

Employment law update

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Get ready, Offset, Go: Modern Award absorption clauses to go

Since their commencement on 1 January 2010, all Modern Awards have had a standard clause 2.2 which allows employers to absorb monetary obligations imposed by the Modern Award into over award payments (**Absorption Clause**).

This clause has allowed employers, who pay employees above the minimum award rates, to offset the over award payments against Modern Award obligations and successfully defend claims for additional Modern Award entitlements (including overtime, penalty rates and allowances) by establishing that the over award payments made to the employees meet or exceed the Modern Award obligations.

This is an extremely convenient clause for employers, as it clearly identifies the interaction between payments made above the minimum award rates (**Over Award Payments**) and monetary obligations imposed under a Modern Award.

Although properly drafted employment contract clauses can allow employers to offset Over Award Payments against Modern Award entitlements, the Absorption Clause can be relied upon by employers who do not have appropriate clauses in their employment contracts (or no written contract at all) for award covered employees.

However in the course of the current *4 Yearly Review of Modern Awards (Review)*, the Full Bench of the Fair Work Commission has considered the Absorption Clause¹ and has expressed the view that this clause was relevant only to the transitional period following the introduction of Moderns Awards, which expired on 31 December 2014.

¹ [2015] FWCFB 6656.



The Full Bench has suggested that the Absorption Clause has served its purpose and is no longer necessary to achieve the objectives of modern awards as specified in the Fair Work Act 2009.

The Full Bench observed that: *“Modern Awards are part of the minimum safety net of the terms and conditions established by the Act”* and that *“it is not the function of such a minimum safety net to regulate the interaction between minimum award entitlements and overall award payments”* which are *“adequately dealt with by common law principles of set off”*.

Although it seems clear that the Full Bench intends to remove the Absorption Clause from Modern Awards, it has decided not to fully determine the issue at this time, and indicated that it would revisit take home pay provisions prior to the conclusion of the Review before deciding whether or not to retain the Absorption Clause in its current form or with amendments.

WHAT SHOULD EMPLOYERS DO?

Although the Absorption Clause remains in effect for the time being, it is clear from the Full Bench decision that this situation is likely to change in the near future.

Employers who pay Over Award Payments should take immediate steps to ensure that they have maximum protection against any potential claims from employees for additional Modern Award entitlements and against allegations that they have not correctly made payments under the relevant Modern Award.

It is otherwise risky for employers to simply rely upon common law principles of set off.

Employers should review their employment contracts, for all levels of employees, to ensure that they include an appropriate clause that clearly identifies and specifies that the basis on which Over Award Payments are made is that they are offset against any monetary obligations imposed by a Modern Award or to which the employee may be otherwise legally entitled (**Offset Clause**).

All employment contracts for new employees should include an Offset Clause.

Although an employer cannot force an existing employee to agree to a new employment contract to include an Offset Clause, there are appropriate times, such as during a wage/performance review or when an employee changes role, when a new employment contract can be implemented. Of course employers should take such an opportunity to fully review their employment contract to ensure that any other relevant alterations are made at this time.

NOW IS THE TIME FOR EMPLOYERS
TO ACT, PARTICULARLY WHILE THE
ABSORPTION CLAUSE CONTINUES
TO OPERATE.

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