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Australian Government

Fair Work
OMBUDSMAN

Best Practice Guide Use of individual flexibility arrangements

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Working at best practice

Flexible work practices can deliver benefits to both employers and employees. They can lead to greater job satisfaction and help attract and retain skilled and valuable staff. Flexibility in the workplace may also improve productivity and efficiency by helping maintain a motivated workforce with reduced staff turnover and absenteeism.

Employers working at best practice will consult with staff about flexible arrangements that might benefit employees by better accommodating their personal circumstances.

The *Fair Work Act 2009* (FW Act) seeks to promote workplace flexibility through the use of individual flexibility arrangements (IFAs). IFAs allow for variations to modern awards or enterprise agreements in order to meet the genuine needs of employers and individual employees while ensuring minimum entitlements and protections are not undermined.

This Best Practice Guide explains how employees and employers can use IFAs to create flexible work practices that enhance productivity and job satisfaction. In particular, the guide explains:

- 'flexibility terms' in enterprise agreements and modern awards under which IFAs can be made
- the effect of an IFA
- how to make an IFA
- what can be included in an IFA
- what happens if an IFA is not made properly, and
- how an IFA ends.

A checklist on best practice in using IFAs is also included.

This guide illustrates best practice when it comes to implementing individual flexibility arrangements in the workplace. For specific information regarding your minimum legal obligations, contact the organisations listed under the 'For more information' section at the end of this guide.

What are 'flexibility terms'?

Modern awards and enterprise agreements set out the minimum terms and conditions of employment for groups of employees performing similar tasks or who are employed by the same employer. These instruments are collective in nature and apply to many employees. Therefore they may not take into account the specific circumstances of individual employees and the employer.

However, every modern award and enterprise agreement must include a 'flexibility term'. If an enterprise agreement does not include a flexibility term it will be taken to include the model flexibility term set out in the *Fair Work Regulations 2009*. A link can be found in the 'For more information' section at the end of this guide.

A flexibility term allows an employer and an individual employee to agree on an arrangement which varies the effect of the modern award or enterprise agreement in order to meet the genuine needs of the employer and that individual employee. The FW Act ensures these arrangements do not undermine minimum employee entitlements by requiring the employer to ensure the employee covered by the IFA is better off overall on the IFA compared to the modern award or enterprise agreement the IFA varies.

What is the effect of an IFA?

An IFA can be used to vary certain terms of a modern award or enterprise agreement as it applies to that particular employee covered by the IFA. For example, an enterprise agreement might provide for ordinary working hours between 9am and 5pm. If an IFA between an employer and an individual employee provides for ordinary working hours of between 7am and 3pm, the enterprise agreement will apply to that employee as if the enterprise agreement provided for ordinary working hours of between 7am and 3pm. The unvaried enterprise agreement will continue to apply to other employees unaffected by the IFA so that they have ordinary working hours between 9am and 5pm.

An IFA has effect as if it were actually a term of a modern award or enterprise agreement and can be enforced as such.

How are IFAs made?

An employee or employer can initiate a request for an IFA.

It is the employer's responsibility to ensure that the employee is better off overall than if there was no IFA. The employer's 'better off overall' assessment will usually involve comparing the employee's financial benefits under the IFA with the financial benefits under the applicable award or enterprise agreement. The employee's personal circumstances and any non-financial benefits which are significant to the employee can also be considered.

An IFA must be in writing and signed by the employer and employee. If the employee is under 18 years of age, it must also be signed by the employee's parent

or guardian.

Once an IFA has been made, it is the employer's responsibility to ensure that a copy of the IFA is given to the employee. The employer should also retain a copy.

What can be included in an IFA?

What can be included in an IFA depends upon whether it is being made to vary a modern award or an enterprise agreement. Modern awards and enterprise agreements are required to contain flexibility terms which specify provisions that can be varied by an IFA such as hours of work.

Modern award flexibility terms

Flexibility terms within modern awards will only allow IFAs to vary:

- arrangements for when work is performed, such as working hours

- overtime rates

- penalty rates

- allowances, and

- leave loading.

This means modern award entitlements relating to any of these five award matters may be varied by agreement between an employer and an individual employee provided that, overall, the employee is 'better off' under the IFA at the time that the IFA is made. An IFA can also only be made after the relevant employee has commenced employment and is entitled to the minimum award conditions prescribed by the relevant modern award. This means an employer cannot ask a prospective employee to agree to an IFA as a condition of employment.



Case study

The benefits of an IFA

Dave is a full-time industrial chemist at Rosie Industries Pty Ltd. Dave's employment is covered by the Rosie Industries Pty Ltd Enterprise Agreement which includes a flexibility term allowing IFAs to be made about the hours an employee works within the Agreement's span of hours. Dave wants to coach his son's under 10s football training on Tuesday afternoons. Dave makes an IFA with his employer allowing him to start and finish work half an hour early on Tuesdays without the usual penalty rate that would apply for the first half hour. Dave is better off overall because he can attend his son's training, something he values as a significant non-financial benefit.

Enterprise agreement flexibility terms

An IFA made under an enterprise agreement can only vary those terms of the enterprise agreement that are set out in the flexibility term contained in the enterprise agreement. The matters included in the flexibility term must be decided by the parties when the enterprise agreement is made. For example, the flexibility term in an enterprise agreement could specify that any terms in the agreement may be varied, or it could say that only particular terms in the agreement can be varied by an IFA.

IFAs varying enterprise agreements may include terms which would be 'permitted matters' if they were included in the enterprise agreement. These include:

- matters pertaining to the relationship between the employer and employees

- matters pertaining to the relationship between the employer and a union covered by the agreement

- deductions from wages for any purpose authorised by employees (such as terms allowing for salary sacrifice, extra superannuation payments or union fees), and

- the operation of the agreement.

IFAs cannot include unlawful terms. These are:

- discriminatory terms (terms which discriminate against an employee on certain grounds)

- objectionable terms (terms which contravene the 'general protections' provisions of the FW Act or require the payment of a bargaining services fee)

- terms that give an employee an entitlement or remedy in relation to unfair dismissal before they have completed the minimum employment period

- terms that exclude or modify the application of unfair dismissal provisions of the FW Act in a way that is detrimental to a person

- certain terms that provide right of entry entitlements

- certain terms that provide for the exercise of state or territory occupational health and safety (OH&S) and work health and safety (WHS) rights, and

- terms inconsistent with the industrial action provisions under the FW Act.

Do I have to agree to an IFA?

An employee or employer cannot be forced to enter into an IFA and a person cannot be treated adversely or discriminated against for refusing to agree to an IFA.

It is the employer's responsibility to ensure that an employee has genuinely agreed to an IFA. When making an IFA, an employer should keep in mind any language or cultural differences that might impact on the employee's understanding of the terms of the IFA or their choice to agree to an IFA.

An employer cannot make an IFA a condition of employment.

Does an IFA have to be approved by the Fair Work Commission?

IFAs do not need to be approved by the Fair Work Commission. It is the employer's responsibility to ensure that the IFA is made correctly, and meets all of the requirements of the FW Act.

What happens if an IFA is not made properly?

If an IFA is not made properly, the terms of the IFA still continue to govern the employee's terms of employment as if it was made properly. This ensures that employees keep any benefits to which they are entitled to under the IFA. However, an employee can terminate an IFA if they believe they are being disadvantaged. The employee may be able to take action for compensation and penalties in that case.

If an employer fails to ensure that an IFA is properly made in accordance with the FW Act, they may be liable to a penalty of up to \$10,200 for an individual or \$51,000 if the employer is a body corporate.

How is an IFA terminated?

The flexibility term and the IFA should include information about how the IFA may be terminated. Generally, an IFA may be terminated by agreement or by either party giving the required written notice. Modern awards require 13 weeks notice but this may be different in an enterprise agreement (but no more than 28 days).

An IFA made in accordance with a modern award or an enterprise agreement will end when a new enterprise agreement begins operating.

Note: IFAs made prior to 4 December 2013 can be terminated with 28 days' notice.

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The process explained

Employer or employee decides they would like an IFA. They approach the other party with their request.



The employer agreeing to the IFA should ensure it can validly be made. Employees on awards have five matters they can vary. Employees on enterprise agreements can make IFAs on matters specified in the enterprise agreement's flexibility term.



The employer and employee discuss the IFA.



The employer makes sure:

- the employee is better off overall under the IFA
- the IFA only deals with matters permitted by the flexibility term in the enterprise agreement or modern award and, in the case of an enterprise agreement, does not contain any unlawful terms.



The employer and employee sign the IFA. If the employee is under 18 their parent or guardian must also sign.



Employer keeps a copy and gives a copy to the employee.



The IFA varies the relevant enterprise agreement or modern award with respect to the employee until either or both parties decide they no longer want the agreement in place.

Checklist for best practice on using an IFA

Employers who are working at best practice will:

- ✓ check the range of permitted matters that an IFA can vary under the enabling flexibility term in the relevant enterprise agreement or modern award

- ✓ identify opportunities in the organisation where an individual flexibility arrangement could benefit the employee and employer

- ✓ have a process for consultation that allows employees to identify appropriate flexible work practices in their interests

- ✓ support employees to balance their work and personal lives. IFAs may be useful in achieving this

- ✓ ensure that IFAs are used to reflect the genuine needs of the particular situation of the employee and employer

- ✓ ensure the IFA does not disadvantage an employee and leaves the employee covered by it better off overall

- ✓ ensure the IFA for an enterprise agreement does not include any unlawful terms

- ✓ ensure employees are not unduly influenced or pressured to agree to an IFA. Employees should be given reasonable time to consider a proposed IFA and opportunity to raise issues with their employer and vice-versa

- ✓ allow employees to be represented if they wish, when negotiating an IFA with their employer

- ✓ be open to approaches from employees about making IFAs

- ✓ give genuine consideration to an employee's requests for an IFA.

For more information

Fair Work Ombudsman

13 13 94
www.fairwork.gov.au

Fair Work Commission

1300 799 675
www.fwc.gov.au

Fair Work Regulations 2009 Model Flexibility Clause
Schedule 2.2

Acronyms used in this guide

FW Act *Fair Work Act 2009*

IFA individual flexibility arrangements

NES National Employment Standards

OH&S Occupational health and safety

WHS Work health and safety

Disclaimer

The Fair Work Ombudsman is committed to providing you with advice that you can rely on.

The information contained in this Best Practice Guide is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or a workplace relations professional.

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