

CIRCULAR: GEN/096/NAT/096/20
DATE: 30 March 2020
SUBJECT: Modern Award Update – Clerks Award variation
ATTENTION: Chief Executive Officer

In response to the COVID-19 pandemic applications to vary modern awards, to increase flexibility of employers otherwise restricted by award conditions are being expedited by the Fair Work Commission (**FWC**).

On Saturday 28 March 2020, [the FWC granted an application](#) to vary the *Clerks — Private Sector Award 2010* by adding a new schedule (Schedule I—Award Flexibility) that will apply during the COVID-19 Pandemic, until 30 June 2020.

The determination takes effect in relation to any particular employee from the employee’s first full pay period on or after Saturday 28 March 2020, and provides for:

- Reduction in minimum shift length for part-time and casual employees working from home (2 hours);
- Increase ordinary span of hours of day work to 6:00am – 11:00pm Monday to Friday; and 7:00am – 12:30pm Saturdays;
- **Capacity to require** employees to take annual leave during shut-down, upon given of 1 week’s notice (but subject to employee’s annual leave balance not being reduced to less than 2 weeks);
- **Capacity to agree** with individual employees to take annual leave at half pay (including during shut down)
- Capacity to agree to temporary reduction of hours for full-time and part-time staff across the board, to not less than 75% of the employee’s ordinary hours – a vote of the workforce is required to which must be approved by at least 75% of the affected workforce and notified in advance to the FWC and any union whose members are included in the affected employee cohort.

Schedule I is **extracted in full in the appendix to this circular**, and will be published as part of the [consolidated Award available on the FWC’s website](#) later today.

Whilst the variation provides some relief for employers, the process required to enable a 75% reduction to working hours is – somewhat – cumbersome. As such, looking to reach 1:1 agreement with staff to vary their individual conditions may continue to be the preferred approach, in circumstances where remote working, agreed leave arrangements and/or unpaid stand down are not applicable.

Please refer to our previous circular as to when unpaid stand down may apply and contact the SIAG National Advisory Service for specific advice.

The Information provided in this e-mail is generic advice. For advice in respect of your specific situation, please contact the SIAG National Advisory Service on 03 9644 1400 or 1300 742 447.



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Schedule I—Award Flexibility During the COVID-19 Pandemic

- 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.2 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:

1.2.1 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 1.2.1.

1.2.2 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.

1.2.3 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.

1.2.4 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 1.2.4(a).

1.2.5 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 1.2.5(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 1.2.5(a), the employee's ordinary hourly rate will be maintained but the weekly wage will be reduced by the same proportion.
- (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 closedown.
- (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.