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FACT SHEET

Individual Flexibility Agreements

The *Hospitality Industry (General) Award 2010* (the 'HIGA') allows for employers and individual employees to enter into an individual flexibility agreement ('IFA') under Clause 7 - Award Flexibility - of the HIGA. As part of the 2008-2009 Award Modernisation process, this clause was incorporated into the HIGA, as well as other modern awards, so that an employer and an individual employee can vary the operation of particular terms of the award to be more flexible and practical in relation to the genuine needs of the employer and the employee.

NOTE: an Individual Flexibility Agreement is referred to as an Individual Flexibility Arrangement in the *Fair Work Act 2009* (the 'Act').

Flexibility clauses only appear in modern awards, and must also be contained in Enterprise Agreements ('EA's). Workplace Agreements made prior to the Act (1 July 2009) do not contain flexibility clauses allowing for an IFA to be made.

Refer: *QHA's Enterprise Agreements Fact Sheet*

WHEN CAN AN IFA BE USED?

An IFA is designed to be used when an employer and an employee mutually agree to vary certain terms of a modern award that applies to the employee – in line with the variations allowable under the relevant modern award.

Therefore, an IFA is not an employment contract, rather, it is an agreement that is reached once employment has commenced. Employment cannot be offered conditional upon a prospective employee entering into an IFA.

WHAT TERMS OF THE HIGA CAN BE VARIED USING AN IFA?

Clause 7 of the HIGA provides that an employer and an individual employee may agree to vary the application of the following terms:

- Arrangements for when work is performed; and/or
- Overtime rates; and/or
- Penalty rates; and/or
- Allowances; and/or
- (Annual) Leave loading.

Where an EA exists at the workplace and applies to an individual employee, the terms that can be varied will be those referred to in the EA, not the HIGA.

Note that where an employer and individual employee seek to vary the application of the allowable terms, such as those listed for HIGA covered employees above, an IFA must result in the individual employee being **Better Off Overall** at the time of making the IFA than the employee would have been if no such IFA had been made.

In the case of an IFA for a HIGA covered employee, the better off overall test applies to the HIGA. Where the IFA is made in accordance with an EA, the test applies to the EA, not the HIGA (or other modern award that applies to the employee's employment)

WHAT MUST AN IFA CONTAIN?

An IFA must:

- Be in writing; and
- Name the parties to the IFA; and
- Be signed by the employer and the individual employee. Where the employee is under 18 years of age, the IFA must also be signed by their parent or guardian; and
- State each term of the HIGA that the employer and the individual employee have agreed to vary; and
- Detail how the application of each term has been varied by the IFA; and
- Detail how the IFA results in the individual employee being Better Off Overall in relation to their terms and conditions of employment; and
- State the date the IFA will commence.

An employer seeking to enter into an IFA must provide an employee with a written proposal to enter into an IFA.

OPERATION OF AN IFA

An IFA does not require formal approval by the Fair Work Commission ('FWC'). Once agreed to and documented in line with the above requirements as well as any other requirements stipulated in the HIGA or the EA, the IFA commences operation. The IFA does not replace the Award or EA, rather, it is read in conjunction with the Award or EA. This is because the IFA can only vary the application of certain terms, not the entire Award or EA.

EMPLOYER RESPONSIBILITIES

It is the employer's responsibility to ensure that any IFA entered into results in the individual employee being Better Off Overall. This involves an assessment of the monetary and non-monetary implications/benefits of an IFA when compared to the modern award or EA that applies.

Employers must also ensure that employees are not unduly influenced, coerced or pressured to agree to an IFA. Employees should be given reasonable time to consider the proposed IFA - which should be presented to an employee as a written proposal - and be given the opportunity to raise questions / issues with the IFA. There must also be a genuine agreement between the parties to enter into the IFA.

Employers who do not comply, and who force an employee to sign an IFA (including making it conditional for employment) not only will have an invalid IFA, but also risk Adverse Action applications under the General Protections provisions of the Act. Such action may be taken because the employee is injured as a result of either signing or not signing an IFA.

Please note that the term 'injured' does not mean solely a physical or psychological injury, rather, it can refer to the employee being injured in their employment by not being offered employment, or not being offered a promotion.

Refer: QHA's General Protections Fact Sheet

TERMINATING THE IFA

The HIGA provides that an IFA may be terminated:

- By the employer or the individual employee providing 13 weeks' written notice to the other; or
- At any time by written agreement between the employer and the individual employee.

Please note that the abovementioned notice provision only applies to agreements made after 4 December 2013. Any agreements made before this date are subject to 4 weeks' notice of termination.

OTHER INFORMATION PERTAINING TO THE IFA

Limited Understanding of English

If the employer is seeking to enter into an IFA when an individual employee whose understanding of written English is limited, the employer must take measures, including translation into an appropriate language, to ensure that the employee understands the IFA proposal.

The Signed IFA

A copy of the signed IFA must be provided to the individual employee and must also be kept by the employer as part of the employee's records.

EXAMPLES OF HOW AN IFA CAN BE UTILISED

IFAs can create flexibilities with respect to the clauses that can be varied. Flexibilities include, but are not limited to:

- Allowing a part-time employee to work a flexible roster (not currently possible under the HIGA);
- Creating flexibility with meal breaks;
- Incorporating penalties into an employee's rate of pay;
- Altering starting and finishing times to meet workload or family responsibilities.

The Fair Work Bill 2009 explanatory memorandum includes the following illustrative example:

"Danae is employed full time as a graphic designer at Pax Designs Pty Ltd. The Pax Designs Pty Ltd Enterprise Agreement 2010 enables an individual flexibility arrangement to be made between the employer and its employees in relation to the span of ordinary hours to be worked.

Danae has school aged children that she wishes to pick up from school two days per week. She negotiates an individual flexibility arrangement with her employer that she will work longer hours three days per week, so that she can leave at 3pm on the other two days to pick up her children. Danae will still work the equivalent of full time hours."

In the above example Danae and her employer have varied the application of the arrangements for when work is performed to allow a longer work day on those three days per week without a penalty payment, such as overtime, being paid by the employer. In lieu of any penalty payment Danae receives the non-monetary benefit of being able to work her full time hours in a way that allows her to pick her children up from school two days per week.

The lack of penalty payment implication, and the non-monetary benefit would be taken into account when assessing whether Danae is better off overall under the IFA as compared to the EA.

HOW DO I GET AN IFA?

QHA's Employment Relations Department staff are available to draft a tailored and legally compliant IFA that meets the mutually agreed needs of the employer and an individual employee. This consultancy service incurs an hourly fee of \$205.00 per hour plus GST, which is very competitive.

Further Assistance

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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