



Working from Home – Important Developments & Key Issues

SUMMARY

Working from home arrangements are very common given the impacts of the COVID-19 pandemic.

This advice covers the following important workplace relations and work health and safety (**WHS**) issues associated with working from home arrangements:

- (a) The continued application of flexibilities in the *Clerks – Private Sector Award 2020* (**Clerks Award**) that facilitate remote working;
- (b) A survey of employers recently conducted by the Fair Work Commission (**FWC**) regarding working from home arrangements;
- (c) Important WHS issues when employees are working from home; and
- (d) A ‘charter’ published by the Australian Council of Trade Unions (**ACTU**), which outlines the claims the unions are pursuing in relation to employees working from home.

Introduction

Working from home arrangements are common in many industry sectors and occupations. In some cases, employees are working from home due to Government-imposed restrictions. In many other instances, working from home arrangements have been implemented formally or informally by agreement between employers and their employees.

Various important workplace relations considerations arise when employees are working from home.

The Clerks Award – Schedule I – Award Flexibility During the COVID-19 Pandemic

The Clerks Award was varied by the FWC on 22 December 2020 in response to an application made by the Australian Industry Group and Australian Chamber of Commerce and Industry. As a result of the variation, Schedule I to the Award was amended and its period of operation extended until 30 June 2021.

The Schedule contains various provisions that facilitate working from home arrangements where an employee requests to work remotely and their employer agrees, including:

- Instead of the spread of ordinary hours prescribed by the Award for day workers (i.e. 7am to 7pm on Monday to Friday), employees may work their ordinary hours between 6am and 10pm, Monday – Friday.

- Though the Award requires that ordinary hours must be worked continuously (with the exception of meal breaks), the employee and employer can agree that the employee is not required to work their ordinary hours continuously.
- The Schedule allows increased flexibility regarding the start and finish times of a part-time employee.
- The Schedule allows greater flexibility regarding the taking of meal breaks, if agreed between the employer and employee.

The Schedule also contains various other terms and conditions. A copy of the Schedule is **attached**.

The FWC Survey

The FWC recently conducted a survey of employers covered by the Clerks Award, regarding working from home arrangements. The survey results were [published](#) earlier this month.

The survey was completed by 123 employers who employed 1,712 employees covered by the Award. Of those employees, 1,089 had been working from home since 1 July 2020. Interestingly:

- Most employers responded that some or all of their employees' hours of work had changed since 1 July 2020.
- The most common response from businesses was that employees who have been working from home since 1 July 2020 had changed their times of work by breaking up their working day.
- The most common reasons for different working arrangements were family/caring commitments and for employees to attend to other personal matters.
- Most businesses responded that they would allow employees to work from home at least some of the time in the future.
- Almost 1 in 3 businesses do not intend to allow employees to work from home at least some of the time in the future.

Important WHS issues when employees are working from home

Employers have duties to ensure the health and safety of their workers, even if they are working from home.

It is important that employers provide guidance to workers about how they can set up their home work spaces to reduce the risk of injury. It is also important for employers to consider mental health risks where employees are working from home.

An extensive amount of information has been published by the Federal and State Governments to assist employers and workers to address working from home risks. This is available on the [Safe Work Australia website](#).

The ACTU Working from Home Charter

In November 2020, the ACTU released a 'Working from Home Charter'. The Charter sets out the claims the unions are pursuing in relation to employees working from home. The ACTU has foreshadowed that unions may seek to achieve the entitlements set out in their Charter through enterprise bargaining and/or by seeking variations to modern awards.

The union claims in the Charter include the following:

- (a) Working from home should be offered to all suitable workers on a voluntary basis.
- (b) It is the responsibility of employers to ensure that appropriate equipment, systems, and technology to support remote working are properly installed, are functioning and maintained and that workers have the required training to operate those systems.
- (c) Employers should provide an adequate allowance or full cost reimbursement for all work-related expenses including water, electricity, gas, stationery, equipment, amenities, telephone and internet expenses.
- (d) Employers must identify, assess, and control health and safety risks arising from working from home arrangements. In particular, employers should make every reasonable effort to ensure that employees:
 - (i) Have a suitable workspace at home for carrying out their work, with particular care given to ensuring proper ergonomics.
 - (ii) Are protected from hazards connected to home working, including any increased potential for online bullying and domestic violence.
 - (iii) Are taking adequate breaks when they work from home.
 - (iv) Working hours are not excessive.
- (e) Work / life balance must be preserved. Flexible work arrangements must be based on employee choice and control. Further, records regarding employee working hours including breaks, starting and finishing times, must be kept and made available for inspection by a properly authorised person when required.
- (f) On commencing a working from home arrangement, employers should provide the employees with the contact details of the relevant union and any nominated delegate, and provide the employee with the opportunity to consult with them. At this time, employers should also provide the union or delegate with the opportunity to address employees who will work from home about their rights.
- (g) Any disputes or grievances that arise in connection with a working from home arrangement should be subject to an independent dispute settlement process, which includes arbitration where the matters cannot be resolved through discussion between parties.
- (h) Employers should not downgrade the quality of working life on their premises simply because some employees are working from home.

To date, no applications have been made to vary awards to reflect the Charter. If such an application was made, the FWC would schedule proceedings to deal with the application, including inviting parties to file submissions and evidence.



AUSTRALIAN INDUSTRY GROUP

COVID-19 CORONAVIRUS

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Do you require further advice?

For further information or assistance, please contact Ai Group.

Ai Group has set up a [special section on our website](#) to provide access to Ai Group advice and assistance relating to the COVID-19 pandemic.

A handwritten signature in black ink, appearing to read 'S. Smith'.

Stephen Smith
Head of National Workplace Relations Policy

This service is provided with the support of the Commonwealth Government, represented by the Fair Work Ombudsman.

ATTACHMENT**Schedule I - Award Flexibility During the COVID-19 Pandemic**

- I.1** The provisions of Schedule I are aimed at preserving the ongoing viability of businesses and preserving jobs during the COVID-19 pandemic and not to set any precedent in relation to award entitlements after its expiry date.
- I.1.1** Schedule I operates from 28 March 2020 until 30 June 2021. The period of operation can be extended on application to the Fair Work Commission.
- I.1.2** Any direction or request given by an employer under Schedule I must be given in writing and does not apply to the employee if the direction is unreasonable in all of the circumstances.
- I.1.3** An employer who issues a direction or makes a request under the provisions of Schedule I, or who makes an agreement pursuant to clause I.2.1, provides consent to a dispute about the direction, request or agreement being settled by the Fair Work Commission through arbitration in accordance with clause 40.5—Dispute resolution and section 739(4) of the Act.
- I.2** During the operation of Schedule I, the following provisions apply:
- I.2.1 Remote Working Arrangements**
- (a) Application of clause I.2.1**
- Clause I.2.1 applies when an employee is undertaking Remote Work as defined in clause I.2.1(b).
- (b) Definition of Remote Work**
- For the purposes of clause I.2.1, Remote Work means work undertaken by an employee from their home or any other location of their choosing that is not the premises of their employer.
- (c) Extended spread of ordinary hours for day worker**
- (i)** Instead of clause 13.3, if an employee engaged on day work is undertaking Remote Work by agreement with their employer and the employee requests and the employer agrees, the spread of ordinary hours of work for the day worker may be between 6.00 am and 10.00 pm, Monday to Friday, and between 7.00 am and 12.30 pm on Saturday.
- (ii)** Day workers are not shiftworkers for the purposes of any penalties, loadings or allowances under the award, including for the purposes of Part 6—Shiftwork.
- (iii)** The facilitative provision in clause 13.4, which allows the spread of hours to be altered, will not operate for the employees referred to in clause I.2.1(c)(i).

(d) Ability for employees to elect not to work ordinary hours continuously

An employee undertaking Remote Work is not required by this award to work their ordinary hours continuously as specified by clause 13.6, if this is agreed between the employer and employee.

(e) Flexible starting and finishing times for part-time employees

(i) Notwithstanding clause 10.2(c), an employer and part-time employee are not required to reach agreement as to the starting and finishing times of an employee for any day that the employee will be undertaking Remote Work, if:

(A) they have instead agreed that the employee may choose their starting and finishing times on those days; or

(B) they have instead agreed to start and finish within a specific range of times.

(ii) Clause 10.3 does not require an employer and employee to reach separate agreements regarding changes to the times at which an employee will start or finish work each day if clause 1.2.1(e)(i) applies.

(f) Ability for part-time employees to work non-consecutive hours

(i) Notwithstanding clause 10.5, an employer is not required to roster a part-time employee so that their hours of work are consecutive, provided that:

(A) It has been agreed between the employer and employee that the work does not need to be undertaken continuously; and

(B) The employee is provided with at least 3 hours of work on that shift.

(g) Arrangements for taking meal and rest break while undertaking Remote Work

(i) An employee who is undertaking Remote Work may take any meal or rest break referred to in clause 15 at any time that suits their personal circumstances, instead of taking them at the times prescribed by clause 15, provided that this is agreed to by their employer.

Example: An employee who is working more than 5 hours may elect to take their break at a point in their shift after the first 5 hours of work.

(ii) An employee who is undertaking Remote Work may alter the configuration of the meal or rest breaks referred to in clause 15 in order to suit their personal circumstances instead of taking the breaks in the manner contemplated by clause 15, provided that this is agreed by their employer.

Example: An employee who is entitled to take a meal break of between 30 and 60 minutes under clause 15.3 may instead take 3 breaks of 20 minutes duration.

1.2.2 Agreed temporary reduction in ordinary hours

- (a)** An employer and the full-time and part-time employees in a workplace or section of a workplace, may agree to temporarily reduce ordinary hours of work for the employees in the workplace or section for a specified period while Schedule I is in operation.
- (b)** At least 75% of the full-time and part-time employees in the relevant workplace or section must approve any agreement to temporarily reduce ordinary hours.
- (c)** For the purposes of clause 1.2.2(a), ordinary hours of work may be temporarily reduced:
 - (i)** For full time employees, to not fewer than 75% of the full-time ordinary hours applicable to an employee immediately prior to the implementation of the temporary reduction in ordinary hours.
 - (ii)** For part-time employees, to not fewer than 75% of the part-time employee's agreed hours immediately prior to the implementation of the temporary reduction in ordinary hours.
- (d)** Where a reduction in hours takes effect under clause 1.2.2(a), the employee's ordinary hourly rate will be maintained but the weekly wage will be reduced by the same proportion.
- (e)** Nothing in Schedule I prevents an employer and an individual employee agreeing in writing (including by electronic means) to reduce the employee's hours or to move the employee temporarily from full-time to part-time hours of work, with a commensurate reduction in the minimum weekly wage.
- (f)** If an employee's hours have been reduced in accordance with clause 1.2.2(a):
 - (i)** the employer must not unreasonably refuse an employee request to engage in reasonable secondary employment; and
 - (ii)** the employer must consider all reasonable employee requests for training, professional development and/or study leave.
- (g)** For the purposes of clause 1.2.2(a), where there is any reduction in the ordinary hours of work for full-time or part-time employees in a workplace or section during the period Schedule I is in operation, all relevant accruals and all entitlements on termination of employment will continue to be based on each employee's weekly ordinary hours of work prior to the commencement of Schedule I.
- (h)** For the purposes of clause 1.2.2(a), the approval of employees shall be determined by a vote of employees. In order for the vote to be valid, the employer must comply with the following requirements:
 - (i)** Where any of the employees are known to be members of the Australian Services Union or another organisation, the ASU or other organisation shall be informed before the vote takes place.
 - (ii)** Prior to the vote of employees, the employer shall provide the employees with the contact details of the ASU, should they wish to contact the ASU for advice; and
 - (iii)** The employer must notify the Fair Work Commission by emailing clerksaward@fwc.gov.au that the employer proposes to conduct a vote under

Schedule I. The employer shall provide the work email addresses of the employees who will be participating in the vote, to the Commission. The Commission will then distribute the ASU COVID-19 Information Sheet to the employees prior to the vote. The Commission shall list the name of the business on a register which will be accessible to the ASU, upon request, for the period when Schedule I is in operation.

- (iv) The vote shall not take place until at least 24 hours after the requirements of clause I.2.2(h)(i), (ii) and (iii) have been met.
- (i) This clause only applies to employers who implemented a temporary reduction in ordinary hours under Schedule I in this Award before 30 June 2020.
- (j) Any employee who has had their hours of work reduced pursuant to this Schedule I prior to 1 July 2020 may request an employer to conduct a further vote to confirm the ongoing reduction in hours pursuant to this Schedule I. Such a vote must be held within 7 days of any request. The vote must comply with the requirements in clause I.2.2(h).
- (k) If any vote requested under clause I.2.2(j) does not approve of the ongoing reduction of hours or is not held within 7 days of the making of the request, the operation of clause I.2.2 with respect to the relevant employees will cease to be effective 7 days from the date when the request was made.

I.2.3 Annual leave

- (a) Subject to clause I.2.3(f) and despite clauses 32.6, 32.7 and 32.8 (Annual leave), an employer may, subject to considering an employee's personal circumstances, request an employee to take paid annual leave, provided that the request does not result in the employee retaining a balance of less than 2 weeks annual leave after the leave is taken. Such a request must be made a minimum of 72 hours before the date on which the annual leave is to commence.
- (b) An employee must consider and may not unreasonably refuse a request to take annual leave made pursuant to clause I.2.3.
- (c) Clauses I.2.3(a) and (b) do not prevent an employer and an employee agreeing to the employee taking annual leave at any time.
- (d) Employers and individual employees may agree to take up to twice as much annual leave at a proportionately reduced rate for all or part of any agreed or directed period away from work, including any close-down.
- (e) The period of annual leave must commence before 30 June 2021 but may end after this date.
- (f) An employer can only request that an employee take annual leave pursuant to this clause if the request is made for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 and to assist the employer to avoid or minimise the loss of employment.