

Alert

EMPLOYMENT LAW

Fair Work Commission Introduces COVID-19 Leave

By Ben Duggan & Thomas Maegraith

In a rare exercise of its powers, under section 157(3) of the *Fair Work Act 2009* (Cth) (“**the Act**”), the Fair Work Commission (**Commission**) has introduced pandemic leave as a temporary measure to help businesses and workers cope with the current crisis. This new measure has been inserted into a total of 99 Modern Awards, and it is in addition to the other temporary measures that have already been introduced by the Commission for the *Hospitality Industry (General) Award 2010*, the *Clerks Private Sector Award 2010* and the *Restaurant Industry Award 2010*. All of these new measures will operate until 30 June 2020. However, the Commission does have the power to extend this date if the business community continues to experience the adverse effects of the current crisis.

The temporary measures - which are contained in a new schedule (Schedule X - Additional measures during the COVID-19 pandemic) and set out below - provide the ability for all employees, including casual employees, to access up to 2 weeks unpaid pandemic leave. The Commission’s intention is to offer greater flexibility for employers to manage employee workloads while they face unprecedented circumstances due to the COVID -19 pandemic. To check whether this impacts your modern award, please review appendix 2.

In their determination, the Commission explained that this temporary measure was required because current personal (sick) leave entitlements were not an adequate response to

the current circumstances presented by COVID -19. The reasons provided by the Commission were:

- i. Casual employees do not have an entitlement to personal (sick) leave;
- ii. Permanent employees are only provided 10 days of paid personal leave per year;
- iii. Paid personal (sick) leave accrues progressively over the course of a year (such that some employees such as new employees will have limited personal leave);
- iv. Paid personal (sick) leave is taken “because of personal illness”; which does not adequately cover circumstances where a person will be required to self-isolate for a 14-day period as a result of coming in to contact with someone who has contracted the virus.

Pandemic leave - available to all classifications of employees, including casual employees - is separate from any pre-existing entitlement to leave which an employee may have during the period of this temporary measure.

An employee will have an entitlement to pandemic leave where they are required to self-isolate:

- as a result of contracting COVID -19; or
- coming in to contact with a person who has contracted COVID -19.

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Other requirements for an employee to be able to access pandemic leave are:

- the employee provides notice of the need to take pandemic leave to their employer; and
- the employee provides suitable evidence demonstrating the reason that the employee needs to take pandemic leave.

Further flexibility provided under this new measure is the ability for an employer and an employee to agree to take pandemic leave at the same time as annual leave enabling a period of leave which is at half pay.

The Commission may make further temporary changes to the current workplace system in order to respond to the rapidly evolving COVID-19 situation. DW Fox Tucker will keep you informed as these changes occur. In the meantime, if you would like to discuss this recent temporary change to the Modern Awards, please contact our Employment Law expert Ben Duggan.



[MORE INFO](#)

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X.1 Subject to clauses X.2.1.(d) and X.2.2(c), Schedule X operates from 8 April 2020 until 30 June 2020. The period of operation can be extended on application.

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

X.2.1 Unpaid pandemic leave

(a) Subject to clauses X.2.1(b) (c) and (d), any employee is entitled to take up to 2 weeks' unpaid leave if the employee is required, by government or medical authorities or acting on the advice of a medical practitioner, to self-isolate and is consequently prevented from working, or is otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic.

(b) The employee must give their employer notice of the taking of leave under clause X.2.1(a) and of the reason the employee requires the leave, as soon as practicable (which may be a time after the leave has started).

(c) An employee who has given their employer notice of taking leave under clause X.2.1(a) must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason given in clause X.2.1(a).

(d) A period of leave under clause X.2.1 (a) must start before 30 June 2020, but may end after that date.

(e) Leave taken under clause X.2.1(a) does not affect any other paid or unpaid leave entitlement of the employee and counts as service for the purposes of entitlements under this Award and the National Employment Standards.

NOTE: The employer and employee may agree that the employee may take more than 2 weeks' unpaid pandemic leave.

X.2.2 Annual leave at half pay

(a) Instead of an employee taking paid annual leave on full pay, the employee and their employer may agree to the employee taking twice as much leave on half pay.

(b) Any agreement to take twice as much annual leave at half pay must be recorded in writing and retained as an employee record.

(c) A period of leave under clause X.2.2(a) must start before 30 June 2020, but may end after that date.

EXAMPLE: Instead of an employee taking one week's annual leave on full pay, the employee and their employer may agree to the employee taking 2 weeks' annual leave on half pay. In this example:

- the employee's full pay for the 2 weeks' leave is the same as the pay the employee would have been entitled to for one week's' leave on full pay (where one week's full pay includes including leave loading under the Annual Leave clause of this award); and
- one week of leave is deducted from the employee's annual leave accrual.

NOTE 1: A employee covered by this Award who is entitled to the benefit of clause X.2.1 or X.2.2 has a workplace right under section 341(1)(a) of the Act.

NOTE 2: Under section 340(1) of the Act, an employer must not take adverse action against an employee because the employee has a workplace right, has or has not exercised a workplace right, or proposes or does not propose to exercise a workplace right, or to prevent the employee exercising a workplace right. Under section 342(1) of the Act, an employer takes adverse action against an employee if the employer dismisses the employee, injures the employee in his or her employment, alters the position of the employee to the employee's prejudice, or discriminates between the employee and other employees of the employer.

NOTE 3: Under section 343(1) of the Act, a person must not organise or take, or threaten to organise or take, action against another person with intent to coerce the person to exercise or not exercise, or propose to exercise or not exercise, a workplace right, or to exercise or propose to exercise a workplace right in a particular way.

Appendix 2 - Modern Awards to be varied to insert Schedule X

1. Aboriginal Community Controlled Health Services Award 2010
2. Aged Care Award 2010
3. Air Pilots Award 2010
4. Aircraft Cabin Crew Award 2010
5. Airline Operations-Ground Staff Award 2010
6. Airport Employees Award 2010
7. Alpine Resorts Award 2010
8. Aluminium Industry Award 2020
9. Ambulance and Patient Transport Industry Award 2020
10. Amusement, Events and Recreation Award 2010
11. Animal Care and Veterinary Services Award 2020
12. Aquaculture Industry Award 2020
13. Architects Award 2010
14. Asphalt Industry Award 2010
15. Banking, Finance and Insurance Award 2020
16. Book Industry Award 2020
17. Broadcasting, Recorded Entertainment and Cinemas Award 2010
18. Business Equipment Award 2010
19. Car Parking Award 2020
20. Cement, Lime and Quarrying Award 2010
21. Cemetery Industry Award 2020
22. Children's Services Award 2010
23. Cleaning Services Award 2010
24. Clerks - Private Sector Award 2010
25. Commercial Sales Award 2010
26. Concrete Products Award 2010
27. Contract Call Centres Award 2010
28. Corrections and Detention (Private Sector) Award 2020
29. Cotton Ginning Award 2020
30. Dry Cleaning and Laundry Industry Award 2010
31. Educational Services (Post-Secondary Education) Award 2010
32. Educational Services (Schools) General Staff Award 2010
33. Educational Services (Teachers) Award 2010
34. Fast Food Industry Award 2010
35. Fitness Industry Award 2010
36. Food, Beverage and Tobacco Manufacturing Award 2010
37. Funeral Industry Award 2010
38. Gardening and Landscaping Services Award 2020
39. General Retail Industry Award 2010
40. Graphic Arts, Printing and Publishing Award 2010
41. Hair and Beauty Industry Award 2010
42. Health Professionals and Support Services Award 2010
43. Higher Education Industry-Academic Staff-Award 2010
44. Higher Education Industry-General Staff-Award 2010
45. Horse and Greyhound Training Award 2010
46. Horticulture Award 2010
47. Hospitality Industry (General) Award 2010
48. Journalists Published Media Award 2010
49. Labour Market Assistance Industry Award 2010

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| 50. Legal Services Award 2020 | 76. Restaurant Industry Award 2010 |
| 51. Live Performance Award 2010 | 77. Road Transport (Long Distance Operations) Award 2010 |
| 52. Local Government Industry Award 2010 | 78. Road Transport and Distribution Award 2010 |
| 53. Mannequins and Models Award 2010 | 79. Salt Industry Award 2010 |
| 54. Manufacturing and Associated Industries and Occupations Award 2010 | 80. Seafood Processing Award 2020 |
| 55. Marine Tourism and Charter Vessels Award 2010 | 81. Security Services Industry Award 2010 |
| 56. Market and Social Research Award 2020 | 82. Silviculture Award 2020 |
| 57. Meat Industry Award 2010 | 83. Social, Community, Home Care and Disability Services Industry Award 2010 |
| 58. Medical Practitioners Award 2020 | 84. Sporting Organisations Award 2020 |
| 59. Miscellaneous Award 2010 | 85. State Government Agencies Award 2020 |
| 60. Nursery Award 2020 | 86. Storage Services and Wholesale Award 2010 |
| 61. Nurses Award 2010 | 87. Sugar Industry Award 2010 |
| 62. Passenger Vehicle Transportation Award 2010 | 88. Supported Employment Services Award 2010 |
| 63. Pastoral Award 2010 | 89. Surveying Award 2020 |
| 64. Pest Control Industry Award 2010 | 90. Telecommunications Services Award 2010 |
| 65. Pharmaceutical Industry Award 2010 | 91. Textile, Clothing, Footwear and Associated Industries Award 2010 |
| 66. Pharmacy Industry Award 2010 | 92. Timber Industry Award 2010 |
| 67. Poultry Processing Award 2010 | 93. Transport (Cash in Transit) Award 2010 |
| 68. Premixed Concrete Award 2020 | 94. Travelling Shows Award 2020 |
| 69. Professional Diving Industry (Recreational) Award 2010 | 95. Vehicle Manufacturing, Repair, Services and Retail Award 2010 |
| 70. Professional Employees Award 2010 | 96. Waste Management Award 2010 |
| 71. Racing Clubs Events Award 2010 | 97. Water Industry Award 2020 |
| 72. Racing Industry Ground Maintenance Award 2020 | 98. Wine Industry Award 2010 |
| 73. Rail Industry Award 2010 | 99. Wool Storage, Sampling and Testing Award 2010 |
| 74. Real Estate Industry Award 2020 | |
| 75. Registered and Licensed Clubs Award 2010 | |