

IMPORTANT CHANGES TO ANNUAL LEAVE FOR MODERN AWARD-COVERED EMPLOYEES

Effective from July last year, the Fair Work Commission (“**Commission**”) made a number of important changes to annual leave for employees covered by a Modern Award. As a result of these changes, most Modern Award-covered employees can now:

- cash-out a portion of their accrued annual leave; and
- be directed by their employer to take annual leave when their accrued balance has become ‘excessive’.

Importantly, the Commission has imposed a number of very strict rules which must always be followed whenever annual leave is being cashed-out or an employee is being directed to take ‘excessive’ leave.

CASHING-OUT ANNUAL LEAVE

Many employees seek permission to ‘cash-out’ a portion of their annual leave. However, until mid-2016, very few Modern Awards allowed the cashing out of annual leave. The Commission has amended the majority of the 122 Modern Awards currently in operation, and the amended Awards now permit annual leave to be cashed-out subject to the following four strict rules:

1. The employee must have a remaining balance of at least four weeks’ annual leave once the cashing-out has been processed.
2. A maximum of two weeks of annual leave can be cashed-out in any 12-month period.
3. Both the employer and the employee must agree for annual leave to be cashed-out, and this agreement must be recorded in writing and kept on the employee’s file.
4. The amount paid to the employee must be the same as the employee would have received had they taken the leave. For example, if annual leave loading would have been payable if the leave was taken, this must be added to the amount paid out to the employee.

DIRECTING AN EMPLOYEE TO TAKE EXCESSIVE ANNUAL LEAVE

Also effective July last year, long-term employees may accrue sizeable annual leave balances, which create a significant liability for employers and may also have serious health and safety-related implications for the employees.



The changes made by the Commission mean employees covered by most Modern Awards can now be directed by their employer to take annual leave once their balance has become ‘excessive’. An employee’s leave balance will be considered ‘excessive’ if:

- they are not a shiftworker and they have 8 or more weeks of accrued annual leave; or
- they are a shiftworker and they have 10 or more weeks of accrued annual leave.

Once an employee’s balance meets this definition, they may be directed to take annual leave subject to the following six strict rules:

1. The employer must attempt to ‘confer’ with their employee regarding the taking of annual leave. If mutual-agreement to take annual leave cannot be reached – or if the employee refuses to confer – the employer may then issue a direction compelling the employee to take annual leave. This may be referred to as a ‘directed annual leave period’.
2. The directed annual leave period must begin: a) no earlier than 8 weeks; and b) no later than 1 year from the date the direction is issued to the employee.
3. The directed annual leave period must be at least one-week long.
4. The employee must have at least six weeks of annual leave remaining after they take the directed annual leave period.
5. The employer’s direction must be consistent with any leave arrangements which have already been agreed between the employer and employee.
6. An employee who is directed to take annual leave may still apply for annual leave despite the employer’s direction. In this situation, the employer is required to disregard the previous direction when deciding whether to approve the employee’s new leave request.

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OTHER CHANGES

The Commission has also:

- made changes to the recovery of annual leave 'debts' owed by an employee when their employment ends, and
- amended most Modern Awards to permit employees to unilaterally take excessive annual leave if a direction to take that leave has not been issued by their employer. This provision becomes effective for most Modern Award-covered employees on 29 July this year.

Given the complexity of these issues, we strongly recommend employers obtain expert legal advice before cashing-out annual leave or issuing a direction for leave to be taken.

Please contact Harmers Workplace Lawyers if you would like further information:

SYDNEY

Level 27 St Martins Tower
31 Market Street
Sydney NSW 2000
tel: +61 2 9267 4322
fax: +61 2 9264 4295

MELBOURNE

Level 40
140 William Street
Melbourne VIC 3000
tel: +61 3 9612 2300
fax: +61 3 9612 2301

BRISBANE

Level 19
10 Eagle Street
Brisbane QLD 4000
tel: +61 7 3016 8000
fax: +61 7 3016 8001

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