

ENTERPRISE AGREEMENTS

Following on from the two articles that I have prepared for Chiropractors Association of Australia, I have received a number of enquiries in relation to Enterprise Agreements.

A number of chiropractors have taken up the option of having an Enterprise Agreement prepared for their business and I thought it would be timely to set out why I believe Enterprise Agreements are a valuable tool for many of your businesses. I will also set out for you the general process involved in preparing, negotiating, voting on and having an Enterprise Agreement approved by Fair Work Australia.

ARE ENTERPRISE AGREEMENTS SUITABLE FOR YOUR BUSINESS

The answer to this question depends on the nature of your business and how you wish to operate. In most cases, I am finding that an Enterprise Agreement is the most suitable, and in some cases the only, vehicle to implement the employment terms and conditions under which many chiropractic practices wish to operate.

If you do not like the terms of the new Health Professionals and Support Services Award, and wish to operate in a different manner, outside of an Individual Flexibility Agreement (under clause 7 of the award), your only other legitimate and safe alternative is to negotiate with all your employees to enter into an "Enterprise Agreement" under the Fair Work Act.

Enterprise agreements are a very valuable tool for businesses:

- They enable you to rationalise employment terms and make them suitable to your particular business;
- You can lock in pay rates and wages during the period of the agreement, which enables you to accurately budget your employment costs;
- You can utilise the agreement to include provisions which allow for instance annualised salaries, all up hourly rates of pay, the payment of wages as a percentage of fees generated, to change definitions such as that of casual and part time employees to allow for regular and systematic casuals, to change certain rostering restrictions and the like.
- Enterprise Agreements cannot be used to reduce overall wages as the agreement will not pass the required Better Off Overall Test. Depending on how much you are prepared to pay above minimum award requirements, you can obtain better flexibilities and potentially avoid many of the difficulties that you will confront with the new Health Award.
- Contrary to popular belief, the process of negotiating and entering an Enterprise Agreement is relatively simple and cost effective.

Of course, if you are happy to run your business in accordance with the Award, then an Enterprise Agreement is not suitable for you.

Additionally, in some cases a Contact of Employment coupled with an Individual Flexibility Agreement to deal with overtime and penalty rates may be suitable, particularly if you have only one or two staff and casual status is not a great issue. The concerns we have with an Individual Flexibility Agreement, as distinct from an Enterprise Agreement, are as follows:

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- Whilst obtaining a draft Individual Flexibility Agreement and a Contract of Employment may in many cases be a cheaper option up front, they need to be altered for each employee, and each category of employee (professional and support) including new employees. In my experience the initial cost difference between the options is minimal and between about \$500 and \$700. Over time however, the cost difference is eroded given your Enterprise Agreement will continue to operate for 4 years and often more. It is also important to understand that you must agree on the Individual Flexibility Agreement separately with each member of staff and you cannot do anything adverse in relation to the employee if they do not agree, whereas an Enterprise Agreement only needs to be approved by a majority of those who vote (more than 50%) and once approved by Fair Work Australia will apply to all staff including those who voted against it.
- Employees can withdraw from an Individual Flexibility Agreement on seven days' notice. This means if your employee withdraws, you would have to go back to operating under the award for that employee, with the consequent administrative burden of having employee's on Flexibility Agreements and others under the Award. You are prohibited from taking any adverse action against a person for withdrawing from a Flexibility Agreement. With an Enterprise Agreement, an employee cannot withdraw from it. They are bound by it whether they like it or not.
- You cannot make signing an Individual Flexibility Agreement a condition of employment and as such, a prospective employee may refuse to adopt the terms and conditions you wish and you may be required to fall back on Award terms for that particular member of staff. You cannot take any adverse action against the person for refusing to agree to an Individual Flexibility Agreement. In other words, you would still have to employ them if you have already offered the role. An Enterprise Agreement automatically applies to new staff and can be a condition of employment.
- With an Individual Flexibility Agreement, you must ensure the employee is "better off overall". This is similar to an Enterprise Agreement, however under an Enterprise Agreement, the test as to whether an employee is better off overall is conducted prior to the agreement being approved, as such, once the Enterprise Agreement is approved, you know you can operate safely under the arrangement. With an Individual Flexibility Agreement, the better off overall test is never conducted unless the employee challenges the Individual Flexibility Agreement at a later time. It is not difficult to envisage circumstances where, after three or more years of employment, a disgruntled employee will seek to challenge whether or not they were better off overall under an Individual Flexibility Agreement. You could be stuck defending a court case or prosecution by Fair Work Australia and if it transpires that the employee was not better off overall, you will significant penalties and back-pay liabilities.
- Individual Flexibility Agreements can only deal with a limited number of matters. They cannot be utilised to correct issues such as in relation to the casual or permanent part-time status of an employee or many of the rostering issues. They cannot be utilised to implement options such as the ability to direct when annual leave can be taken, annual shut downs, personal leave notice and other requirements etc.
- We have pro-forma Individual Flexibility Agreements available for purchase.

GENERAL PROCEDURE

The general procedure for entering and negotiating an Enterprise Agreement is as follows:

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- You would ascertain whether or not your staff would support having an Enterprise Agreement, in particular whether you would obtain the necessary level of votes to have it approved (more than 50% of employees). There is little utility in going to the expense of having an Enterprise Agreement drafted if it is unlikely to be approved by your staff.
- If you think you have the support of your staff then an Agreement can be drafted. Generally, I request you provide me with details of your current employment arrangements and what you wish to achieve out of the Agreement, for example, maintaining the casual status of certain employees. I then adopt my basic template agreement for you and provide you with a working draft document together with a covering letter of explanation.
- The next part of the process is usually for us to discuss the draft document and finalise the draft Agreement according to your wishes.
- You are then at the stage where the draft Agreement is able to be provided to staff for their review. The Agreement is provided to all employees who will be covered, together with a prescribed form from Fair Work Australia which details the employee's rights in relation to the process. This is called a Notice of Bargaining Rights. Over a period of at least 21 clear days from the time you provide the Notice of Bargaining Rights, you must negotiate and bargain in good faith with your staff in relation to any terms or changes they may request. After this period, we finalise the document into a form that will be voted on. This finalised document is then provided to all staff.
- After at least seven clear days from this finalised document being provided to staff, a vote can be held. The voting process can be quite simple such as a show of hands, the collection of emails, a secret ballot by a ballot box or the like. I am happy to discuss this with you depending on your particular circumstances and needs.
- Once a vote is held, if the Agreement is approved by staff then it must be sent to Fair Work Australia within 14 days of approval. The Agreement is sent to Fair Work Australia together with certain specified forms which must be completed. These forms are relatively straight forward to complete. I can certainly assist to the extent you require. Some clients like to do the work themselves; others like to leave most to me.
- Fair Work Australia then assess the Agreement under the "better off overall test". If the Agreement passes the "better off overall" test", it will notify you and the Agreement will then operate from seven days after approval is given.
- If Fair Work Australia has some issue with the document, they may seek undertakings from you in relation to certain provisions of the Agreement. Alternatively, they may simply decline to approve the Agreement. I have no capacity to guarantee any Agreement will pass the test.

THE BETTER OFF OVERALL TEST

Fair Work Australia must assess the Agreement and approve it under the Better Off Overall Test or "BOOT". This requires that employees be better off overall under the Agreement when compared to what they would be under the current Health Professionals Award requirements (including the transitional arrangements). Generally, the test involves a comparison of the remuneration the employees would earn.

There are certain terms which we cannot include in an Enterprise Agreement given recent decisions from Fair Work Australia. We cannot incorporate annual leave pay into

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all up pay rates or percentage based rates of pay. Annual leave must be paid when it is taken (generally the way to deal with this if you usually include annual leave pay in percentage based rates is reduce the percentage rate or deduct a certain amount, usually 4/52, to reflect annual leave costs and pay it back when leave is taken). Other terms that cannot be included relate to “common law” type requirements such as in relation to confidential information, intellectual property, post-employment restraints and company policies. We recommend these matters be addressed in a separate letter of offer or Contract of Employment which is given to staff to operate alongside the Enterprise Agreement. I provide such a letter of offer for you together with the draft Enterprise Agreement.

There are many ways in which an Enterprise Agreement can be drafted. We can start from scratch and produce a very short and simple document for you which is easy to operate under. The risk with this type of document is that it becomes very difficult to make a judgement, and for Fair Work to assess, whether the document will pass the better off overall test.

In the majority of cases, we recommend that the Enterprise Agreement be drafted significantly along the lines of the Health Professionals and Support Services Award.

Whilst this may cause you some initial concern, drafting in this manner provides a better chance of passing the better off overall test. What we do to make the Agreement worthwhile is introduce some subtle changes to important provisions of the Health Professionals Award such as:

- Including provision that allows part-time employees to have their hours varied permanently or temporarily by genuine agreement, without overtime being required.
- Changes to the poor drafting of the Saturday and Sunday penalty rate regime under the Health Professionals Award, to facilitate it operating in relation to chiropractic practices for those employees who regularly work weekends. As you will be aware, currently the Saturday and Sunday penalty rates cannot apply to chiropractic practices due to what I feel is a drafting error, and the more generous overtime provisions must be utilised for Saturday and Sunday work (other than for casuals).
- We can include a specific clause defining what is a casual employee in order to facilitate a casual employee who can work on a regular and systematic basis. This is one of the primary problems the industry is facing.
- We include provisions to enable you to pay annualised salaries, percentage base rates of pay or grossed-up hourly rates of pay and the like.
- We can make some subtle changes to the rostering requirements of the Award to enable more flexibility and enable roster changes where an employee is simply absent for any reason, as distinct from the Award’s provision where an employee must be absent due to “illness” to facilitate certain roster changes, which is substantially restrictive.
- We can include certain provisions in relation to annual leave and personal leave (sick and carers leave) such as providing for the cashing-out of certain amounts of annual leave, terms providing you with the ability to direct an employee to take annual leave, including annual shut down(which you do not necessarily have under the National Employment Standards). We can also include certain provisions in relation to personal leave (including sick leave) relating to notice and evidence requirements as well as your ability to direct an employee to undergo medical assessment after a certain number of absences and the like.

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CONCLUSION

We reiterate our view that Enterprise Agreements are a very valuable tool for your business, whether it is small or large.

The usual costs for us to prepare an Enterprise Agreement and assist you with the process are in the order of \$2,000. This can be up to \$3,000 depending on the type of agreement you want (i.e. if you ask us to draft something unique for you), and the level of assistance you require after we provide the draft Agreement. Given that this Agreement may operate for four years plus and applies to all employees, it can certainly be worthwhile in helping you to manage your business with certainty and in a way which suits your particular needs when compared to the very restrictive and prescriptive Award terms.

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