

## Annualised Wage Provisions & Contractual Offset Clauses

We have set out below a comparison of the annualised salary provisions and a contractual offset arrangement in the table below:

Issue	Annualised Salaries	Contractual Offset
<b>Period Over Which Arrangement Operates</b>	<b>Annual:</b> The annual salary over the entire year must be sufficient to cover the award entitlements over the entire year.	<b>Pay Period:</b> The salary paid in each pay period must be sufficient to cover the award entitlements an employee would have received in that pay period.
<b>Agreement to the Arrangement</b>	<b>Not Required:</b> In the Clerks Award (but not all awards), an employer may simply determine to pay employees an annualised salary by informing them that it is doing so (and providing other information required by the award).	<b>Required:</b> Employees must agree to this arrangement. Ordinarily, this is done through the initial contract with the employee, but if the employer is varying the contract to include the offset clause, this may require an incentive eg a pay increase.
<b>Penalty for Failure to pay Award Entitlements</b>	<p><b>Low Risk:</b> If the employer is paying in accordance with the requirements of the clause, then if the employee works so many hours that they are underpaid, the award allows this to be addressed through annual reconciliation.</p> <p>In our view, this makes an underpayment unlikely to be a contravention of the award and therefore unlikely to give rise to a potential civil penalty (fine).</p>	<p><b>Moderate Risk:</b> Under this arrangement, the employer must keep track to ensure that at all times its employees are not working so many overtime or penalty rate hours, or other work incurring a loading or allowance, which would make their award entitlements exceed the pay for that pay period.</p> <p>If the award entitlements exceed the salary for that pay period, and this is not addressed at that time, there is a greater risk that this may result in a civil penalty (fine) for the employer. In most offset clauses, if the "excess" is not enough to cover overtime, penalty rates, allowances and loadings, there are complexities which mean that it may be difficult to argue that it covers any of those amounts.</p>

<p><b>Record Keeping Requirements</b></p>	<p><b>Many:</b> From 1 March 2020, employers who enter into an annualised salary arrangement must keep timesheets of employees' hours and get their signature on such time sheets in each pay period or roster cycle.</p>	<p><b>Some:</b> While employers are not required to obtain signed timesheets from employees, employers must still maintain records of overtime hours and any hours which would attract penalty rates under the relevant award. This is required by the Fair Work Act, and a failure to keep such records is likely to result in a presumption that such overtime or penalty rate hours were worked if an employee brings a claim.</p>
<p><b>Limitations on Working Hours</b></p>	<p><b>Yes:</b> From 1 March 2020, employers must inform employees of the outer limit of hours which would incur overtime rates and the outer limit of hours which would incur penalty rates in each pay period or roster cycle.</p>	<p><b>No (but):</b> While there is no such requirement for a contractual offset clause to be effective, it is useful for employers to understand the relevant amount of hours of either overtime, weekend work, shift work etc which would make the award entitlements exceed the salary paid in a relevant pay period, as such hours may make the offset ineffective and incur a civil penalty (fine).</p>
<p><b>Certainty regarding Enforceability</b></p>	<p><b>High:</b> Under an annualised salary, it is clear that the award allows for the salary to satisfy all relevant award entitlements.</p>	<p><b>Moderate:</b> The Full Bench has stated that <i>"If there is a lack of a "close correlation between the nature of the contractual obligation and the nature of the award obligations", then payment of the salary may not satisfy the relevant award entitlements."</i></p> <p>One of the ways in which this can be addressed is by clear drafting that targets the individual entitlements which the salary is intended to satisfy.</p>
<p><b>Calculation of Base Rate</b></p>	<p><b>Award Ordinary Rate:</b> The annualised salary provisions expressly provide that, in calculating the base rate of pay for the NES (eg leave entitlements), the employer must only take into account the ordinary rate of pay under the award and not include the extra amounts for overtime, penalty rates etc.</p>	<p><b>Hourly/Weekly Rate:</b> In our view, the "base rate" for an employee paid in accordance with a contractual offset clause is the amount paid per week or per hour, including the amounts paid to satisfy overtime, penalty rates etc.</p>

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