

**Circular No. 185/2017**

14 December 2017

## *Horticulture Award 2010*

### Significant Decision: Variations to Overtime Provisions in Modern Awards – Time Off Instead of Payment for Overtime (TOIL)

On 27 November 2017 the Fair Work Commission (**Commission**) issued a final determination which varies the *Horticulture Award 2010* (**Award**) to delete the current TOIL provision, clause 24.1, and insert a modified version of the Commission's model term for TOIL.

#### What does the new provision mean?

Prior to the variation the Award provided that an employee would be allowed time off instead of being paid for overtime that had been worked by the employee, unless the employee elected to be paid for the overtime.

The new TOIL provision introduces a requirement for there to be a **written agreement** before an employee can take time off instead of being paid for any overtime. Such an agreement applies to **all overtime worked** by an employee as long as the agreement is in place, and there is no need to have a separate agreement for each occasion or pay period.

In addition, such an agreement must state:

- that it can be terminated by the employer or employee at any time with written notice;
- that overtime worked after the agreement is terminated will be paid at the overtime rate applicable to the overtime when worked;
- that the time off must be taken within the period of 6 months after the overtime is worked, at a time or times agreed by the employee and employer; and
- that if agreed time off has not been taken within a period of 6 months, the employer must make payment for the overtime in the next pay period, at the applicable overtime rate.

The Award has also been varied to include an example of the type of written agreement now required for any TOIL arrangement. The variation **does not require**, however, that this particular form of agreement must be used. A written agreement can also be made by an exchange of emails between the employee and employer, or by other electronic means, provided it includes the required information set out above. The agreement must be kept as an employee record (i.e. for 7 years).

The new TOIL provision also sets out further clarifications and conditions for TOIL including:

- the period of time off an employee is entitled to take is equivalent to the time worked (e.g. where an employee who worked 2 hours overtime at time and a half is entitled to take 2 hours as time off);
- an employer must not exert undue influence or undue pressure on an employee in relation to making (or not making) an agreement to take time off instead of payment for overtime; and
- on termination of employment any accrued but unused TOIL must be paid to the employee, at the applicable overtime rate.

The variation includes a note that if the request for time off instead of payment for working overtime is a request under section 65 of the *Fair Work Act 2009* (Cth) (**Act**) for flexible working arrangements, an employer may only refuse such request on **reasonable business grounds**. Where an employer agrees to such a request, the agreement is subject to the same conditions outlined above.

The variation also includes a note that, under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person concerning the above matters.

## When do the variations commence?

The variation takes effect from the commencement of the first full pay period on or after 27 November 2017.

Please follow the link to the updated version of this Award: [Horticulture Award 2010](#)

## What if I want to know more?

For more information please contact the AFEI Hotline on 02 9264 2000.