# INDUSTRIAL RELATIONS UPDATE

April 2017

## Changes to penalty rates – what's the deal?

In case you missed it, a FWC full bench handed down a landmark decision last month, as part of the 4 yearly review of modern awards, to reduce penalty rates and public holiday rates across a number of awards.

In recent years, the issue of penalty rates has become a highly contested area, as Australia has evolved into a '24/7' service economy , where some argue the existing system of penalties no longer reflects the reality of working arrangements in many industries.

In reaching its decision, the FWC observed that penalty rates traditionally served a compensatory and deterrence purpose for working outside the 'normal' hours of 9-5pm Monday—Friday. However, it said that the extent of disutility for working weekends and public holidays is now much less than in times past.

### Does it affect my business?

This decision has direct effect on employers and employees who are covered by the following Awards:

- Hospitality Industry (General) Award 2010
- Registered and Licensed Clubs Award 2010
- Restaurant Industry Award 2010
- Fast Food Industry Award 2010
- General Retail Industry Award 2010
- Pharmacy Industry Award 2010

If your business is not covered by any of these Awards, you should still be aware of the changes made as they may have a flow on effect to other Awards in the future.

### What changes have been made?

In summary, the following changes will be made to the affected Awards listed above:

- No changes will be made to Saturday penalty rates.
- Sunday and public holidays rates will be reduced across most affected Awards but remain higher than Saturday penalty rates.
- There will be minor changes to late night and early morning penalties for those covered by the Restaurant Award and the Fast Food Award. These changes are yet to be finalised.

The FWC decided that there was insufficient evidence to support a change to Sunday or public holiday penalty rates for the Clubs Award, or Sunday penalty rates for the Restaurant Award. Interested parties have been given another chance to provide evidence to the contrary.

### When will these changes come into effect?

Given that the FWC have not finalised changes to the affected Awards, it is unclear when the proposed changes will come into effect and what transitional arrangements will apply.

At this stage, the FWC is in the process of reviewing submissions on the phasing in of penalty rates across the affected Awards. This will most likely result in a substantial delay to applying the changes and any transitional arrangement.

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The only thing known for certain is that changes to public holiday penalty rates will take effect from 1 July 2017.

### What implications does this decision have for employers?

For those employers who are covered by these Awards but have an enterprise agreement (EA) in place, this decision will have no immediate impact as they must continue to comply with their pay obligations under their EA. When negotiating a new EA, you must keep in mind that the reduced penalty rates, once operational, will be used as the basis of comparison with the applicable award for the purposes of the Better Off Overall Test.

Employers who pay in accordance with any of these Awards must keep a close eye on the dates that these changes come into effect and any other changes the FWC makes as a result of further proceedings. In particular, you should review employment contracts, before implementing any penalty rate reductions in accordance with this decision, as they may prohibit any unilateral variation of existing conditions.

If you are unsure how these changes affect your current or future employees, or how to implement them in your workplace, please give First IR a call on (02) 9231 2088.

**4 yearly review of modern awards — Summary of Penalty Rates decision**

## Recall (call back) vs Overtime—What's the difference?

With an increasing number of employees performing work outside of their normal hours and workplace, issues with overtime and recall (call backs) have taken centre stage. In a recent Federal court case, some light (albeit very dim) has been shed on the distinction between overtime and recall**.**

In this case, a rostering manager for a large regional hospital was required to be on-call at all times outside her normal working hours to ensure that the hospital was adequately staffed in cases where doctors were sick or on leave. Although she received an on call allowance for her "recall duties", she sought back payments for overtime worked during her 17 year service.

The court found that the work performed by the manager at home was actually overtime rather than a recall for duty.

Justice Mortimer stated that performance of overtime is more likely to be an ongoing arrangement between an employer and employee, whereas a recall will occur by way of a specific instruction or direction to an employee on a particular occasion and for a more particular purpose. In her view, recall is in response to an unstructured, unforeseen or unplanned event that is required to be dealt with at short notice.

The judge also made the following points about the distinction between recall and overtime:

- Recall suggests that an active decision or instruction has been made by the employer to require an employee to perform specific duties outside the employee's ordinary hours of work. Overtime, on the other hand, is where an employee has been authorised to perform the work outside their ordinary hours
- An employee may perform recall duties at a location other than the employer's workplace e.g. their home

In this case, the court found that by paying the manager an "on call allowance," the employer expected repeated occasions to arise where she would be required to perform duties outside her normal hours. The court then ordered that the employer pay approximately $28,000 for back-payments of overtime.

Employers need to be extra careful when accessing the call back provisions contained in their EA or the relevant Award otherwise they may be liable for big pay outs.

**Polan v Goulburn Valley Health (No 2) [2017] FCA 30**

# Undertakings Burying Bargaining?

It seems that the "*simple, flexible and fair framework that enables collective bargaining*" is not so simple after all. When agreements get to the approval stage in the Fair Work Commission, it seems nearly all of them are deficient in some way or another. Just about every approval is accompanied by undertakings, which are necessary to gain FWC approval.

But on closer examination, it turns out many of these undertakings merely restate the requirements of the NES, which are mandatory anyway.

The astonishing part of all this is that even household names in industry, represented by experts and supported by lawyers, are getting caught in this red-tape.

If News Corp, BP, Esso, Woolworths, Kmart, CSR, Toll, Linfox, Coca-Cola, Schweppes can't get it right, how does 'Joe's Garage' think it's going to fare. And when these corporates are working with the NUW, AWU, TWU, MEAA, AMWU, SDA, ASU - all powerful, well-resourced unions - and still have to give undertakings to get approval, it calls into question just how 'simple' the system is.

How can it be that massive corporations, working together with these powerful unions, present their agreed outcomes to the FWC and they can't get it right? Surely these companies and unions know what they're doing? And don't the overwhelming numbers of employees voting in favour of these agreements know what they're doing too?

Clearly there's an appetite for bargaining so the system needs to be more responsive. Because the process is complicated and uncertain, many workplaces are operating off agreements that were certified six, seven and more years ago. That suggests strongly that despite being out of date, companies and their employees prefer agreements to the awards. But they're reluctant to renew, and the system needs to change.

There is widespread acknowledgment that enterprise agreements, undertaken genuinely, lift productivity for the nation. The regulatory framework around bargaining and approval processes needs urgent attention to encourage, not dissuade, participation in it.

## New Notice of Representational Rights

On 3 April 2017 an amendment to the *Fair Work Regulations 2009* commenced that affects the Notice of Employee Representational Rights used during bargaining for an enterprise agreement.

The change to the Regulations will affect the content of the Notice, and will only apply to parties who issue the Notice from 3 April 2017 onward.

## Big Claims for Federal Minimum Wage

The Fair Work Commission is being pressured to award huge claims this year as it conducts its Annual Wage Review for 2017 -18. The first cab off the rank was the ACTU, claiming 6.7% which translates to around $45 per week at the federal minimum wage level – the lowest weekly rate there is.

But the Shop Assistants Union thought that was nowhere near enough and has claimed 10% increase, or around $70 per week at the base level.

Not to be outdone, United Voice, another of the large unions, has gone for 13%, or around $90 a week. This claim is primarily based on the idea that the federal minimum wage should be set at 60% of median wages. While this sounds worthy on the surface, the trouble is, free market increases are usually accompanied by offsets and other checks and balances at the level of the firm. This is absent in the award arena.

The FWC usually announces its decision well in advance of the 1st July each year. It has announced it will take final submissions on 18th May after the federal government hands down the Budget.