

AM2014/300—Award flexibility—Time off instead of overtime

In accordance with the Full Bench decision issued by the Fair Work Commission on 24 April 2016¹ it is proposed that a term providing for time off instead of paid overtime (TOIL)² be inserted into modern awards. The model TOIL term has been redrafted in plain language and is published for comment.

This document contains:

1. the plain language redraft of the model TOIL term; and
2. a schedule setting out a template TOIL agreement.

Comments on the model TOIL term should be forwarded to amod@fwc.gov.au by 4.00pm on Monday 23 May 2016.

1. April 2016 Model TOIL term

A.1 Time off instead of payment for overtime

- (a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.
- (b) Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause A.1.
- (c) An agreement must state each of the following:
 - (i) the number of overtime hours to which it applies and when those hours were worked;
 - (ii) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;
 - (iii) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;
 - (iv) that any payment mentioned in subparagraph (iii) must be made in the pay period immediately following the request.

Note: An example of the type of TOIL agreement required by this clause is set out at Schedule [x]. There is no requirement to use the form of TOIL agreement set out at Schedule [x]. A TOIL agreement can also be made by an exchange of emails between the employee and employer, or by other electronic means.

¹ [\[2015\] FWCFB 2602](#)

² Ibid at [48]

- (d) The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.³

EXAMPLE: An employee who worked 2 overtime hours is entitled to time off of 2 hours.

- (e) Time off must be taken:
- (i) within the period of 6 months after the overtime is worked; and
 - (ii) at a time or times within that period of 6 months agreed by the employee and employer.
- (f) If the employee requests at any time, to be paid for overtime covered by an agreement under clause A.1 but not taken as time off, the employer must pay the employee for the overtime, in the pay period immediately following the request, at the overtime rate applicable to the overtime when worked.
- (g) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (e), the employer must pay the employee for the overtime, in the pay period immediately following those 6 months, at the overtime rate applicable to the overtime when worked.
- (h) The employer must keep a copy of any agreement under clause A.1 as an employee record.
- (i) An employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause A.1.
- (j) An employee may, under section 65 of the *Fair Work Act*, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. Clause A.1 applies to any such time off granted by the employer as if it were time off covered by an agreement under clause A.1.

Note: If an employee makes a request under section 65 of the *Fair Work Act* for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the *Fair Work Act*).

- (k) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause A.1 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

Note: Under section 345(1) of the *Fair Work Act*, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause A.1.

³ Note: determinations varying the 21 awards that currently provide for TOIL on a "time for penalty" basis will be tailored to match the current entitlements and published for comment in due course – see para [49]

2. Schedule X—TOIL template agreement

AGREEMENT FOR TIME OFF INSTEAD OF PAYMENT FOR OVERTIME

Name of employee: _____

Name of employer: _____

The employer and employee agree that the employee may take time off instead of being paid for the following amount of overtime that has been worked by the employee:

Date and time overtime started: ___/___/20___ ___ am/pm

Date and time overtime ended: ___/___/20___ ___ am/pm

Amount of overtime worked: _____ hours and _____ minutes

The employer and employee further agree that, if requested by the employee at any time, the employer must pay the employee for overtime covered by this agreement but not taken as time off. Payment must be made at the overtime rate applying to the overtime when worked and must be made in the pay period immediately following the request.

Signature of employee: _____

Date signed: ___/___/20___

Name of employer
representative: _____

Signature of employer
representative: _____

Date signed: ___/___/20___