union movement.

Greater flexibility now exists for employers to manage their workforce in response to the dramatic economic and social consequences of COVID-19.

Should you wish to discuss how your business can take advantage of these temporary measures, please contact our Employment Law expert Ben Duggan.



[MORE INFO](#)

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[Sched I inserted by PR717900 ppc 28Mar20]

I.1 The provisions of Schedule I are aimed at preserving the ongoing viability of businesses and preserving jobs during the COVID-19 pandemic and not to set any precedent in relation to award entitlements after its expiry date.

I.1.1 Schedule I operates from 28 March 2020 until 30 June 2020. The period of operation can be extended on application to the Fair Work Commission.

I.2 During the operation of Schedule I, the following provisions apply:

I.2.1 Operational flexibility

(a) As directed by their employer, where necessary an employee will perform any duties that are within their skill and competency regardless of their classification under clause 15—Classifications and Schedule B—Classifications, provided that the duties are safe, and that the employee is licensed and qualified to perform them.

(b) An employer must not reduce an employee's pay if the employee is directed to perform duties in accordance with clause I.2.1.

I.2.2 Part-time employees working from home

Instead of clause 11.5 (Part-time employment), an employer is required to roster a part-time employee who is working from home by agreement with the employer, for a minimum of 2 consecutive hours on any shift.

I.2.3 Casual employees working from home

Instead of clause 12.4 (Casual employment), an employer must pay a casual employee who is working from home by agreement with the employer, a minimum payment of 2 hours' work at the appropriate rate.

I.2.4 Ordinary hours of work for employees working from home

(a) Instead of clause 25.1(b) (Ordinary hours of work (other than shiftworkers)), for employees working from home by agreement with the employer where an employee requests and the employer agrees, the spread of ordinary hours of work for day workers is between 6.00 am and 11.00 pm, Monday to Friday, and between 7.00 am and 12.30 pm on Saturday.

(b) Day workers are not shiftworkers for the purposes of any penalties, loadings or allowances under the award, including for the purposes of clause 28.

(c) The facilitative provision in clause 25.2 (Ordinary hours of work (other than shiftworkers)), which allows the spread of hours to be altered, will not operate for the employees referred to in clause I.2.5(e).

I.2.5 Agreed temporary reduction in ordinary hours

(a) An employer and the full-time and part-time employees in a workplace or section of a workplace, may agree to temporarily reduce ordinary hours of work for the employees in the workplace or section for a specified period while Schedule I is in operation.

(b) At least 75% of the full-time and part-time employees in the relevant workplace or section must approve any agreement to temporarily reduce ordinary hours.

(c) For the purposes of clause I.2.5(a), ordinary hours of work may be temporarily reduced:

(i) For full time employees, to not fewer than 75% of the full-time ordinary hours applicable to an employee immediately prior to the implementation of the temporary reduction in ordinary hours.

(ii) For part-time employees, to not fewer than 75% of the part-time employee's agreed hours immediately prior to the implementation of the temporary reduction in ordinary hours.

(d) Where a reduction in hours takes effect under clause I.2.5(a), the employee's ordinary hourly rate will be maintained but the weekly wage will be reduced by the same proportion.

Appendix - Schedule I—Award Flexibility During the COVID-19 Pandemic

(e) Nothing in Schedule I prevents an employer and an individual employee agreeing in writing (including by electronic means) to reduce the employee's hours or to move the employee temporarily from full-time to part-time hours of work, with a commensurate reduction in the minimum weekly wage.

(f) If an employee's hours have been reduced in accordance with clause 1.2.5(a):

(i) the employer must not unreasonably refuse an employee request to engage in reasonable secondary employment; and

(ii) the employer must consider all reasonable employee requests for training, professional development and/or study leave.

(g) For the purposes of clause 1.2.5(a), where there is any reduction in the ordinary hours of work for full-time or part-time employees in a workplace or section during the period Schedule I is in operation, all relevant accruals and all entitlements on termination of employment will continue to be based on each employee's weekly ordinary hours of work prior to the commencement of Schedule I.

(h) For the purposes of clause 1.2.5(a), the approval of employees shall be determined by a vote of employees. In order for the vote to be valid, the employer must comply with the following requirements:

(i) Where any of the employees are known to be members of the Australian Services Union or another organisation, the ASU or other organisation shall be informed before the vote takes place.

(ii) Prior to the vote of employees, the employer shall provide the employees with the contact details of the ASU, should they wish to contact the ASU for advice; and

(iii) The employer must notify the Fair Work Commission by emailing clerksaward@fwc.gov.au that the employer proposes to conduct a vote under Schedule I. The employer shall provide the work email addresses of the employees who will be participating in the vote, to the Commission. The Commission will then distribute the ASU COVID-19 Information Sheet to the employees prior to the vote. The Commission shall list the name of the business on a register which will be accessible to the ASU, upon request, for the period when Schedule I is in operation.

(iv) The vote shall not take place until at least 24 hours after the requirements of clause 1.2.5(h)(i), (ii) and (iii) have been met.

1.2.6 Annual leave

(a) Employers and individual employees may agree to take up to twice as much annual leave at a proportionately reduced rate for all or part of any agreed or directed period away from work, including any close-down

(b) Instead of clauses 29.6, 29.7 and 29.8 (Annual leave), an employer may direct an employee to take any annual leave that has accrued, subject to considering the employee's personal circumstances, by giving at least one week's notice, or any shorter period of notice that may be agreed. A direction to take annual leave shall not result in an employee having less than 2 weeks of accrued annual leave remaining.

1.2.7 Close down

(a) Instead of clause 29.5 (Annual leave), and subject to clause 1.2.7(b), an employer may:

(i) require an employee to take annual leave as part of a close-down of its operations by giving at least one week's notice, or part of its operations, or any shorter period of notice that may be agreed; and

(ii) where an employee who has not accrued sufficient leave to cover part or all of the close-down, the employee is to be allowed paid annual leave for the period for which they have accrued sufficient leave and given unpaid leave for the remainder of the close-down.

(b) Clause 1.2.7(a) does not permit an employer to require an employee to take leave for a period beyond the period of operation of Schedule I.

(c) Where an employee is placed on unpaid leave pursuant to clause 1.2.7(a), the period of unpaid leave will count as service for the purposes of relevant award and NES entitlements