

Form F46 – Application to vary a modern award

Fair Work Act 2009, ss.157–160

This is an application to the Fair Work Commission to make a modern award or make a determination varying or revoking a modern award, in accordance with Part 2-3 of the [Fair Work Act 2009](#).

The Applicant



These are the details of the person who is making the application.

Title	<input checked="" type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)	Andrew		
Surname	Donnellan		
Postal address			
Suburb			
State or territory	Postcode		
Phone number	Fax number		
Email address	andrew@donnellan.id.au		

If the Applicant is a company or organisation please also provide the following details

Legal name of business	
Trading name of business	
ABN/ACN	
Contact person	

Does the Applicant need an interpreter?



If the Applicant has trouble accessing this information, please contact us. We can arrange to provide it in another format. You can find information about [help for non-English speakers](#) on our website.

Yes – Specify language

No

Does the Applicant require any special assistance at the hearing or conference (eg a hearing loop)?

Yes – Please specify the assistance required

No

Does the Applicant have a representative?



A representative is a person or organisation who is representing the applicant. This might be a lawyer or paid agent, a union or employer organisation, or a family member or friend. There is no requirement to have a representative.

Yes – Provide representative’s details below

No

Applicant’s representative



These are the details of the person or organisation who is representing the Applicant (if any).

Name of person	
Firm, organisation or company	
Postal address	
Suburb	
State or territory	Postcode
Phone number	Fax number
Email address	

Is the Applicant’s representative a lawyer or paid agent?

Yes

No

1. Coverage

1.1 What is the name of the modern award to which the application relates?



Include the Award ID/Code No. of the modern award

Professional Employees Award 2020 (MA000065)

1.2 What industry is the employer in?

Information technology industry

2. Application

2.1 What are you seeking?

Specify which of the following you would like the Commission to make:

- a determination varying a modern award
- a modern award
- a determination revoking a modern award

2.2 What are the details of your application?

Vary the Professional Employees Award 2020 by inserting a new clause in Schedule X to provide that, from a date determined by the Commission until the expiry of Schedule X, paid COVID-19 vaccination leave is available for all employees, consisting of up to 4 hours of leave per COVID-19 vaccination appointment, and up to 2 days of leave, per vaccination, for illness connected with a COVID-19 vaccination.

A draft clause is provided below:

X.2.3 COVID-19 vaccination leave

(a) An employee, including a casual employee, is entitled to up to 4 hours of paid leave, per occasion, in order to obtain a COVID-19 vaccination.

(b) Leave may be taken under clause X.2.3(a) for a period agreed between an employee and their employer. The employer must not unreasonably refuse to agree to a request by the employee to take leave under clause X.2.3(a).

(c) An employee, including a casual employee, is entitled to up to 2 days of paid leave immediately following a COVID-19 vaccination if they are not fit for work because of a personal illness or injury connected with the COVID-19 vaccination.

(d) An employee must give their employer notice of the taking of leave under clause X.2.3(c). The notice:

(i) must be given to the employer as soon as practicable (which may be a time after the leave has started); and

(ii) must advise the employer of the period, or expected period of the leave.

(e) An employee who has given their employer notice of the taking of leave under clause X.2.3(a) or clause X.2.3(c) must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for the purpose specified in clause X.2.3(a) or clause X.2.3(c) respectively.

(f) An employer must not fail to re-engage a casual employee because the employee has accessed an entitlement under this clause.

Attach additional pages, if necessary.

2.3 What are the grounds being relied on?

Using numbered paragraphs, specify the grounds on which you are seeking the proposed variations.



You must outline how the proposed variation etc is necessary in order to achieve the modern awards objective as well as any additional requirements set out in the FW Act.

Applicant's standing to bring application

1. The applicant is a professional software developer employed by IBM Australia Limited and covered by the Professional Employees Award 2020.

Background

2. The COVID-19 pandemic continues to have a significant impact on Australia. Public health orders under Commonwealth, state and territory legislation continue to be in force across Australia, with a significant impact on businesses and individuals. As at 29 July 2021, following a major outbreak of the Delta variant of concern that has impacted multiple states, the Greater Sydney region is under strict lockdown restrictions which are expected to remain in force for several more weeks,¹ and the state of Victoria has only recently relaxed its lockdown restrictions.²
3. The Commission has introduced Schedule X to the Professional Employees Award 2020 (as well as other awards) for the purpose of assisting employees and businesses to deal with the consequences of the COVID-19 pandemic, enabling more people to remain in employment, and supporting important public policy objectives in limiting the spread of COVID-19 in workplaces and allowing businesses to continue to operate (see [2020] FWCFB 5137 at [11]).
4. Multiple types of COVID-19 vaccines have now been approved for use in Australia and are being widely deployed as part of a national vaccination strategy. The importance of vaccination as part of the national COVID-19 strategy has been repeatedly emphasised by Commonwealth, state and territory authorities. For example, on 27 July 2021, the Premier of New South Wales, the Hon Gladys Berejiklian MP, stated:

"Vaccination is the key to our freedom. Getting jabs in arms is a key part of our strategy. I want August to be the month where everyone comes forward to get the jab. That is key to us being able to see what September looks like. I don't think anyone can deny that the vaccination rate is absolutely key to how we live life in NSW."³
5. The Grattan Institute has estimated that an 80% vaccination rate is necessary to allow for the permanent lifting of lockdowns and border restrictions, and advocates for this target to be met by March 2022.⁴

1 <https://www.theguardian.com/world/2021/jul/27/nsw-covid-update-172-new-cases-as-berejiklian-flags-greater-sydney-lockdown-lasting-into-september>

2 <https://www.theage.com.au/national/victoria/what-are-the-new-coronavirus-restrictions-for-victoria-20210727-p58d87.html>

3 <https://www.theguardian.com/world/2021/jul/27/nsw-covid-update-172-new-cases-as-berejiklian-flags-greater-sydney-lockdown-lasting-into-september>

4 <https://grattan.edu.au/wp-content/uploads/2021/07/Race-to-80-our-best-shot-at-living-with-COVID-Grattan-Report.pdf>

6. Due to the immense demand for COVID-19 vaccines, the medical and logistical complexities surrounding the two different types of vaccine currently being used in Australia, the limited and unevenly distributed supply of vaccines, and the limited number of vaccination providers, individuals seeking a vaccine often have significant constraints around the timing and location of their vaccination appointments.
7. The current COVID-19 vaccines have a high rate of short-term side effects, often requiring 1-2 days of personal leave. This disadvantages employees with chronic illnesses or caring responsibilities who often have very little personal leave available.
8. As such, there have been calls from unions for employers to make special vaccination leave available to encourage employees to be vaccinated as quickly as possible.⁵
9. The Grattan Institute states in their Race to 80 report:

“Employers could assist Australia’s vaccination efforts by giving employees additional sick leave or bonus leave if they get vaccinated, and allowing people to get vaccinated during work time.”⁶
10. Research by the Kaiser Family Foundation published in April 2021 shows (albeit in the American context, where workplace rights are significantly different from Australia) that 20% of people are concerned that they need to take time off work to be vaccinated, and 48% of people are concerned about needing to take time off due to vaccination side-effects. These figures are also noticeably higher among minority ethnic groups. 28% of people said they would be more likely to be vaccinated if they had paid time off for vaccination and recovery, rising to 47% among respondents who described their attitude towards the COVID-19 vaccine as “wait and see”.⁷

Existing employer practices

11. A considerable number of employers in both the public and private sector, many of whom employ workers covered by the Award, have already voluntarily introduced paid vaccination leave and flexibility schemes, some of which cover casual employees.
12. For example, ANZ, Westpac, Domain, Prospa, Zip and Athena Home Loans have publicised their commitments to paid vaccination leave and flexibility for employees, which have been the subject of media attention.⁸
13. The NSW Government has introduced up to 2 hours of special leave per occasion for NSW public sector employees to attend vaccination appointments. However, Unions NSW views this entitlement as insufficient.⁹
14. The ACT Government permits use of a special COVID-19 leave entitlement for public servants who are unable to obtain a vaccination outside of work hours, and for dealing with

5 <https://www.theaustralian.com.au/breaking-news/union-boss-calls-for-paid-covid19-vaccination-leave/news-story/1bb85cb7040b8e7a498c0ed7fabdde84>

6 <https://grattan.edu.au/wp-content/uploads/2021/07/Race-to-80-our-best-shot-at-living-with-COVID-Grattan-Report.pdf>, p. 33

7 <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-april-2021/>

8 <https://www.abc.net.au/news/2021-07-20/vaccine-covid19-coronavirus-companies-lockdown-sick-leave/100305406>

9 <https://www.themandarin.com.au/164267-nsw-public-sector-workers-receive-paid-vaccine-leave/>

side-effects.¹⁰

Proposed variation

15. This application proposes the introduction of a paid leave scheme to assist employees in obtaining COVID-19 vaccinations and in dealing with the common side-effects of vaccination. The introduction of such leave would encourage employees to be vaccinated by removing the need to use annual leave to obtain a vaccination during working hours, and by enabling employees to deal with side-effects without depleting their personal leave balance.
16. A leave period of up to 4 hours for vaccination appointments is proposed as appropriate to allow employees the time required for administration of the vaccine, as well as a reasonable time to travel to a vaccination provider that may be in a different suburb or town (and potentially while travelling via public or active transport), and to allow for moderate delays at vaccination providers. It is appropriate that the timing of such leave is negotiated between employee and employer, but that an employer may not unreasonably refuse the leave.
17. A leave period of up to 2 days for dealing with vaccination-related illnesses is proposed as appropriate to allow recovery from likely short-term side effects, given that the standard timeframe for mild COVID-19 vaccine side effects is generally 1-2 days.¹¹
18. The leave entitlements should cover all employees, including casual employees, due to the importance of increasing the vaccination rate as quickly as possible, and the additional economic precarity of casual employees which amplifies the difficulties in obtaining a COVID-19 vaccination.
19. It is proposed that this leave entitlement have effect for the same period as the other COVID-19 measures in Schedule X. In the event that vaccination leave is considered necessary for a longer period than the other measures in Schedule X, the Commission could consider a further variation at a later point.

Necessity of variation to achieve the modern awards objective

20. This variation would support the critical public policy objective of increasing the Australian vaccination rate, which has been identified as a prerequisite for loosening public health restrictions. Public health restrictions, particularly the harsher stay-at-home and lockdown orders which are currently in force in Sydney, have come at an enormous cost to most sectors of the Australian economy and resulted in large scale job losses.
21. Increased vaccination rates within individual workplaces limit the spread of COVID-19 within the workplace and thus mitigate health and safety risks for workers as well as the potential commercial impacts of a COVID-19 outbreak on the business.
22. Encouraging vaccination therefore promotes social inclusion through increased workforce participation, and has a positive impact on productivity, employment growth and the sustainability, performance and competitiveness of the national economy.
23. The costs to employers and regulatory burdens involved in implementing the proposed provisions are reasonable, being a maximum of 5 days of additional leave per employee (assuming a 2-dose vaccination protocol) and with most employees likely to take significantly

10 https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0008/1709324/Emergency-Response-ACTPS-Staff-Entitlements-COVID-19-Vaccination-v2-21052021-1.pdf

11 <https://www.health.gov.au/sites/default/files/documents/2021/03/covid-19-vaccination-after-your-pfizer-comirnaty-vaccine-covid-19-vaccination-after-your-pfizer-comirnaty-vaccine.pdf>

less than the full 5 days.

24. The most effective way of achieving the modern awards objective for professional engineering, scientific and information technology workers is to vary the Award so that these entitlements are available across the entire industry.

Conclusion

25. The proposed variation will support the national COVID-19 vaccination effort, improve Australia's vaccination rate, protect the health and safety of workers, protect the position of economically vulnerable workers seeking a vaccine, and move Australia towards a position where harsh and economically costly public health measures can be relaxed.
26. The proposed variation reflects measures already being introduced by a number of major employers who have assessed these measures as commercially viable and necessary.
27. As such, this variation is necessary to achieve the modern awards objective and should be granted.

Attach additional pages, if necessary.

Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature	Andrew Donnellan
Name	Andrew Donnellan
Date	29 July 2021
Capacity/Position	Employee covered by the modern award



Where this form is not being completed and signed by the Applicant, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS