

INDIVIDUAL FLEXIBILITY ARRANGEMENTS (IFAs)

The *Fair Work Act 2009* (Cth), (FW Act), seeks to promote workplace flexibility through the use of individual flexibility arrangements (IFAs). IFAs are intended to allow for variations to industrial instruments to meet the genuine needs of employers and individual employees, while ensuring minimum entitlements and protections continue to be met. Modern awards and enterprise agreements contain flexibility terms under which IFAs can be made.

Flexibility Terms

Modern awards and enterprise agreement set out the minimum terms and conditions of employment. These instruments are collective in nature thus, to take into account the specific circumstances of individual parties, every modern award will include a 'flexibility term.'

A flexibility term allows an employer, and an individual employee to agree on an arrangement which varies the effect of the industrial instrument in order to meet the genuine needs of both the employer and employee. Employers will consult with employees about flexible arrangements that might benefit them, and to better accommodate individual personal circumstances. This can be for a specific period of time, or on an ongoing basis.

The FW Act ensures these IFAs do not diminish minimum employee entitlements, by requiring the employer to ensure the employee covered by the IFA is **better off overall** (the 'BOOT' test) on the IFA compared to the industrial instrument.

You must have evidence of this for your own records to demonstrate the employee is better off overall.

An IFA can also only be made after the employee has commenced employment however an employer cannot ask a prospective employee to agree to an IFA as a condition of employment.

IFA Inclusions

Flexibility terms within industrial instruments will only allow IFAs to vary:

- ☒ arrangements for when work is performed (rostered hours)
- ☒ overtime rates
- ☒ penalty rates
- ☒ allowances
- ☒ leave loading

IFAs cannot include the following Unlawful Terms:

- ☒ discriminatory terms
- ☒ objectionable terms (terms which contravene the 'general protections' provisions of the FW Act)
- ☒ terms that give an employee an entitlement or remedy in relation to unfair dismissal before they have completed the minimum employment period
- ☒ terms that exclude or modify the application of unfair dismissal provisions of the FW Act in a way that is detrimental to a person
- ☒ certain terms that provide right of entry entitlements
- ☒ certain terms that provide for the exercise of state or territory occupational health and safety (OHS) rights; or
- ☒ terms inconsistent with the industrial action provisions under the FW Act.

Agreeing to IFA's

An employee or employer cannot be forced to enter into an IFA, and a person cannot be treated adversely or discriminated against for refusing to agree to an IFA. It must be in writing and signed by the employer and employee. If the employee is under 18 years of age, it must also be signed by the employee's parent or guardian. Employees should be given reasonable time to consider a proposed IFA, be represented if they wish during negotiation, and have reasonable time and opportunity to raise any issues. An employer cannot make an IFA a condition of employment and both parties must receive a copy of the IFA.

It is the employer's responsibility to ensure that an employee has genuinely agreed to an IFA; an individual request by an employee should be recorded in writing. An employer should also keep in mind any language or cultural differences that might impact on the employee's understanding of the terms of the IFA, or their choice to agree to an IFA.

Terminating IFA's

The flexibility term and the IFA should include information about how the IFA may be terminated. Depending on when the IFA was made, the IFA in a modern award may be terminated by either party written notice. On 4 December 2013, FWC changed the notice period required by either party wishing to terminate the IFA:

- for IFA's created **prior to 4 December 2013**, a 4 week written notice period applies.
- for IFA's created **on or after 4 December 2013** a 13 week written notice period will apply.

Employers covered by an enterprise agreement will not be affected by these changes.

IFA's Made Incorrectly

Regardless of whether an IFA is made incorrectly, the terms of the IFA still continue to govern the employee's terms of employment. However, an employee can terminate an IFA if they believe they are being disadvantaged. The employee may be able to take action for compensation and penalties in that case.

If an employer fails to ensure that an IFA is properly made in accordance with the FW Act it may be liable to a penalty of up to \$13,320 (60 penalty units) for an individual or \$66,600 (300 penalty units) if the employer is a body corporate (as at 1 July 2020).

Hints and Tips

- ✓ identify opportunities in the organisation where an IFA could be beneficial
- ✓ check the range of permitted matters that an IFA can vary
- ✓ ensure that IFA's are used to reflect the genuine needs of the business and/or the particular situation of the employee; be open to new approaches and give genuine consideration to an employee's requests for an IFA
- ✓ have a process for consultation and support employees to balance their work and personal lives
- ✓ ensure the IFA does not disadvantage an employee and leaves the employee covered by being better off overall
- ✓ does not include any unlawful terms
- ✓ ensure employees are not unduly influenced or pressured to agree to an IFA

Frequently Asked Questions (FAQs)

Does an IFA have to be approved by Fair Work Commission (FWC)?

IFA's do not need to be approved by FWA. It is the employer's responsibility to ensure that the IFA is made correctly, and meets all of the requirements of the FW Act.

What are the allowable flexibility terms within modern awards?

The five areas that can be varied being: working hours, overtime rates, penalty rates, allowances, and leave loading.

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.

Adopting a best practice process in your workplace can assist in ensuring IFA's are actioned within the requirements as set down by the FW Act.

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**.

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