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Reducing penalty rates: the beginning of the end?

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Fair Work Commission reduces Sunday and Public Holiday penalty rates

In a recently published decision, the Full Bench of the Fair Work Commission (**FWC**) has decided to reduce Sunday and Public Holiday penalty rates in modern awards covering the retail and hospitality industries by between 25 – 50%. In addition, the FWC has proposed some variations to early and late night work penalty rates under certain awards.

The modern awards that will be affected include:

- Hospitality Industry (General) Award 2010
- Fast Food Industry Award 2010
- General Retail Industry Award 2010
- Pharmacy Industry Award 2010
- Restaurant Industry Award 2010

The FWC has proposed that the changes to the penalty rates be subject to as yet unspecified transitional arrangements to mitigate the hardship that will inevitably arise from reductions in pay. While there have been no clear decisions made

about the form of the transitional arrangements, the FWC has suggested that the reductions be effected as a series of annual adjustments, most likely over a period of two years, commencing from 1 July 2017.

The FWC has called for submissions from interested parties regarding some of the provisional views that it expressed in its decision, including the proposed transitional arrangements.

In making the decision, the FWC gave careful consideration to the objective of modern awards as set out in section 13 of the *Fair Work Act 2009* (Cth) (**FW Act**) which is to 'ensure that modern awards, together with the *National Employment Standards*, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss 134(1)(a) to (h).



Historically, penalty rates were set to compensate employees for the ‘disutility’ of working outside of normal working days due to the interruption to family and social life and to religious observance.¹ The FWC considered a large amount of recent research which demonstrated that although Australians continue to allocate work and leisure activities to the week and weekend respectively,² there was data to indicate that the differences between the uses of Saturdays and Sundays have declined. This is due to factors such as an increase in consumer demand for retail shopping on Sundays and a decrease in religious observance amongst 15 to 34 year olds who are most likely to work in the retail and hospitality sectors where the impact of Sunday work is greater than other industries.³

Penalty rates were also designed to deter employers from scheduling work outside of the regular working week. However, the FWC found that deterrence is no longer a relevant consideration. Deterrence from scheduling work on Sundays and public holidays has now become an effect of penalty rates rather than their objective and, in the retail and hospitality industries, has become a barrier to business that is inconsistent with the objectives of the FW Act.⁴

Being mindful of the need for modern awards to provide terms and conditions that are ‘fair and relevant’ to both employees and employers, the FWC found that the notion of setting a rate of pay for a particular day or time of day with the objective of deterrence was not fair and is not required by the FW Act.

The FWC found that the reduction in penalty rates was likely to have a positive impact on businesses by reducing employment costs and increasing productivity.⁵

Employers should continue payment of penalty rates at their current rates until further information is released regarding the transitional arrangements.

Employers and employees should expect further changes as the FWC continues its 4 yearly review of modern awards. In particular, there is an expectation of further changes to penalty rates, and other variations, to promote consistency between awards in similar industries and ensure that the awards remain ‘fair and relevant’ according to contemporary standards.

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¹ 4 yearly review of modern awards - Penalty Rates [2017] FWCFB 1001, [38].

² Ibid [492].

³ Ibid [507] – [507].

⁴ Ibid [39] and [149].

⁵ Ibid [224].

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