IT'S TIME-SHEET O'CLOCK - DON'T BE ALARMED

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Australia Labour, Employment and Workplace Safety Alert

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On 1 March 2020, almost every business in Australia woke up and realised that the deadline for the Fair Work Commission's (FWC) new annualised wage provisions had passed, and many were convinced that they need to change the way they do business now.

It's true that the FWC has introduced new annualised wage provisions into around 30 modern awards, and that these provisions impose more onerous obligations than businesses are used to. However, there is more than one way to skin a cat, or pay an annual salary, and your business may already be using it…

LET'S CUT TO THE CHASE

- New arrangements apply if your employees are being paid an annualised wage in accordance with the provisions of a modern award, including agreed outer limits on hours worked, detailed calculations of annualised wages and signed time sheets.
- These obligations do not apply if you are using a contractual offset clause, so long as that clause is properly drafted and wages are sufficient to cover employees' entitlements in each pay period.
- If you are covered by an award with annualised wage provisions, you have a choice: Adopt the new requirements, or review (and if necessary update) the offset clause in your employees' contracts.

WHAT DO THE NEW ANNUALISED WAGE PROVISIONS REQUIRE?

Annualised wages do exactly what they say; they allow an employer to pay an annual wage which means they may not be required to pay the vast array of overtime, penalty rates and allowances in awards which can be confusing or difficult to administer.

The new award clauses, which take effect under approximately 30 awards from the first full pay period after 1 March 2020, come in 4 different types. In some awards annualised wages can be imposed on employees unilaterally; in others they require agreement.

However, common requirements include:

- Setting out the provisions of the award which will be satisfied by paying an annualised wage.
- Showing the calculations and assumptions used in calculating the annualised wage.
- Setting limits on hours of work which might attract overtime or penalty rates.

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- Requiring time sheets showing the starting and finishing times of work and any unpaid breaks taken, which must be acknowledged by employees in writing in each pay period or roster cycle.

These requirements may be appropriate to some contexts, but as was argued in the four yearly review of modern awards, they do not reflect how many businesses operate in practice. Because of this, many businesses are choosing instead to use or retain contractual "offset clauses" to provide employees with a salary but allow for the flexibility many businesses and their employees expect.

WHAT'S AN OFFSET CLAUSE?

Offset clauses do not "offset" in the strict legal sense, but they allow for payments made for one purpose to be applied to others. In many modern employment contracts, they provide that an employee's total remuneration may be applied to all monetary entitlements under an industrial instrument such as a modern award, including wages, overtime, penalty rates, allowances and loadings - to the extent that the excess covers such entitlements.

The majority of awards do not even have annualised wage provisions - and employers who are covered by those awards have often turned to offset clauses for their salaried employees. But what about where you are covered by an award with an annualised wage provision? Can you still use offset clauses?

For those of you who like to see the judgement for yourselves - here it is. In decisions in 2018 and 2019, the Full Bench stated:

"Of course it is not necessary to have an annualised wage provision in a modern award in order for an employer to be able to pay an employee to whom the award applies an annualised salary that compensates for or "buys out" various identified award entitlements."

"In short, under a contract of employment the employer and employee may agree that the salary payable under the contract has the purpose of satisfying the obligation to pay identified award entitlements…The payment of salary pursuant to such a contract of employment may be relied upon by the employer as satisfying in part or whole any claim by the employee for under-payment of the identified award entitlements."

"An employer is able to pay an employee to whom an award applies an annualised salary arrangement that compensates for or "buys out" various identified award entitlements without engaging with any annualised wage arrangement clause in that award…The model clauses do not seek to invalidate or regulate any such contractual arrangements"

SO WHAT DOES THIS ALL MEAN?

It's your choice as a business which arrangement you choose to use to engage salaried staff. In many cases, where annualised wage provisions under the award would be used, an offset clause may be just as effective.

Contractual offset clauses aren't for everyone, and the FWC has warned that they carry some risk, including less certainty. A key issue for offset clauses is that the amount paid in each pay period should exceed the award entitlements an employee would otherwise earn.

To make things easier, a simplified comparison of the pros and cons of each arrangements can be found here.

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It's also important to remember that even if you have a contractual offset, you will still have record keeping obligations under the *Fair Work Act 2009*. These include keeping records of the hours worked which attract overtime or penalty rates - but they don't require the same level of timesheets set out in the new annualised salary clauses.

If you don't already have a contractual offset, but want to adopt one, now is the time to update your contracts. If you already use offsets, this is a timely reminder to review them, make sure they are correctly drafted, and that you are paying enough to actually offset any award entitlements on a pay period by pay period basis. In either case, we are happy to assist in reviewing these arrangements.

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