

Penalty rates decision: Sunday and Public Holiday Penalty Rates to be cut

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In brief

This is a complex decision affecting a range of different industries, businesses, unions and employees in many different ways.

This table sets out the key conclusions reached by the Fair Work Commission:

Award	Sunday penalty rate *		Public holiday penalty rate	
	Current	New	Current	New
Retail Award				
Full-time and part-time employees	200%	150%	250/225%	225%
Casual employees	200%	175%	275/250%	250%
Hospitality Award				
Full-time and part-time employees	175%	150%	250%	225%
Casual employees	175%	175%	275%	250%
Fast Food Award (Level 1 employees)				
Full-time and part-time employees	150%	125%	250%	225%
Casual employees	175%	150%	275%	250%
Pharmacy Award (7.00am – 9.00pm only)				
Full-time and part-time employees	200%	150%	250%	225%
Casual employees	200%	175%	275%	250%
Clubs Award				
Full-time and part-time employees	No change		No change	
Casual employees	No change		No change	
Restaurant Award				
Full-time and part-time employees	No change		250%	225%
Casual employees	No change		250%	250%

* it is likely that there will be at least 2 annual instalments beginning on 1 July 2017, though less than 5 instalments

By way of a more detailed summary:

- The Fair Work Commission (**FWC**) has reviewed 6 modern awards in the retail, hospitality, restaurant, fast food, pharmacy and club industry. It has determined that in some of these industries, the Sunday penalty and public holiday penalty is neither fair nor relevant.
 - **Retail employees** covered by the *General Retail Industry Award 2010 (GRIA)*: Sunday penalty rates will drop from 200 per cent to 150 per cent of their standard hourly rate; for permanent employees, while casuals will go from 200 per cent to 175 per cent.
 - **Hospitality employees** covered by the *Hospitality Industry (General) Award 2010 (Hospitality Award)* will face a reduction in Sunday penalty rates from 175 per cent to 150 per cent for permanent employees, while casual hospitality workers' pay will remain unchanged. Public holiday rates will reduce across the board by 25%.
 - **Restaurant and Club employees** - the FWC refused to cut Sunday penalties for these employees, finding that employers had failed to establish the merits for this change.
 - The Full Bench decided to vary the span of hours which attract a loading in relation to early/late night work in the *Restaurant Industry Award 2010 (Restaurant Award)*. In this regard, the FWC decided to vary the span of hours which attract the current 15 per cent loading to work performed between midnight and 6.00am for both the *Restaurant Award* and the *Fast Food Industry Award 2010 (Fast Food Award)* (not 7.00am as is currently the case).
 - **Fast food employees** covered by the *Fast Food Award* will see the span of hours which attract the 10 per cent evening work loading to work between 10.00pm and midnight (not 9.00pm as is currently the case). The Sunday penalty rate for full-time and part-time level 1 employees will be reduced from 150 per cent to 125 per cent and the penalty rate for level 1 casuals will be reduced from 175 per cent to 150 per cent. No change to Sunday penalty rate for Level 2 and 3 employees (typically the permanent employees) under Fast Food Award were made. Public holiday rates will reduce across the board by 25%.
 - **Pharmacy employees** will see Sunday penalties drop from 200% to 150% for permanent employees, and from 200% to 175% for casuals. Public holiday rates will also drop by 25% to 225% (permanents) and 250% (casuals).
 - The reductions in Sunday penalty rates are proposed to take place in a series of annual adjustments commencing on 1 July 2017.
 - The changes to public holiday penalty rates will take effect on 1 July 2017 and the variation of the early/late night span of hours that attract the work loadings in the *Restaurant Award* and *Fast Food Award* will take effect on 27 March 2017.
 - The Full Bench acknowledged the changes would cause hardship to some employees and proposed the transitional arrangements to mitigate the immediate effect.
 - The penalty rates in other industries under the remaining modern awards were not considered in this decision and the FWC has been very careful to advise that this decision does not have a flow on effect to other modern awards.
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In detail

Background

- As part of the broader 4 yearly review of modern awards, the FWC received approximately 6,000 submissions and held 40 days of hearings in relation to Sunday penalty rates in the retail, hospitality, fast food, restaurant and club industries.
- In undertaking the review, the FWC considered the reduction of Saturday penalty rates in some awards though decided that it was not necessary at this stage. It found that Saturday penalty rates are a fair and relevant minimum safety net and noted that there had been no real attempt by the employer parties to seek to reduce Saturday rates in most of these awards.
- A review of Saturday penalty rates in the *Registered and Licensed Clubs Award 2010 and Pharmacy Industry Award 2010* will be the subject of further proceedings.
- Unions sought to vary the modern award so that an employee could refuse to work Sundays. The FWC was not attracted to this argument and no change to the modern award giving an employee any right to refuse to work on Sundays was made.

Effect of the decision on employers and employees

- Attachment 1 sets out the summary of the adjustments made by the FWC.
- The impact of this decision will vary greatly for different businesses in each industry and will ultimately depend upon individual circumstances:
 - If your business is covered by an enterprise agreement (**EA**) that deals with the issue of penalty rates, those penalty rates under the EA will continue to apply. The changes to the modern award will have no direct effect.
 - If your business is making a new EA, the threshold for the Better Off Overall Test (BOOT) will be reduced as the penalty rates in the modern award will be reducing.
 - If your business is covered by an EA that incorporates the modern award and the EA does not deal with penalty rates, there is an interesting question whether the variations to the penalty rates in the modern award are intended to apply. For example, some EA's state that the "award, as varied from time to time, is incorporated into the agreement". If this is the case, the variation will take immediate effect. If your EA is drafted differently, the individual drafting will need consideration.
 - If your business is covered by the modern award, this decision will have immediate effect.
- Some employers may have issued contracts of employment that specify the Sunday or public holiday penalty rate or reference the modern award. Any unilateral change to a contract of employment may be a breach of contract.
- The employer should review their contract of employment to see if there is any contractual impediment to implementing the modern award changes.

Transitional arrangements to mitigate negative effect

- The Full Bench acknowledged that the immediate implementation of the variations to penalty rates would inevitably have a negative effect on living standards and the ability of Australia's lowest paid employees to meet their needs. The Full Bench proposed that transitional arrangements are necessary to mitigate the hardship caused to employees who work on Sunday.
- Similar to when modern awards were introduced, the FWC has proposed an adjustment process that involves staggered changes to Sunday penalty rates. The FWC considers that "it is likely that at least 2 instalments will be required (but less than 5 instalments)" for the changes to Sunday rates to be rolled out.
- The FWC did not reach a final conclusion on what the transitional arrangements would look like, and proposed to seek submissions from interested parties. Information on submissions in this regard will be publicly available soon.

Future steps

- The FWC has signalled that it is also prepared to consider including "loaded rates" in the awards under review.
- A loaded rate is an all-purpose hourly rate that applies to each hour of work, regardless of when that hour is worked. No penalties apply where loaded rates are used.
- The FWC has identified that the use of loaded rates by employers has been the root cause of significant non-compliance with award obligations. It is difficult and complex to calculate a loaded rate that covers each employee working each individual roster.
- The step of defining a loaded rate would ensure that understanding the BOOT would be simplified for employers who adopt this payment approach. It is likely to be some time off before these loaded rates are implemented.

Consultation with employees

- Under the *GRIA* and *Hospitality Award*, employers have an obligation to notify and consult with employees about major workplace change that is likely to have a significant effect on employees.
- While it may be arguable whether a change to an award falls within the scope of these consultation obligations, it is good HR practice for an employer to notify its employees who may be affected by the proposed change as well as their representatives, if any.
- Even employers who are covered by an EA and where there is no immediate effect arising from these changes should consider consulting with its employees. There will be a significant amount of confusion arising from this decision and the media and unions' response. Employers should ensure timely and accurate information is given to each employee.
- The employer should discuss the affect that the change will have on them (if any) and any measures to avert or mitigate the adverse effects of such changes.
- Good consultation requires the employer to listen to its employees and to give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes.
- We also strongly recommend that the employer should also provide to the affected employees all relevant information about the changes in writing. This will ensure the same message is received by all employees in the workplace.

The takeaway

- The serious question to be asked is what is the value in enterprise bargaining in these industries? How can enterprise bargaining provide flexibility and drive productivity, enhance the employee value proposition and the customer experience and what trade-offs are necessary in order to achieve these business imperatives.
- Also, the bar that employers need to get across to satisfy the BOOT is coming down a little. This should be factored into the approach that employers in these industries take to enterprise bargaining, and should increase the confidence employers and the Fair Work Commission can have about whether the BOOT has been satisfied.
- Employers will need to carefully assess how these changes affect their business and what opportunities they present.
- Employers also need to appreciate that there is a human face to these changes; their employees. For employers in these industries, their employees are the direct interface with the customer. How fundamental changes to long held terms and conditions of employment impact upon employees and the customer experience is a necessary consideration.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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