

# AN EMPLOYER'S GUIDE TO ANNUALISED SALARIES

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On 1 March 2020 the Fair Work Commission introduced new annualised salary provisions into many awards. There is a lot of confusion about annualised salaries, so we have created this guide to set out what employers need to know about them.

## What is an annualised salary?

An annualised salary is where an employer agrees to pay an employee an annual salary in satisfaction of some or all of the monetary amounts the employee is entitled to under an award.

For instance, if an employee is covered by the *Clerks – Private Sector Award 2010*, they will be entitled to minimum wages of up to \$1090.50 per week, allowances, overtime rates, penalty rates and annual leave loading. Instead of paying each of these entitlements, the employer could pay one annual salary of, say, \$70,000 in satisfaction of all of these entitlements.

## What changes has the Fair Work Commission made?

In order to pay an annualised salary, an employer needs to ensure that the annual salary is high enough to cover all of the employee's award entitlements for the year. The Fair Work Commission was concerned that some employers were not doing this properly and that employees were being disadvantaged by being on an annualised salary.

The new annualised wage provisions put processes in place that employers must follow to ensure employees do not become worse off by being on an annualised salary. They are targeted at those employees who are vulnerable to being disadvantaged, which is why they have been introduced into some awards and not others.

The provisions vary slightly between the awards, so you need to check the provisions of the award that applies to see what the particular requirements are. However, most of the effected awards include the following requirements:

- The employer needs to advise the employee in writing, and keep a record of, the annualised wage that will be paid, which of the provisions of the award are satisfied by payment of the annualised wage, the method by which the annualised wage has been

calculated and the outer limit of ordinary hours which the employee may be required to work before they become entitled to penalty rates or overtime.

- The annualised wage must be no less than the amount the employee would have received under the award for work performed over the year.
- If an employee works in excess of the outer limit of ordinary hours in a pay period or roster cycle, they must be paid penalty rates or overtime.
- Every 12 months (or on termination of employment) the employer must conduct a reconciliation by calculating the amount of remuneration that would have been payable to the employee under the award and compare it to the amount of the annualised wage actually paid to the employee. If there is a shortfall, the employer must pay the shortfall within 14 days.
- For the purpose of doing the 12-month reconciliation, the employer must keep a record of starting and finishing times and any unpaid breaks taken. This record must be signed by the employee or acknowledged as correct in writing (including by electronic means) each pay period or roster cycle.

Some awards also require a written agreement to be entered into between the employer and employee that records the annualised wage arrangement. The agreement can only be terminated by mutual agreement or by either party providing 12 months' written notice. Employers should check the applicable award to see whether this is a requirement.

### **Which awards have the new provisions?**

So far, the annualised wage provisions have been introduced into 18 of the 122 modern awards. They are as follows:

- Banking, Finance and Insurance Award 2010
- Broadcasting and Recorded Entertainment Award 2010
- Clerks-Private Sector Award 2010
- Contract Call Centres Award 2010
- Horticulture Award
- Hydrocarbon Industry (Upstream) Award 2010
- Legal Services Award 2010
- Local Government Industry Award 2010
- Manufacturing and Associated Industries and Occupations Award 2010
- Mining Industry Award 2010
- Oil Refining and Manufacturing Award 2010 (non-clerical employees)
- Pastoral Award 2010
- Pharmacy Industry Award 2010
- Rail Industry Award 2010
- Salt Industry Award 2010
- Telecommunications Services Award 2010
- Water Industry Award 2010

- Wool Storage, Sampling and Testing Award 2010

The Fair Work Commission will also be including annualised wage provisions in the following awards in the near future:

- Health Professionals and Support Services Award 2010 (supervisory and managerial staff)
- Hospitality Industry (General) Award 2010 (non-managerial staff)
- Marine Towing Award 2010
- Restaurant Industry Award 2010

### **Do we have to comply with the new annualised wage provisions?**

Many employers are looking at these new provisions thinking they are very onerous. There is a lot of work involved in calculating annualised wages and doing the annual reconciliation. Also, many employers don't record hours worked and would need to implement a time recording system if they start using the new annualised wage provisions.

Fortunately, there is another way. It has always been possible to have an all-inclusive annual salary in a common law employment contract. This is done by having an offset clause that says the annual salary is paid in satisfaction of some or all of the employee's monetary entitlements under an award. The effectiveness of these clauses has been upheld by the courts. Also, the Fair Work Commission has confirmed that the introduction of the new annualised wage provisions will not change the ability of an employer and employee to use a common law offset clause.

This means that both options are available. Employers can choose whether to use the annualised wage provisions in the applicable award (if it has them) or use a common law offset clause.

If an employer decides to use the annualised wage provisions, they will need to comply with the more onerous notification, record keeping and reconciliation provisions in the award.

If an employer uses a common law offset clause, they will not have to comply with the new annualised wage provisions, including the more onerous notification, record keeping and reconciliation requirements.

However, it should be noted that there are general record keeping requirements in the Fair Work Act that apply to all employers. They include a requirement for employers to record overtime hours worked if a penalty rate or loading is payable for overtime hours actually worked. It is likely that this includes where a penalty rate or loading is payable under an Award, even if a common law offset clause is being used (doing so doesn't change the obligation to pay overtime under the award, it is just that the obligation is being satisfied by the annual salary). However, this is still less onerous than recording all hours worked plus unpaid breaks, as is required by the new annualised salary provisions.

## **Making a common law offset clause work**

For a common law offset clause to be effective, the annual salary must be high enough to satisfy each award entitlement that it is paid in satisfaction of. This means that employers still need to monitor them. For example, if employees work overtime or earn penalty rates, this needs to be taken into account by employers and it must not push the value of the employee's award entitlements above the annualised salary. This applies for each pay or roster period and can't be averaged out over the year. Employers also need to take into account the increase to minimum award wages that takes place on 1 July each year.

The need to monitor the entitlements for employees under a common law offset clause will be higher for employees who have an annualised salary that is close to their award entitlements, but less burdensome for employees who have annualised salaries that are well above award requirements.

Further, it is important that a common law offset clause is well drafted. The courts have found that there needs to be a "close correlation" between the offset clause and the award entitlement it is discharging. For this reason, we recommend that offset clauses refer to the award that applies and name the particular award entitlements that the annual salary is being paid in satisfaction of.

## **What should employers do now?**

Employers only need to take action in relation to employees who are paid an annualised salary. Employees who are not paid an annualised salary, such as casual employees or employees who are paid award entitlements, are not affected.

For employees who are paid an annualised salary, employers first need to know which award applies to them. If you haven't worked this out yet it is a good idea to. This is something our team at Source can help with.

Once the applicable award is known, you can check to see whether it has annualised wage provisions. If it does, you can choose whether to use those provisions, which means complying with all of the new notification, record keeping and reconciliation requirements, or use a common law offset clause. Of course, if there is no award that applies with annualised wage provisions, you can simply use a common law offset clause.

If you do choose to use a common law offset clause it is a good idea to check the provisions in the employment contract to ensure they refer to the award and name the particular award entitlements that the annual salary is paid in satisfaction of. You should also ensure that the annual salary is high enough to satisfy the award entitlements that are being offset.

We also recommend that employers conduct at least an annual review of salaries for employees using common law offset clauses to ensure they are above award entitlements. This is best done in June each year after the annual increase to minimum award wages is announced by the Fair Work Commission, which takes effect on 1 July. Where employees are

on annualised salaries that are close to award entitlements, these reviews should be carried out more frequently.

If you choose to use the new annualised wage provisions in an award you will need to:

- determine the annualised wage that will be paid, which provisions of the award will be satisfied by the annualised wage and set the outer limits of ordinary hours that an employee may be required to work before they become entitled to overtime or penalty rates (this usually means working backwards from the annualised wage to work out how many hours can be worked under the annualised wage and still have it be higher than award entitlements);
- provide the employee with written notification setting out these calculations, or enter into an annualised wage agreement with the employee if the applicable award requires it;
- ensure there is a time recording system in place and that allows employees to record their starting and finishing times and unpaid breaks, and that the employee acknowledges the record as correct each pay period or roster cycle;
- set up your payroll to pay the employee overtime or penalty rates if they work more than the outer limit of hours allowed under the annualised salary arrangement in any pay period or roster cycle;
- conduct 12 monthly reconciliations to ensure the annualised wage paid to the employee is higher than their award entitlements for the year and make up any shortfall if needed.

The area of annualised salaries can get confusing but getting this area sorted out is a good idea – it will help your business be compliant with award requirements and meet its minimum pay obligations. If you need help implementing the annualised wage provisions or common law offset clauses in your business, don't hesitate to get in touch. We have a team of experienced employment lawyers and specialist HR consultants ready to help you.

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