
CIRCULAR:	195.NAT.195.24
DATE:	23 August 2024
SUBJECT:	Right to Disconnect Term for Awards Released
ATTENTION:	Chief Executive Officer

Today, the Full Bench of the Fair Work Commission ('**FWC**') released the final Right to Disconnect clause to be included in all modern awards as of 26 August 2024. This is pursuant to the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*, which received Royal Assent earlier this year. On 11 July 2024, the Commission published a draft Right to Disconnect clause and gave interested parties until 1 August 2024 to comment on it. After considering the submissions the Full Bench has decided not to make any fundamental changes to the previous draft term.

The FWC have decided on the attached clause, which will vary the *Business Equipment Award 2020*. The Full Bench intended the Right to Disconnect clause to be minimalist, reflecting the likelihood that particular awards will vary it once the issues affecting specific industries and occupations are better understood. A copy of the draft / model clause is at **Attachment A** (extracted from the Statement). The FWC has, however, decided to make the following minor changes:

- Adding an additional paragraph to the explanatory note following clause XX.1 explaining that the general protections of the *Fair Work Act 2009* (Cth) ('FW Act') prohibit taking adverse action against an employee because of the employee's rights under s 333M.
- Changing the drafting of paragraph (b) of clause XX.4 to remove an unintended limitation on an employer's capacity to contact an employee in receipt of an award stand-by allowance in respect of the stand-by.
- Deleting paragraph (c) of clause XX.4 because identifying what are the employer's 'usual arrangements' for notifying employees confuses the clauses operation.
- Amending clause XX.5 to clarify that a short-notice roster change or call-back provision, is not exhaustive as to the circumstances in which an employer may contact an employee outside of their working hours.
- Additionally, the Commission has inserted a note in at the end of existing dispute resolution clauses to alert readers to s 333N, which prescribes a procedure for resolving disputes about an employee's right to disconnect.

Within this proposed clause, the FWC provided that subclauses XX.1 – XX.3 will be the same across awards, however subclause XX.4(a) will be adjusted to each specific award, containing an equivalent standby allowance or payment provision. Additionally, subclause XX.5(a) will be modified if the respective award contains a provision allowing for an emergency roster change on 48 hours' notice or less and subclause XX.5(b) will be adjusted to each specific award that contains a recall to work provision.

The clause released by the FWC is far less prescriptive than that which was submitted by the Australian Council of Trade Unions ('**ACTU**') but more express than the mere principles which were advocated for by the Australian Industry Group ('**AIG**'). The FWC has sought to

strike, a middle ground between industry groups broadly representing employees and employers respectively. By and large, the clause defers to the Act where necessary and aims to make several carveouts from the right to disconnect where existing award provisions may be inconsistent with the right.

The FWC does not intend to make guidelines concerning the Right to Disconnect. The Commission is of the view that it 'will be in a better position to make guidelines once it has dealt with at least some disputes concerning the operation of the right.' The Commission, however, intends to review of the Right to Disconnect terms in modern awards approximately 12 months after it takes effect. This will offer interested parties the opportunity to raise practical difficulties that have arisen in the operation of the term more generally, or specific to industries.

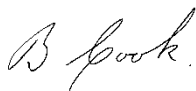
How Will This Draft Clause Apply to Each Award?

As stated above, this draft clause will be slightly modified with respect to each award. In general, subclause XX.4(a) aims to create an exemption from the right to disconnect where employees are compensated by way of a 'standby' allowance. This is analogous to the on-call allowance under the *Social, Community, Home Care and Disability Services Industry Award 2010* and the *Nurses Award 2020*, which is explicitly referred to in the variation of these awards.

Subclause XX.5(a) again aims to create a Right to Disconnect exemption in respect of contacting employees regarding emergency situations and subclause XX.5(b), is a carveout from the Right to Disconnect, to ensure that employers are within their right to recall staff in the manner prescribed by an Award.

Ultimately, the FWC through the introduction of the Right to Disconnect clause, was conscious not to interfere with forms of outside of work hours contact by an employer which have already been contemplated by an Award.

If you have any questions or if you require further information, please contact the SIAG National Advisory Service on 03 9644 1400 or 1300 (SIAG HR) / 1300 742 447.



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