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CLIENT ALERT

CHANGES TO ANNUAL LEAVE PROVISION IN AWARDS AND TAKING AND ACCRUAL OF ANNUAL LEAVE ON WORKERS COMP

JUNE 2015

To All of My Valued Clients,

This Client Alert is advise that the Fair Work Commission has announced significant changes to the Annual Leave provisions in all Awards as part of the 4 year Modern Award Review.

The Federal Court has also delivered a decision in respect to taking and accrual of annual leave whilst on Workers Compensation. The details of both of these important decisions are included in this Client Alert.

If you need further information in relation to this issue please do not hesitate to contact me.

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FWC announces changes to Annual Leave Provisions in Awards

Federal Court Decision allows the taking and accrual of Annual Leave on Workers Comp

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FWC MAKES SIGNIFICANT CHANGES TO ANNUAL LEAVE PROVISIONS

The Fair Work Commission (FWC) last week announced significant changes to the annual leave provisions in modern Awards.

Cashing out of annual leave will be allowed in all modern awards and a model term to deal with the taking of excessive annual leave is proposed for inclusion in all modern awards, in last week's FWC decision.

The Full Bench published its decision on a number of important changes and proposed changes to paid annual leave in modern awards as part of the 4 yearly review of modern awards.

The FWC dealt with the following matters in its decision:

1. **Cashing out annual leave:** will be allowed in all modern awards, subject to four provisions.
 - (a) A maximum of two weeks paid annual leave can be cashed out in any 12-month period.
 - (b) Record keeping requirements.
 - (c) Employees under 18 years of age must have the cashing out agreement signed by their parent or guardian.
 - (d) There will be provisions protecting against undue employer influence and misrepresentation in relation to cashing out leave.

2. **Excessive annual leave:** a model clause has been drafted clause that defines an "excessive leave accrual" as 8 weeks for non-shiftworkers, and 10 weeks for shiftworkers. If an employer and employee can't agree on how and when leave will be taken, the clause gives an employer the power to direct an employee to take a period or periods of annual leave.

The FWC will hear further submissions on its content and on the proposition that all modern awards be varied to insert the model term.

3. **Annual close-down:** employers' submissions to insert a model "close-down" clause into modern awards was rejected by the FWC full bench.

4. **Granting annual leave in advance:** employers proposed to vary modern awards to allow the taking of annual leave in advance of accrual, by agreement between an employer and employee. The employer would be allowed to make a deduction from monies payable to an employee on termination of employment. The FWC agreed to the proposal and also said in its view all modern awards should be varied to contain this term. It will hear further submissions.

5. **Purchased leave:** This was an innovative prospect put forward by employers, but was not fully pursued. The intent is for an employee to forgo payment for a period of work and instead accrue a corresponding additional amount of annual leave. The FWC considered that there was a "level

of interest” in the proposition and has decided to publish a discussion paper dealing with this issue. It will take submissions on the discussion paper.

6. **Payment of annual leave entitlements on termination:** Unions sought to vary modern awards in relation to the payment of annual leave entitlements on termination, to provide that an employer must pay an employee the amount that would have been payable to the employee had the employee taken that period of leave, as opposed to payment at the base rate of pay. Because legal matters are currently underway on this issue, as well as its treatment in the *Fair Work Amendment Bill 2014* currently before the Senate, the FWC adjourned this claim. It will, however, take further submissions from interested parties.
7. **EFT and paid annual leave:** The FWC granted the employer claim to vary modern awards, which currently require the employer to pay an employee for annual leave prior to the employee taking the leave. This will allow employees who are paid by electronic funds transfer (EFT) to be paid in their usual pay cycle while on leave.

This FWC decision represents a significant departure from the customary position that has been taken by the various industrial tribunals and indeed the Unions in the past; particularly in relation to the cashing out of annual leave. Previously this provision was only available where a specific provisions were included in Enterprise Agreements, pursuant to the National Employment Standards.

It is expected that most Awards will be varied by the FWC between now and the end of the year.

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- **Injury Management and Workers Compensation**
- **Employment Contracts**

FEDERAL COURT ALLOWS THE TAKING AND ACCRUAL OF ANNUAL LEAVE ON WORKERS COMP

The Full Federal Court has allowed an employee to take annual leave while receiving workers compensation benefits. The Federal Court also found that annual leave continues to accrue over the period of workers compensation.

This case related to a NSW employee, however the Federal Court was of the view that if the relevant State or Commonwealth workers compensation legislation sanctioned, condoned or countenanced dual entitlement then that was permitted.

The legislation under consideration was both Commonwealth and New South Wales. Section 130 (1) of the *Fair Work Act 2009* provides that an employee is not entitled to take or accrue leave whilst on workers compensation. However at s130 (2) that the legislation does not prevent an employee from *taking or accruing leave during a compensation period if the taking or accruing of the leave is permitted by a compensation law*. So the question reverts to the wording of the State or Commonwealth workers compensation laws. Therefore, the taking and accrual of annual leave is permitted if the relevant State or Commonwealth workers compensation allows it; or in the view of the Federal Court, there must be an express provision to the contrary.

The Federal Court stated that in effect, *“by s130 an employee may recover both annual leave entitlements and compensation during the same period of absence from work as long as a compensation law permits it. A mere failure by the compensation law to advert to the situation will not suffice.”*

In the NSW *Workers Compensation Act 1987* at s49 (1) it states that *“Compensation is payable under this Division to a worker in respect of any period of incapacity for work even though the worker has received or is entitled to receive in respect of the period any payment, allowance or benefit for holidays, annual holidays or long service leave under any Act (Commonwealth or State), award or industrial agreement under any such Act or contract of employment . . .”* The Federal Court therefore found that this section of the NSW legislation was consistent with s130(2) of the *Fair Work Act*.

Their Honours concluded: *“The purpose of s 130(2) is to enable employees who are absent from work and in receipt of compensation to retain their entitlements to leave over the same period as long as that course is sanctioned, condoned or countenanced by the relevant compensation law. Put another way, employees in this position are entitled to both compensation and leave benefits provided that permission is given by the compensation law for dual receipt. While it is no longer sufficient that the compensation law does not prevent the simultaneous enjoyment of the two, it is not necessary that the compensation law provides for the payment of the leave benefit.*

..... The purpose and effect of s 130 is to remove the entitlement to take or accrue leave for employees in receipt of workers compensation unless there is a law relating to compensation in the relevant jurisdiction which countenances the simultaneous receipt of workers compensation while the employee is absent from work. Section 49 of the WC Act is such a law.”

The result of this decision is that an employee will be entitled to both annual leave payments and accrual when receiving workers compensation benefits. The *Fair Work Act 2009* was considered to have severely limited this dual entitlement; however, this case has determined otherwise. However much will depend upon the wording of the relevant workers compensation legislation.

Anglican Care v NSW Nurses and Midwives' Association [2015] FCAFC 81 (5 June 2015)]