

Modern Award update – New termination pay provisions employers must comply with.

Do you pay your employees within 7 days following the termination of their employment? Probably not. It is likely that you process your final payment within your next payroll cycle to best suit the needs of your business.

The Fair Work Commission (FWC) however, has recently introduced changes to a number of Modern Awards which will impact employers with employees covered by the *Fitness Industry Award 2010* (**Fitness Award**) or the *Clerks Private Sector Award 2010* (**Clerks Award**).

These new changes require you to pay an employee no later than 7 days after the day on which employment ends. You will need to pay all wages and entitlements owing to the employee at the end of their employment within this 7-day period.

The new requirement has been inserted into clause 22.5 of the Fitness Award, and clause 23.5 of the Clerks Award. The operation of the clause which is provided below is effective from the 1 November 2018.

(a) The employer must pay an employee no later than 7 days after the day on which the employee's employment terminates:

(i) the employee's wages under this award for any complete or incomplete pay period up to the end of the day of termination; and

(ii) all other amounts that are due to the employee under this award and the NES.

(b) The requirement to pay wages and other amounts under paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this award or the Act.

Note 1: Section 117(2) of the Act provides that an employer must not terminate an employee's employment unless the employer has given the employee the required minimum period of notice or "has paid" to the employee payment instead of giving notice.

Note 2: Paragraph (b) allows the Commission to make an order delaying the requirement to make a payment under clause X. For example, the Commission could make an order delaying the requirement to pay redundancy pay if an employer makes an application under section 120 of the Act for the Commission to reduce the amount of redundancy pay an employee is entitled to under the NES.

Note 3: State and Territory long service leave laws or long service leave entitlements under s.113 of the Act, may require an employer to pay an employee for accrued long service leave on the day on which the employee's employment terminates or shortly after."

It is important to be aware of the changes prescribed above because the FWC may impose financial penalties for a contravention of an obligation arising under the Award.

Modern Award update – New provisions for withholding wages where an employee fails to give the required notice.

In addition to making changes to the timing of termination payments, the FWC has made amendments to the Fitness Award and the Clerks Award which changes the employer's ability to withhold monies from employees for unworked notice.

The new requirement has been inserted into clause 14.1 of the Fitness Award, and clause 13.1 of the Clerks Award. The operation of the clause which is provided below is effective from the 1 November 2018.

Notice of termination by an employee

(a) This clause applies to all employees except those identified in ss.123(1) and 123(3) of the Act.

*(b) An employee must give the employer notice of termination in accordance with **Table 1—Period of notice** of at least the period specified in column 2 according to the period of continuous service of the employee specified in column 1.*

Table 1—Period of notice

Column 1 Employee's period of continuous service with the employer at the end of the day the notice is given	Column 2 Period of notice
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

Note: The notice of termination required to be given by an employee is the same as that required of an employer except that the employee does not have to give additional notice based on the age of the employee.

*(c) In paragraph (b) **continuous service** has the same meaning as in s.117 of the Act.*

(d) If an employee who is at least 18 years old does not give the period of notice required under paragraph (b), then the employer may deduct from wages due to the employee under this award an amount that is no more than one week's wages for the employee.

(e) If the employer has agreed to a shorter period of notice than that required under paragraph (b), then no deduction can be made under paragraph (d).

(f) Any deduction made under paragraph (d) must not be unreasonable in the circumstances.

In effect, employers can withhold the maximum of one week's wages in the event that an employee who is 18 years of age or above, does not provide the required amount of notice upon resignation of employment. The monies withheld may only be taken from wages owed. No money can be deducted from accrued annual leave or any other statutory entitlement. It is almost important to note that the amount of notice the employee is required to provide is not changed by this decision.

Employers should remember to check the updated version of the Award prior to making any decision to avoid any breach or underpayment. Further, paragraph (f) outlined above, creates uncertainty for employers with respect to the definition of unreasonable circumstances, and employers should also seek advice from the Fitness Australia HR Hotline when in doubt.

For any questions in relation to the above changes please contact the Fitness Australia HR Hotline on 1300 211 311.

