

ANNUAL LEAVE IN ADVANCE - MODEL CLAUSE

26.5 Annual leave in advance

- (a) An employer and employee may agree in writing to the employee taking a period of paid annual leave before the employee has accrued an entitlement to the leave.
- (b) An agreement must:
 - (i) state the amount of leave to be taken in advance and the date on which the leave is to commence; and
 - (ii) be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

Note: An example of the type of agreement required by clause 26.5 is set out at Schedule F. There is no requirement to use the form of agreement set out at Schedule F.

- (c) The employer must keep a copy of any agreement under clause 26.5 as an employee record.
- (d) If, on the termination of the employee's employment, the employee has not accrued an entitlement to all of a period of paid annual leave already taken in accordance with an agreement under clause 26.5, the employer may deduct from any money due to the employee on termination an amount equal to the amount that was paid to the employee in respect of any part of the period of annual leave taken in advance to which an entitlement has not been accrued.

CASHING OUT OF ANNUAL LEAVE - MODEL CLAUSE

26.6 Cashing out of annual leave

- (a) Paid annual leave must not be cashed out except in accordance with an agreement under clause 26.6.
- (b) Each cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under clause 26.6.
- (c) An employer and an employee may agree in writing to the cashing out of a particular amount of accrued paid annual leave by the employee.
- (d) An agreement under clause 26.6 must state:
 - (i) the amount of leave to be cashed out and the payment to be made to the employee for it; and
 - (ii) the date on which the payment is to be made.
- (e) An agreement under clause 26.6 must be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.
- (f) The payment must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made.
- (g) An agreement must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.
- (h) The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is 2 weeks.
- (i) The employer must keep a copy of any agreement under clause 26.6 as an employee record.

Note 1: Under section 344 of the Fair Work Act, an employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause 26.6.

Note 2: Under section 345(1) of the Fair Work Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 26.6.

Note 3: An example of the type of agreement required by clause 26.6 is set out at Schedule G. There is no requirement to use the form of agreement set out at Schedule G.

EXCESSIVE LEAVE ACCRUALS - MODEL CLAUSE

26.7 Excessive leave accruals: general provision

Note: Clauses 26.7 to 26.9 contain provisions, additional to the National Employment Standards, about the taking of paid annual leave as a way of dealing with the accrual of excessive paid annual leave. See Part 2.2, Division 6 of the Fair Work Act.

- (a) An employee has an **excessive leave accrual** if the employee has accrued more than 8 weeks' paid annual leave (or 10 weeks' paid annual leave for a shiftworker, as defined by clause 26.1(b)).
- (b) If an employee has an excessive leave accrual, the employer or the employee may seek to confer with the other and genuinely try to reach agreement on how to reduce or eliminate the excessive leave accrual.
- (c) Clause 26.8 sets out how an employer may direct an employee who has an excessive leave accrual to take paid annual leave.
- (d) Clause 26.9 sets out how an employee who has an excessive leave accrual may require an employer to grant paid annual leave requested by the employee.

5. By inserting clause 26.8 as follows:

26.8 Excessive leave accruals: direction by employer that leave be taken

- (a) If an employer has genuinely tried to reach agreement with an employee under clause 26.7(b) but agreement is not reached (including because the employee refuses to confer), the employer may direct the employee in writing to take one or more periods of paid annual leave.

- (b) However, a direction by the employer under paragraph (a):
- (i) is of no effect if it would result at any time in the employee's remaining accrued entitlement to paid annual leave being less than 6 weeks when any other paid annual leave arrangements (whether made under clause 26.7, 26.8 or 26.9 or otherwise agreed by the employer and employee) are taken into account; and
 - (ii) must not require the employee to take any period of paid annual leave of less than one week; and
 - (iii) must not require the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the direction is given; and
 - (iv) must not be inconsistent with any leave arrangement agreed by the employer and employee.
- (c) The employee must take paid annual leave in accordance with a direction under paragraph (a) that is in effect.
- (d) An employee to whom a direction has been given under paragraph (a) may request to take a period of paid annual leave as if the direction had not been given.

Note 1: Paid annual leave arising from a request mentioned in paragraph (d) may result in the direction ceasing to have effect. See clause 26.8(b)(i).

Note 2: Under section 88(2) of the Fair Work Act, the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

6. By inserting clause 26.9 as follows:

26.9 Excessive leave accruals: request by employee for leave

- (a) Clause 26.9 comes into operation from 29 July 2017.
- (b) If an employee has genuinely tried to reach agreement with an employer under clause 26.7(b) but agreement is not reached (including because the employer refuses to confer), the employee may give a written notice to the employer requesting to take one or more periods of paid annual leave.
- (c) However, an employee may only give a notice to the employer under paragraph (b) if:
- (i) the employee has had an excessive leave accrual for more than 6 months at the time of giving the notice; and

- (ii) the employee has not been given a direction under clause 26.8(a) that, when any other paid annual leave arrangements (whether made under clause 26.7, 26.8 or 26.9 or otherwise agreed by the employer and employee) are taken into account, would eliminate the employee's excessive leave accrual.
- (d) A notice given by an employee under paragraph (b) must not:
 - (i) if granted, result in the employee's remaining accrued entitlement to paid annual leave being at any time less than 6 weeks when any other paid annual leave arrangements (whether made under clause 26.7, 26.8 or 26.9 or otherwise agreed by the employer and employee) are taken into account; or
 - (ii) provide for the employee to take any period of paid annual leave of less than one week; or
 - (iii) provide for the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the notice is given; or
 - (iv) be inconsistent with any leave arrangement agreed by the employer and employee.
- (e) An employee is not entitled to request by a notice under paragraph (b) more than 4 weeks' paid annual leave (or 5 weeks' paid annual leave for a shiftworker, as defined by clause 26.1(b)) in any period of 12 months.
- (f) The employer must grant paid annual leave requested by a notice under paragraph (b).

ANNUAL LEAVE CLAUSE VARIATIONS IN MARITIME AWARDS

Award	'Cashing out' model clause	'Leave in advance' model clause	'Excessive leave' model clause
Marine Towage Award 2010	✓ Will be inserted. Draft determination to issue shortly	✓ Will be inserted. Draft determination to issue shortly	Will not be inserted
Maritime Offshore Oil and Gas Award 2010	✓ Will be inserted. Draft determination to issue shortly	✓ Will be inserted. Draft determination to issue shortly	Will not be inserted
Seagoing Industry Award 2010	✓ Will be inserted. Draft determination to issue shortly	✓ Will be inserted. Draft determination to issue shortly	Will not be inserted
Professional Diving Industry (Industrial) Award 2010	✓ Will be inserted. Draft determination to issue shortly	✓ Will be inserted. Draft determination to issue shortly	The Full Bench won't deal with this clause until this award has been reviewed as part of the "award" stage of the modern award review.
Dredging Industry Award 2010	✓ Will be inserted. Draft determination to issue shortly	✓ Will be inserted. Draft determination to issue shortly	✓ Will be inserted. Draft determination to issue shortly
Ports, Harbours and Enclosed Water Vessels Award 2010	✓ Will be inserted. Draft determination to issue shortly	✓ Will be inserted. Draft determination to issue shortly	<div style="text-align: center;">✓</div> <div>Will be inserted. Draft determination to issue shortly.</div> <div>Existing clause 22.4 of this award will also be deleted which requires annual leave to be taken within six months of it accruing and allows an employer to require an employee to take annual leave with 14 days' notice.</div>