



17 May 2024

VARIATION OF MODERN AWARDS TO INCLUDE A DELEGATES' RIGHT TERM (AM2024/6)

Background

1. On 18 January 2024, the Fair Work Commission (the '**Commission**') President issued a statement¹ commencing a process to vary all modern awards so that they include a delegates' rights term for workplace delegates by 30 June 2024.
2. On 30 January 2024, the President issued a statement² outlining the process including timeline when submissions are required.
3. On 10 May 2024, the President issued a statement³ on the developed a draft delegates' rights term.
4. In accordance with paragraph [10] of [2024] FWC 1214, the Pharmacy Guild of Australia ('**Guild**') provides the following responses for consideration.
5. The Guild acknowledges the difficulty for the Commission to draft a set of terms that will achieve the legislative directions, is within the Commission's remit under the *Fair Work Act 2009*, and only to the extent necessary to achieve the modern awards objective (s138).
6. Nevertheless, the Guild acknowledges the Commission's approach; however, does have concerns about some specific clauses within the draft document, being:
 - a. Clause X.5 – the intent of providing some guidance or a list to employers and delegates on when industrial interests could represent may have unforeseen consequences of providing rights that more than required or permitted to achieve under the modern awards objective. For example, the inclusion of X.5(c-e) may have extended the representational rights, however this could be addressed by the removal of those sub-paragraphs, as X.5(f) provides the necessary guidance on when the right could be exercised in particular situations.
 - b. Clause X.6 – The Guild is of the opinion that the second sentence in X.6(a) may have extended the delegates right beyond the legislative provisions. It is suggested that to remove this potential concern the following proposed combining of [x.6a-b] would be suitable:

"X.6 Entitlement to reasonable communication

(a) *A workplace delegate may communicate with eligible employees for the purpose of representing the industrial interests of the employees under clause X.5. This includes discussing membership of the delegate's organisation with the employees during working hours subject to X.9 conditions, or during work breaks or before the commencement of rostered hours or at the end of rostered working hours."*
 - c. Clause X.7 – the title indicates 'reasonable access' however this point is not enforced in the opening sentence of the paragraph. The non-inclusion of 'reasonable' in the sentence description could give rise to an argument that an

¹ [2024] FWC 150

² [2024] FWC 241

³ [2024] FWC 1214

employer is required to purchase the equipment listed in the paragraph if not available or required for the business' operational capability.

In addition, the Guild suggests a new sub paragraph is included that clearly outlines that an employer may refuse access to or use of the workplace or workplace facilities as defined in X.7 where the request will cause a deterrent to operational capability at that specific date and time or particular facilities.

- d. Clause X.8 – The clause does not clearly indicate the small business employer also needs to provide access to unpaid time for the delegate to be absent from the workplace to attend the training. This could impact when the small business employee would be able to attend the training sessions.

It is suggested that the term “**and the training provider**” be included at the end of X.8(c) to assist both the employer and delegate in approving the absence when requested.

The Guild notes that the definition of paid time for an approved paid absence has not been defined clearly in the draft provisions or in 350C. It is suggested that it has the same meaning as within the respective Awards being ‘at the employee’s base rate of pay or minimum rate of pay’.

The Guild notes X.8(b) may have unforeseen consequences in determining who is counted in the proposed concept of 1 delegate per 50 eligible employees. Therefore, it is suggested that eligible employees are calculated by using the methodology at s23(1) and s23(2) of the *Fair Work Act 2009*.

It is suggested that ‘and duration’ is included after ‘of attendance’ in X.8(f) to clearly clarify the duration of the approved training course.

7. For your consideration.

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Pharmacy Guild of Australia