



# DRAFT DETERMINATION

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

## **4 yearly review of modern awards—Annual leave**

(AM2014/47)

### **TEXTILE, CLOTHING, FOOTWEAR AND ASSOCIATED INDUSTRIES AWARD 2010**

[MA000017]

Clothing industry

Textile industry

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT KOVACIC  
COMMISSIONER HAMPTON

MELBOURNE, XX FEBRUARY 2017

*4 yearly review of modern awards - annual leave common issue.*

A. Further to the Full Bench decision issued by the Fair Work Commission on 19 December 2016<sup>1</sup>, the above award is varied as follows:

1. By deleting clause 41.4—Requirement to take annual leave and inserting the following:

#### **41.4 Excessive leave accruals: general provision**

Note: Clauses 41.4 to 41.6 contain provisions, additional to the National Employment Standards, about the taking of paid annual leave as a way of dealing with the accrual of excessive paid annual leave. See Part 2.2, Division 6 of the Fair Work Act.

- (a) An employee has an **excessive leave accrual** if the employee has accrued more than 8 weeks' paid annual leave (or 10 weeks' paid annual leave for a shiftworker, as defined by clause 3.1).
- (b) If an employee has an excessive leave accrual, the employer or the employee may seek to confer with the other and genuinely try to reach agreement on how to reduce or eliminate the excessive leave accrual.

---

<sup>1</sup> [\[2016\] FWCFB 9074](#)

- (c) Clause 41.5 sets out how an employer may direct an employee who has an excessive leave accrual to take paid annual leave.
- (d) Clause 41.6 sets out how an employee who has an excessive leave accrual may require an employer to grant paid annual leave requested by the employee.

2. By renumbering clauses 41.5 to 41.9 as 41.7 to 41.11.

3. By inserting a new clause 41.5 as follows:

**41.5 Excessive leave accruals: direction by employer that leave be taken**

- (a) If an employer has genuinely tried to reach agreement with an employee under clause 41.5(b) but agreement is not reached (including because the employee refuses to confer), the employer may direct the employee in writing to take one or more periods of paid annual leave.
- (b) However, a direction by the employer under paragraph (a):
  - (i) is of no effect if it would result at any time in the employee's remaining accrued entitlement to paid annual leave being less than 6 weeks when any other paid annual leave arrangements (whether made under clause 41.4, 41.5 or 41.6 or otherwise agreed by the employer and employee) are taken into account; and
  - (ii) must not require the employee to take any period of paid annual leave of less than one week; and
  - (iii) must not require the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the direction is given; and
  - (iv) must not be inconsistent with any leave arrangement agreed by the employer and employee.
- (c) The employee must take paid annual leave in accordance with a direction under paragraph (a) that is in effect.
- (d) An employee to whom a direction has been given under paragraph (a) may request to take a period of paid annual leave as if the direction had not been given.

Note 1: Paid annual leave arising from a request mentioned in paragraph (d) may result in the direction ceasing to have effect. See clause 41.5(b)(i).

Note 2: Under section 88(2) of the Fair Work Act, the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

4. By inserting new clause 41.6 as follows:

**41.6 Excessive leave accruals: request by employee for leave**

- (a) Clause 41.6 comes into operation from XX February 2018.
- (b) If an employee has genuinely tried to reach agreement with an employer under clause 41.4(b) but agreement is not reached (including because the employer refuses to confer), the employee may give a written notice to the employer requesting to take one or more periods of paid annual leave.
- (c) However, an employee may only give a notice to the employer under paragraph (b) if:
  - (i) the employee has had an excessive leave accrual for more than 6 months at the time of giving the notice; and
  - (ii) the employee has not been given a direction under clause 41.5(a) that, when any other paid annual leave arrangements (whether made under clause 41.4, 41.5 or 41.6 or otherwise agreed by the employer and employee) are taken into account, would eliminate the employee's excessive leave accrual.
- (d) A notice given by an employee under paragraph (b) must not:
  - (i) if granted, result in the employee's remaining accrued entitlement to paid annual leave being at any time less than 6 weeks when any other paid annual leave arrangements (whether made under clause 41.4, 41.5 or 41.6 or otherwise agreed by the employer and employee) are taken into account; or
  - (ii) provide for the employee to take any period of paid annual leave of less than one week; or
  - (iii) provide for the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the notice is given; or
  - (iv) be inconsistent with any leave arrangement agreed by the employer and employee.
- (e) An employee is not entitled to request by a notice under paragraph (b) more than 4 weeks' paid annual leave (or 5 weeks' paid annual leave for a shiftworker, as defined by clause 3.1) in any period of 12 months.
- (f) The employer must grant paid annual leave requested by a notice under paragraph (b).

5. By updating the cross-references accordingly.

6. By deleting clause 41.6 and inserting the following:

**41.6 Excessive leave accruals: request by employee for leave**

- (a) If an employee has genuinely tried to reach agreement with an employer under clause 41.4(b) but agreement is not reached (including because the employer refuses to confer), the employee may give a written notice to the employer requesting to take one or more periods of paid annual leave.
- (b) However, an employee may only give a notice to the employer under paragraph (a) if:
  - (i) the employee has had an excessive leave accrual for more than 6 months at the time of giving the notice; and
  - (ii) the employee has not been given a direction under clause 41.5(a) that, when any other paid annual leave arrangements (whether made under clause 41.4, 41.5 or 41.6 or otherwise agreed by the employer and employee) are taken into account, would eliminate the employee's excessive leave accrual.
- (c) A notice given by an employee under paragraph (a) must not:
  - (i) if granted, result in the employee's remaining accrued entitlement to paid annual leave being at any time less than 6 weeks when any other paid annual leave arrangements (whether made under clause 41.4, 41.5 or 41.6 or otherwise agreed by the employer and employee) are taken into account; or
  - (ii) provide for the employee to take any period of paid annual leave of less than one week; or
  - (iii) provide for the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the notice is given; or
  - (iv) be inconsistent with any leave arrangement agreed by the employer and employee.
- (d) An employee is not entitled to request by a notice under paragraph (a) more than 4 weeks' paid annual leave (or 5 weeks' paid annual leave for a shiftworker, as defined by clause 3.1) in any period of 12 months.

- (e) The employer must grant paid annual leave requested by a notice under paragraph (a).

B. Items 1 to 5 of this determination come into operation from XX February 2017. In accordance with s.165(3) of the *Fair Work Act 2009* these items do not take effect until the start of the first full pay period that starts on or after XX February 2017.

C. Item 6 of this determination comes into operation from XX February 2018. In accordance with s.165(3) of the *Fair Work Act 2009* this item does not take effect until the start of the first full pay period that starts on or after XX February 2018.

PRESIDENT