

Award clarification update and advice from Industry Legal Group

Three per cent wage increase from first full pay period after 1 July 2019

The Fair Work Commission (FWC) has announced a three per cent increase to minimum wages which will apply from the first full pay period starting on or after 1 July 2019.

Updated pay scale summaries for both the General Retail Industry Award (Retail Award) and the Health Professionals and Support Services Award (HP&SS Award) will be made available to Optometry Australia members in the next few days.

Do I need to pass these wage increases on to an employee if they are already paid above the Award?

Generally speaking, if your employee is already paid at least 3% above the current Award rate of pay, you may not need to pass this increase on to your employee. Instead, you may be able to absorb the increase. However, you will need to ensure that the employee's wage is at least equal to, or better off, overall compared to the employee's minimum entitlements under the Award. You can contact Optometry Australia Member Assist (OAMA; contact details below) for advice on absorbing increases.

Which Award will my support staff fall under? (i.e. optical dispensers and sales employees etc)

Further to our update to members on 8 May 2019, Optometry Australia, has reached a position in relation to award coverage for support staff employed within optometry practices both in a retail and practice setting. During our meeting with the Fair Work Ombudsman they were quite firm in their position that optometry practice support staff (as well as optometrists) should be provided coverage under the HP&SS Award.

Given that there is currently no definitive ruling to the contrary, it is Optometry Australia's position that the most risk adverse approach would be to adopt the Fair Work Ombudsman's position on coverage.

After undertaking a benchmarking exercise across a number of indicative support staff rosters for optometry practices operating across a seven-day roster, we found that while there are differences between the penalty, loading and overtime rates, the main pay rates are slightly higher under the HP&SS Award.

The calculations demonstrate that when taking into consideration penalty, loading and overtime rates paid to both casual and permanent employees (including on weekends and public holidays), overall the costs to business were comparable albeit slightly higher under the HP&SS Award. Following this logic, employers who pay staff under the higher HP&SS Award rates would be at less risk of an underpayment claim.

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How will I know how to classify my support staff under the HP&SS Award?

As a general rule of thumb, the following principle can be applied:

- An employee currently classified as a Level 4 employee under Retail Award will translate to a Level 5 employee under the HP&SS Award*.

* this is not ironclad and if you are unsure please check with OAMA.

I'm still not sure how to classify my support staff, how can you help me with this?

Over the next few weeks ILG will be developing indicative positions for each classification under the HP&SS Award. This advice will include a description of indicative duties and responsibilities, qualifications, level of experience, reporting line, direct reports and so forth.

What about optometrists?

Again, the Fair Work Ombudsman's position remains firm that optometry practices as a whole, including optometrists, should be classified under the HP&SS Award. Dentists and other health professionals are covered under the HP&SS Award so in principle it is difficult for us to argue exclusion. To ensure salary and wage rates are not eroded under any implied or explicit award coverage decision by the Fair Work Commission, we will be creating an industry-based salary structure that optometrists will be able to rely upon when determining how to pay their optometrists. This will also be provided to members over the coming weeks.

What now?

- 1- Keep an eye out for the updated pay scale summaries which will be made available in the next days. Employers should start reviewing their employees' current pay rates and employment contracts in preparation for the increase.
- 2- In the next few weeks, Optometry Australia will release indicative descriptors for each award classification under the HP&SS Award. Once received, benchmark your support staff against the indicative descriptors for each classification under the HP&SS Award.
- 3- Undertake a Better Off Overall Test (BOOT) to ensure that your employee will be no worse off OVERALL under the HP&SS Award than they are currently under the Retail Award.
- 4- Check with OAMA if you are unsure.
- 5- Await further advice regarding salary and wages for optometrists.

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What if I don't want my support staff or optometrists under the HP&SS Award?

The above is advice only, based on the considerable work ILG has undertaken over the past six months. At the time of writing, the Fair Work Commission had not made a clear determination in relation to award coverage for the optometry sector. In all likelihood the status quo may well be maintained and there will be no clear determination in relation to the optometry industry (i.e. optometry practices will not be specifically included under the definition of health professionals under the HP&SS Award). However, the uncertainty created by the Fair Work Ombudsman media release has prompted Optometry Australia to provide some certainty for the industry moving forward.

What if I continue to pay my support staff under the Retail Award?

Should you continue to pay your support staff under the Retail Award, just be mindful that at some future point the Fair Work Ombudsman or the Fair Work Commission may deem you to be paying under the incorrect Award. Should that happen the Fair Work Ombudsman have advised that they will undertake a 'no harm' test, in that they will simply ensure that the employee has not been disadvantaged in any way by virtue of their coverage under the Retail Award versus the HP&SS Award.

To ensure that your support staff are correctly classified and would pass a 'no harm' test, we recommend that you introduce contracts of employment that include a 'Set Off' clause that will ensure that any and all entitlements paid to your employees are set off against any award entitlements that are payable under the HP&SS Award. Contact OAMA for more details.

What happens next?

Over the coming weeks, with Optometry Australia, ILG will be preparing the indicative descriptors for each classification under the HP&SS Award. Once finalised these will be distributed to all members along and for practice owners and managers, this will include further information on how to communicate with your employees about the changes and how to ensure your practice complies with all Award provisions under the HP&SS Award.

If you have any questions, contact OAMA on oa@industrylegalgroup.com.au or 1300 153 154 or Optometry Australia's support team on 03 9668 8500.