

## DON'T ASSUME A WORKER'S BETTER OFF UNDER AN IFA - PROVE IT

Employers that use individual flexibility arrangements (IFAs), but have no way of proving employees are better off, are in a "high-risk situation", says EMA Consulting director Ashleigh Smith.

IFAs, which were introduced along with modern awards in January 2010, allow an individual and an employer to vary certain terms of the employee's award or agreement by mutual consent.

Depending on the employee's agreement, variations might pertain to stipulations about when work should be performed, how the employee should be paid, overtime rates, penalty rates, allowances or leave loading, Smith says.

A lot of modern awards for part-time employees are highly prescriptive about days and hours of work, and classify any additional work as overtime, which makes it difficult for workers to pick up extra shifts, he says.

If a worker wants extra or different shifts, and their employer is willing to provide them, an IFA can benefit both parties.

For example, a part-time university student who has a limited ability to work during the week might want to vary their agreement so they can work weekends for the extra cash. This could be in the employer's best interests as well, because it means they are more likely to retain the worker.

"The critical thing is, employees really need to be better off," Smith says.

"If employers want to rely on an IFA, they really need to take a step back and say, 'Can we prove that the employee is better off under this IFA?' And if they can't say 'yes' to that question, they're in a high-risk situation."

Employers need to exercise particular caution when offering an IFA to multiple employees, he says.

"When you have these group applications, employers need to be very careful that they're not just trying to cut their costs, because an IFA is not designed for that - an IFA is designed for true, genuine benefit to an individual."

For this reason, it is essential that employers assess each agreement on a case-by-case basis, giving careful consideration to every employee's individual circumstances and rejecting any proposals that disadvantage the worker.

"However, they would need to be very careful, if they've approved them for other employees in similar circumstances, that their reasons for not approving them are not discriminatory," he adds.

## **Policies and education are fundamental**

Smith says employers with workers under modern awards and industrial agreements should educate staff about what IFAs are, in case they wish to make use of them, and implement "a very clear policy" to ensure a consistent approach among all supervisors and managers involved in negotiations.

"Without them truly understanding, our experience shows rolling out a policy won't necessarily control the way supervisors and managers use them. It's a high-risk situation with the penalties that exist under the legislation [so] policies and education of those people is fundamental."

Policies should spell out when an IFA can be entered into (for example, it can't be a condition of employment), its purpose, and the obligations of both the employer and employee, he says.

To further guard against risk, they should also require the employee who is agreeing to the IFA to record why they will be better off.

Because personal circumstances change, Smith says employers should go back to the employee at least once a year to confirm the benefits that caused them to enter into the arrangement still apply.

"I think there'll be a lot of employers... at risk of the IFA not providing the benefits that they think they're providing," he says.

It's also important to avoid taking advantage of workers who speak English as a second language or lack knowledge of their workplace rights, Smith says.

Another trap is presenting ultimatums. In a recent case, an employer told workers that if they didn't sign up to an IFA, it would no longer be able to offer them shifts that were previously available.

Such an approach is unlawful because employers must not offer IFAs on a conditional basis, or coerce workers into acceptance. It could also result in an adverse action claim because an employee's ability to accept or reject an IFA without penalty is a workplace right, he says.