

MODERN AWARD COVERAGE AND CLASSIFICATION

What is a modern award?

A modern award applies to national system employees in a certain industry or occupation. The modern awards commenced on 1 January 2010 and operate in line with the National Employment Standards to provide a minimum safety net of terms and conditions for Australian employees. Modern awards are generally based on industry sectors, although some awards are occupational based, and some are both. Coverage under the industry award needs to be considered first.

What is an industry award?

An industry award is one that applies only if the business operates in the award-defined industry. This means the primary purpose of the business must align with the coverage definition contained in the award. If the business does not operate in the defined industry, the award will not apply. The below example of the *Fast Food Industry Award 2010*, is an example of an industry award.

Fast Food Industry Award 2010 (“Fast Food Award”)

4.1 This **industry award** covers employers throughout Australia in the **fast food industry** and their employees in the classifications listed in clause 17—Minimum weekly wages to the exclusion of any other modern award

The term “fast food industry” is defined in clause 3.1 of the Fast Food Award and relevantly states:

“Fast food industry means the industry of taking orders for and/or preparation and/or sale and/or delivery of:

- meals, snacks and/or beverages, which are sold to the public primarily to be consumed away from the point of sale;
- take away foods and beverages packaged, sold or served in such a manner as to allow their being taken from the point of sale to be consumed elsewhere should the customer so decide; and/or
- food and/or beverages in food courts and/or in shopping centres and/or in retail complexes, excluding coffee shops, cafes, bars and restaurants providing primarily a sit down service inside the catering establishment”

What is an occupational award?

An occupational award applies to individual roles an employee may perform for the business, irrespective of the primary purpose of the business. The below is an example of an occupational award.

Nurses Award 2010

4.1 This **occupational award** covers:

(a) employers throughout Australia in the health industry and their employees in the classifications listed in Schedule B—Classification Definitions to the exclusion of any other modern award; and

(b) employers who employ a nurse/midwife, principally engaged in nursing/midwifery duties comprehended by the classifications listed in Schedule B—Classification Definitions.

Can a modern award be both industry and occupational?

Yes. The below is an example of an award that has both industry and occupational coverage. This means that it can apply both to a business in the defined industry and/or to an individual employee performing a role within the scope of the award.

Health Professionals and Support Services Award 2020 (“HPSS Award”)

4.1 This **industry and occupational award** covers:

(a) employers throughout Australia in the **health industry** and their employees in the classifications listed in clauses 14—Minimum weekly wages for Support Services employees and 15—Minimum weekly wages for Health Professional employees to the exclusion of any other modern award;

(b) employers engaging a health professional employee falling within the classification listed in clause 15.

The term “health industry” is defined in clause 3.1 of the HPSS Award and relevantly states:

“**health industry means** employers whose business and/or activity is in the delivery of health care, medical services and dental services”

Why does modern award coverage matter?

Modern awards contain important legal requirements employers must follow. These requirements include various terms and conditions of employment, including but not limited to:

- Minimum wage rates;
- Overtime and allowances;
- Consultation about major workplace change; and
- Dispute resolution.

Importantly, modern award requirements such as consultation are frequently highlighted in Fair Work Commission statements to be strict legal requirement and not a mere guideline. Similarly, failure to pay an employee at least the minimum wages required under the relevant modern award places the business at a risk of an underpayments claim.

Classifying an employee under a modern award

Once coverage under the applicable modern award has been determined, the employer is required to determine whether the role in question is covered by the classification definitions contained in the award. If the employee’s inherent duties and responsibilities align to those specified in the award’s classification structure, the employee is covered by that modern award. Please note, modern awards contain broad and indicative classification descriptors and they may not align exactly to the position description in question.

Below are some key considerations to inform classification exercises:

- Skills and duties
- Qualifications
- Experience
- Discretion
- Extent of supervision

‘Award Free’

From time to time certain businesses or positions do not fall within the scope of the modern award system. If so, they may be ‘award free’. Deciding an employee is ‘award free’ has considerable implications under the Australian Industrial Relations system. For example, it may influence access to award derived terms, including but not limited to, loadings, penalties, overtime penalties and/or allowances. The Victorian Chamber strongly recommends advice is sought prior to determining no award applies to either the business or the employee. Importantly, even if an employee is deemed to be ‘award free’ they are still covered by the *Fair Work Act 2009* (including the National Employment Standards) and the National Minimum Wage.

Miscellaneous Award 2020

The Miscellaneous Award operates through a series of exclusions. For example, certain groups of employees are not covered such as managerial and professional employees and those excluded by the *Fair Work Act 2009*. This award can be used where there is no industry or occupational coverage for a certain role and no exclusions apply, however it is not a “catch-all” or alternative where no other award applies. Given the complex nature of this award, we recommend further advice is sought before concluding this award applies.

2020 modern awards

The Fair Work Commission is currently in the process of reviewing existing modern awards. Throughout 2020, relevant modern awards will be updated, including changes to their titles from 2010 to 2020. These changes are gradually being

introduced and some changes are already operational/effective under some awards. Employers should be aware of impending changes which could significantly affect existing workplace practices.

Frequently Asked Questions

Q. If I pay my employee a salary does that mean an award no longer applies?

A. No. Paying an employee above the minimum wages contained in the relevant award does not mean the award no longer applies to the employee's employment. Wage conditions are only one entitlement contained in a modern award. Failure to comply with the award puts the business at risk of claims at the Fair Work Commission and Fair Work Ombudsman.

Q. Can I opt out of the modern award system?

No, it is not possible to opt out of an award that covers and applies to an employee's employment. In Australia, an employee is entitled to the terms and conditions of the award that applies to them, as well as the National Employment Standards (minimum safety net). Businesses can certainly implement more beneficial terms of employment in policies, procedures and/or employment contracts, but they cannot undercut the minimum terms and conditions in the relevant award. If a business wishes to negotiate terms and conditions that are specific to their workplace, they may consider negotiating an Enterprise Agreement ("EA"). An EA can be negotiated between an employer and its employees, but must result in employees being "Better Off Overall" under the EA as opposed to the applicable modern award that would otherwise apply to them.

Notwithstanding the above, the employer does have the ability to offer a Guarantee of Annual Earnings ("Guarantee"). The Guarantee is a written agreement and represents a commitment by the employer to pay the employee no less than an amount that exceeds the 'high income threshold' (currently \$153,600 as at 1 July 2020) during a defined period. In exchange for the Guarantee, the relevant award that covers the employee ceases to apply.

By entering into the Guarantee, the employer will not be required to comply with the terms of the award (e.g. penalties, loadings and other terms and conditions) and can merely provide the employee with the terms and conditions offered to the employee in their contract of employment. It is important to note however, that while the Guarantee means the award no longer applies to the employee, the award still technically 'covers' the employee for the purposes of providing them with access to the unfair dismissal regime.

Contacting the Victorian Chamber of Commerce and Industry

The Victorian Chamber's team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222**.

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