

The Fair Work Commission (FWC) has released its determination to vary the [Professional Employees Award 2020 \(PE Award\)](#), giving effect to a January decision that determined that the PE Award needed amendment in order to:

- Provide clarity as to coverage under the PE Award
- Introduce entitlements to employees covered by the PE Award in respect of overtime and penalty rates

Overview of the Changes

Award Coverage

Assessing coverage under the PE Award is often a difficult and complex task, with the FWC commenting on the vast amount of litigation concerning coverage under the PE Award. In an effort to provide clarity (although not going as far as it could have), the FWC has added the following to Schedule A – Classifications, in order to emphasise that employees engaged wholly or principally in a managerial position are excluded from coverage under the PE Award.

“An employee performing professional engineering duties, professional scientific duties, professional information technology duties, professional scientific duties, professional information technology duties or quality auditing must be classified in one of the following classifications **provided that the employee is not employed in a wholly or principally managerial position.**” (Our emphasis).

This change will be effective from an employee’s first full pay period on or after 23 March 2023.

Hours of Work and Overtime

The FWC has also changed the overtime and hours of work clauses of the PE Award to correct disparity between full-time and part-time/casual employees. Until this variation, part-time and casual employees covered by the PE Award have been paid their hourly rate for work in excess of 38 hours per week, whereas no similar entitlement exists for full-time employees who work in excess of 38 hours per week.

Notably, the changes introduce penalty rates and overtime provisions into the PE Award. However, the determination does include an exemption from applying the penalty rates and overtime provisions in respect of employees earning over a certain amount. In circumstances where an employee is contractually entitled to an annual salary exceeding the minimum award entitlement by at least 25%, the new overtime, time off in lieu, penalty rates and record keeping provisions do not apply.

Provision	Current Position	New Position (Effective 16 September 2023)
Ordinary hours of work	38 hours per week	<ul style="list-style-type: none"> • The ordinary hours of work, for which minimum rates are payable, are 38 hours per week
	Employers must compensate employees for time worked in specific circumstances, including “time worked regularly in excess of ordinary hours of duty”, “time worked on call-backs” and “time worked on afternoon, night or weekend shifts”.	<ul style="list-style-type: none"> • The previous provision is deleted, with no equivalent replacement (although noting that overtime and penalty rate provisions are now included, as outlined below)



The below changes will apply only to those employees who do not earn an annual salary of at least 25% above the minimum entitlements under the PE Award:

Provision	Current Position	New Position (Effective 16 September 2023)
Overtime and penalty rates	Not currently provided for	<ul style="list-style-type: none"> All hours worked in excess of 38 hours per week, for a full-time employee, must be paid at the applicable minimal hourly rate
Penalty rates	Not currently provided for	<ul style="list-style-type: none"> A loading of 25% on any hours worked between Monday and Saturday between 10 p.m. and 6 a.m. A loading of 50% on any hours worked on Sunday or a public holiday
Time off in lieu	Not currently provided for	<ul style="list-style-type: none"> An employee who works overtime will be entitled to agree with their employer to take time off in lieu instead of receiving payment for overtime
Record keeping	Not currently provided for	<p>Employers must keep records of all hours worked by an employee:</p> <ul style="list-style-type: none"> In excess of 38 hours per week Before 6 a.m. or after 10 p.m. from Monday through Saturday On a Sunday or public holiday

In order to allow employers time to prepare, the changes outlined above will come into effect on an employee's first full pay period on or after 16 September 2023.

Looking Ahead

While the changes will align the PE Award with the provisions of many other modern awards, it is likely to present significant change for some employers. Employers with employees covered by the PE Award should be taking steps to prepare for the changes, including:

- Conducting a remuneration audit to understand which employees may be captured by the changes
- If a requirement to keep records will apply to your employees, developing processes to capture and store these records
- Checking if your employment contracts contain a comprehensive contractual set-off clause (and checking if these clauses can, in fact, be relied on)

We regularly provide advice to clients on the coverage of the PE Award, so please get in touch if you believe that the changes may impact on any of your workforce and HR and payroll practices.