# Modern Award Individual Flexibility Agreement

The following letter template(s) should be used as a guide only. Any wording changes, other than those to insert a business name, may change the context, meaning or purpose of the policy. We recommend you receive advice from the Victorian Chamber of Commerce and Industry prior to making such changes.

## Contacting the Victorian Chamber of Commerce and Industry

The Victorian Chamber’s team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on (03) 8662 5222.

Disclaimer

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## General Information

Flexibility provisions within Modern Awards allow employers and an individual employee to enter into an arrangement, whereby certain terms of the Award are modified to meet the individual circumstances of the employment relationship. Before considering using a Flexibility Agreement, employers must:

ensure that no other industrial instrument applies; and

consider which Modern Award is the most appropriate instrument in relation to that employee’s employment. The Coverage and Classification provisions of the Award will assist in determining whether a particular Award is the correct instrument. Whilst only one Award will apply to an employee's employment, it is possible that multiple Awards may cover an employer's business.

## How do Flexibility Agreements work?

Flexibility provisions in Awards specify that an employer and employee may vary the application of a number of terms of the Award if they enter into a Flexibility Agreement concerning those terms (for example, hours of work, overtime and penalty rates etc). An employer and employee can only agree to vary the terms of the Award that are specified in the flexibility clause of the applicable Award.

As each award contains different clauses which may be altered, it is important that the flexibility provision in the relevant Award is properly analysed when entering into a Flexibility Agreement with an employee.

## How do I vary the effect of terms of the award by using a Flexibility Agreement?

Within the Victorian Chamber Flexibility Agreement, Victorian Chamber Members can identify the terms of the award of which they wish to vary the effect. Once doing so, the Flexibility Agreement will need to identify, with sufficient detail, how the effect of that particular Award term is being modified by the Flexibility Agreement. For example, it will be necessary to show that a particular entitlement has been removed, altered, or even increased.

In addition, Victorian Chamberusers must ensure that the Flexibility Agreement results in the employee’s terms and conditions of employment being better off overall than if the Flexibility Agreement didn’t apply. Therefore, users must also ensure that the Flexibility Agreement identifies in sufficient detail, how the Agreement ensures the employee is better off overall, as compared to the Award. For example, it will be necessary to show what benefits or entitlements an employee will receive (such as an increase in their wage) for entering into the Flexibility Agreement.

## How do I implement a Flexibility Agreement?

Attached to the front of the Flexibility Agreement is a Proposal Form, which should accompany the Flexibility Agreement given to employees for consideration. As stated in the proposal, employees should be given ample time to consider the terms of the Flexibility Agreement, and to request clarification if they are unsure of any terms.

The Victorian Chamber members should ensure that employees who may have difficulties understanding the terms of the Flexibility Agreement are given access to the agreement in terms that they can understand. This may include engaging an interpreter where the employee has language difficulties. Employers should ensure that they document all reasonable attempts to accommodate individual employee circumstances.

In addition, if a proposed Flexibility Agreement will cover a person under 18 years of age, they are required to also have a parent or guardian sign the Flexibility Agreement.

It is important that the employee is not put under any pressure or duress to sign the Flexibility Agreement, as this could result in the Flexibility Agreement being declared invalid, or even a penalty being imposed. The signing of the agreement must not be contingent on any other person signing the Flexibility Agreement.

An employer cannot enter into a Flexibility Agreement with a prospective employee. A Flexibility Agreement can only be agreed upon after a person has commenced employment with the employer.

## Duration of the Flexibility Agreement

Whilst a Flexibility Agreement has an indefinite term, the following events will cause the cessation of the Flexibility Agreement:

The employer and employee agree in writing to terminate the Flexibility Agreement;

* Either the employee or employer unilaterally terminate the Flexibility Agreement, by giving the other 13 weeks' written notice of termination; or

The award no longer applies to the employee’s employment. This will occur, for example, if a new enterprise agreement comes into operation and applies to the employee, or if an employee has a guarantee of annual earnings that exceeds the high income threshold. As the award no longer applies, the Flexibility Agreement also ceases to apply.

## Other relevant factors to consider

Whilst the Individual Flexibility Agreement is a useful tool for Victorian Chamber Members, care should be taken in implementation. In particular, given the vast range of awards, there may be other requirements in the award which a Flexibility Agreement is required to address. Regard should be had to the particular award’s flexibility clause when drafting a specific Flexibility Agreement.

Furthermore, the Flexibility Agreement, which is essentially an extension of the relevant award, does not regulate all the terms and conditions of employment of the employee subject to the agreement. It is recommended that all employees are still provided with a letter of offer or contract of employment which will operate alongside the award and the Flexibility Agreement.

Employers should ensure that the contract of employment, the award, the Flexibility Agreement, and the National Employment Standards (NES) do not conflict with each other. If unsure of the interaction between each of these instruments, it is recommended that you seek further advice.

Flexibility varies the effect of award terms, it does not vary the award. Although there is little case law on Individual Flexibility Agreements, at least one case emphasises that the Flexibility Agreement varies the effect of the award terms, it does not go as far as varying the award. For example, a Flexibility Arrangement cannot, according to current case law, go as far as allowing the employer and the employee to agree that the employee will commence their shift early (at a time that would attract a penalty rate) and forfeit the penalty rate in exchange for the employee leaving early to attend to family commitments. Employers may wish to seek advice on the use of Flexibility Agreement in circumstances where the trade off does not improve the financial outcome for the employee.

# Proposal of Individual Flexibility Agreement

**[INSERT** BUSINESS NAME **LETTERHEAD]**

[INSERT DATE]

PRIVATE AND CONFIDENTIAL

[NAME]

[STREET ADDRESS]

[SUBURB] [STATE] [POSTCODE]

Dear **[NAME]**,

## Re: Proposal of Individual Flexibility Agreement

On behalf of **[INSERT COMPANY NAME]** (‘**[INSERT COMPANY SHORT NAME]**.), I am pleased to offer you a proposal for an Individual Flexibility Agreement.

An Individual Flexibility Agreement is an instrument that allows both you and **[INSERT COMPANY SHORT NAME]** to customise your employment conditions. This is done by varying the effect of certain terms of the **[INSERT MODERN AWARD FULL NAME]**, which is the relevant Award applicable to your employment with **[INSERT COMPANY NAME]**.

However, the proposed Individual Flexibility Agreement, whilst varying the effect of certain clauses of the relevant Award, will not become a term of your contract of employment, and therefore may not contain all of your entitlements and obligations in relation to your employment with **[INSERT COMPANY NAME]**.

It is entirely your choice as to whether you wish to enter into such an agreement with **[INSERT COMPANY NAME]**. We strongly recommend that you read the terms of the enclosed Individual Flexibility Agreement before you make the decision as to whether you sign the Agreement, and if you have any questions, you should contact **[INSERT COMPANY CONTACT]** or alternatively, seek the advice of an appropriate advisor (eg a lawyer).

Should you have any difficulties in understanding the Agreement due to a disability, language or other impediment, please contact **[INSERT COMPANY NAME]**, who will organise a more suitable explanation of the Agreement for you.

Whilst you and **[INSERT COMPANY NAME]** will be bound by the terms of the Individual Flexibility Agreement, you may terminate the Agreement at any time, in accordance with the terms of the Agreement.

Yours faithfully,

[INSERT COMPANY NAME]

[INSERT COMPANY CONTACT]

[INSERT COMPANY CONTACT POSITION]

**Individual Flexibility Agreement**

**[INSERT O****N** COMPANY NAME **LETTERHEAD]**

[INSERT DATE]

PRIVATE AND CONFIDENTIAL

[NAME]

[STREET ADDRESS]

[SUBURB] [STATE] [POSTCODE]

Dear **[NAME]**,

## Re: Individual Flexibility Agreement

On Behalf of **[INSERT COMPANY NAME]** (‘**[INSERT COMPANY SHORT NAME]**’), I am pleased to offer you an Individual Flexibility Agreement (‘the AGREEMENT’) with **[INSERT COMPANY SHORT NAME]** on the terms and conditions set out below:

## Terms and Conditions

1. Parties to the agreement

The parties to this Agreement (‘the Parties’) are:

* 1. **[INSERT COMPANY NAME]** (‘**[INSERT COMPANY SHORT NAME]**’); and
	2. **[INSERT EMPLOYEE’S NAME]** (‘you’).

Only the above parties are bound by the terms of this Agreement.

1. Commencement and operation
	1. This Agreement will commence on **[INSERT DATE]**.
	2. This Agreement is made in conjunction with the **[INSERT MODERN AWARD FULL NAME]** (‘the AWARD’). Once signed, this Agreement will vary the effect of certain parts of the Award, as specified below, and will become a term of the Award. To avoid doubt, as the Agreement will have the effect of becoming a term of the Award, if the Award ceases to apply to you (as defined by the Fair Work Act 2009 (Cth)), the Agreement will cease to operate.
	3. To avoid doubt, this Agreement does not provide you with a contractual entitlement, nor does it form part of your contract of employment.
2. Termination
	1. The Agreement can be terminated:
		1. at any time, by written agreement between the Parties;
		2. without agreement between the parties, if one party gives the other 13 weeks’ written notice of termination. When 13 weeks’ has elapsed since the giving of the notice, the Agreement will terminate.
3. Genuine agreement
	1. By signing this Agreement, you agree that:
		1. you have entered into this Agreement without coercion or duress;
		2. you have been given adequate time to consider the terms of this Agreement prior to signing it, and have had the opportunity to seek relevant advice on its terms, including any advice from a parent or guardian who may or may not be a signatory to this Agreement; and
		3. as a result of entering into the Agreement, you are better off overall than you would have been, if no individual flexibility agreement had been agreed to.
4. Amendment of award terms
	1. The Parties have agreed to amend the following terms of the Award, as permitted by the Award, in the following manner:

|  |  |  |  |
| --- | --- | --- | --- |
| **No** | **Clause** | **Type of amendment** | **Additional benefits** |
| * + 1.
 | [THE PARTIES MUST SPECIFY HOW THE FLEXIBILITY AGREEMENT MODIFIES THE EXISTING CLAUSES OF THE AWARD. IT IS IMPORTANT THAT THE AGREEMENT SUFFICIENTLY DETAILS THE PROPOSED AMENDMENT, AND HOW THE AGREEMENT CHANGES THE APPLICATION OF THE AWARD TERM BEING MODIFIED.] | [WHILST THE FLEXIBILITY AGREEMENT ALLOWS THE PARTIES TO AMEND CERTAIN CLAUSES OF THE AWARD, IT IS IMPORTANT THAT THE AGREEMENT ONLY AMENDS THOSE CLAUSES WHICH THE AWARD ALLOWS. THIS WILL REQUIRE CHECKING THE FLEXIBILITY CLAUSES OF THE AWARD, WHICH WILL SHOW WHICH CLAUSES MAY BE AMENDED, THEN CHECKING EACH CLAUSE TO DETERMINE WHICH CLAUSE YOU WISH TO AMEND. ONCE THIS IS DONE, NOTE THE SPECIFIC CLAUSE NAMES AND CLAUSE NUMBER. IF UNSURE, IT IS RECOMMENDED THAT YOU SEEK FURTHER ADVICE.] | [THE FLEXIBILITY AGREEMENT MUST SPECIFY WHAT BENEFIT(S) THE EMPLOYEE WILL RECEIVE FOR ENTERING INTO THE FLEXIBILITY AGREEMENT. IT IS IMPORTANT THAT THE AGREEMENT PROVIDES THE EMPLOYEE WITH SUFFICIENT COMPENSATION FOR SIGNING THE FLEXIBILITY AGREEMENT, TO ENSURE THE EMPLOYEE IS “BETTER OFF OVERALL” AS COMPARED WITH THE AWARD. IF THE SAME BENEFIT IS BEING PROVIDED FOR MORE THAN ONE TYPE OF AMENDMENT (E.G. AN INCREASE IN THE EMPLOYEE’S WAGE), THIS SHOULD BE REFLECTED NEXT TO EACH AMENDMENT.] |

1. Better Off Overall
	1. As a result of the amendments in paragraph 5 above, the terms and conditions of your employment are better off overall, when compared with the **[INSERT MODERN AWARD FULL NAME]**, as a result of the following:
	2. Amendments to clause

 **[*The parties must specify how the Flexibility Agreement modifies the existing clauses of the Award. It is important that the Agreement sufficiently details the proposed amendment, and how the Agreement changes the application of the Award term being modified. will result in*** ***The Agreement must specify how the Agreement results in the employee being better off overall in relation to their terms and conditions of employment. The Agreement will need to specify in some detail what benefits the employee receives that results in the employee being better off overall, taking into account the removal or amendment of any benefit under a clause of the Award. If unsure, it is recommended that you seek further advice]:***

Signed By: **[INSERT EMPLOYEE’S NAME]**

|  |  |  |
| --- | --- | --- |
|  |   |   |
| (Signature of Employee) |  |  |
| (Name of Employee) |  |  |
|   |   |   |
| (Address of Employee) |   |  |
|   |   |   |
| (Date) |   |  |
|  **[DELETE IF NOT REQUIRED]** |   |    |
|  |   |   |
| (Signature of Parent or Guardian of Employee) |   |   |
|    |   |   |
| (Name of Parent or Guardian of Employee) |   |   |
|    |   |   |
| (Address of Parent or Guardian of Employee) |   |   |
|    |   |   |
| (Date) |   |   |

Signed on behalf of:

**[INSERT COMPANY NAME]**, **[INSERT COMPANY ABN]**

|  |  |  |
| --- | --- | --- |
| By its duly authorised officer: |   |   |
|    |   |   |
| (Signature of Authorised Officer) |   |   |
|    |   |   |
| (Name of Authorised Officer) |   |   |
|    |   |   |
| (Address of Authorised Officer) |   |   |
|    |   |   |
| (Date) |   |   |