

## 202 Enterprise agreements to include a flexibility term etc.

### *Flexibility term must be included in an enterprise agreement*

- (1) An enterprise agreement must include a term (a ***flexibility term***) that:
  - (a) enables an employee and his or her employer to agree to an arrangement (an ***individual flexibility arrangement***) varying the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer; and
  - (b) complies with section 203.

### *Effect of an individual flexibility arrangement*

- (2) If an employee and employer agree to an individual flexibility arrangement under a flexibility term in an enterprise agreement:
  - (a) the agreement has effect in relation to the employee and the employer as if it were varied by the arrangement; and
  - (b) the arrangement is taken to be a term of the agreement.
- (3) To avoid doubt, the individual flexibility arrangement:
  - (a) does not change the effect the agreement has in relation to the employer and any other employee; and
  - (b) does not have any effect other than as a term of the agreement.

### *Model flexibility term*

- (4) If an enterprise agreement does not include a flexibility term, the model flexibility term is taken to be a term of the agreement.
- (5) The regulations must prescribe the ***model flexibility term*** for enterprise agreements.

## 203 Requirements to be met by a flexibility term

### *Flexibility term must meet requirements*

- (1) A flexibility term in an enterprise agreement must meet the requirements set out in this section.

### *Requirements relating to content*

- (2) The flexibility term must:
  - (a) set out the terms of the enterprise agreement the effect of which may be varied by an individual flexibility arrangement agreed to under the flexibility term; and
  - (b) require the employer to ensure that any individual flexibility arrangement agreed to under the flexibility term:
    - (i) must be about matters that would be permitted matters if the arrangement were an enterprise agreement; and
    - (ii) must not include a term that would be an unlawful term if the arrangement were an enterprise agreement.

- (2A) If, in accordance with this Part, the enterprise agreement includes terms that would be outworker terms if they were included in a modern award, the flexibility term must not allow the effect of those outworker terms to be varied.

*Requirement for genuine agreement*

- (3) The flexibility term must require that any individual flexibility arrangement is genuinely agreed to by the employer and the employee.

*Requirement that the employee be better off overall*

- (4) The flexibility term must require the employer to ensure that any individual flexibility arrangement agreed to under the term must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to.

*Requirement relating to approval or consent of another person*

- (5) Except as required by subparagraph (7)(a)(ii), the employer must ensure that the flexibility term does not require that any individual flexibility arrangement agreed to by an employer and employee under the term be approved, or consented to, by another person.

*Requirement relating to termination of individual flexibility arrangements*

- (6) The flexibility term must require the employer to ensure that any individual flexibility arrangement agreed to under the term must be able to be terminated:
- (a) by either the employee, or the employer, giving written notice of not more than 28 days; or
  - (b) by the employee and the employer at any time if they agree, in writing, to the termination.

*Other requirements*

- (7) The flexibility term must require the employer to ensure that:
- (a) any individual flexibility arrangement agreed to under the term must be in writing and signed:
    - (i) in all cases—by the employee and the employer; and
    - (ii) if the employee is under 18—by a parent or guardian of the employee; and
  - (b) a copy of any individual flexibility arrangement agreed to under the term must be given to the employee within 14 days after it is agreed to.

(Fair Work Act 2009)

## **204 Effect of arrangement that does not meet requirements of flexibility term**

*Application of this section*

- (1) This section applies if:

- (a) an employee and employer agree to an arrangement that purports to be an individual flexibility arrangement under a flexibility term in an enterprise agreement; and
- (b) the arrangement does not meet a requirement set out in section 203.

Note: A failure to meet such a requirement may be a contravention of a provision of Part 3-1 (which deals with general protections).

*Arrangement has effect as if it were an individual flexibility arrangement*

- (2) The arrangement has effect as if it were an individual flexibility arrangement.

*Employer contravenes flexibility term in specified circumstances*

- (3) If section 203 requires the employer to ensure that the arrangement meets the requirement, the employer contravenes the flexibility term of the agreement.

*Requirement relating to termination of arrangement*

- (4) If the arrangement does not provide that the arrangement is able to be terminated:
  - (a) by either the employee, or the employer, giving written notice of not more than 28 days; or
  - (b) by the employee and the employer at any time if they agree, in writing, to the termination;the arrangement is taken to provide that the arrangement is able to be so terminated.