Employee entitlements and protections

Legal information for community organisations

This fact sheet covers:

- employee entitlements under the *Fair Work Act 2009*
- national employment standards under the *Fair Work Act 2009*
- industrial instruments, and
- general protections and 'adverse action' under the *Fair Work Act 2009* including workplace rights, industrial activities and sham contracting arrangements

Not-for-profit organisations are bound by the same employment laws as any other employer.

Meeting the legal entitlements of your employees is vital – your organisation is breaking the law if it doesn't meet these obligations, and your organisation's success and development often hinges on your employees.

This fact sheet provides an outline of common employee entitlements.

Disclaimer

This fact sheet provides information on common employee entitlements. This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to the full disclaimer that applies to this fact sheet.

The employment arrangement

To avoid confusion and ambiguity, an employment arrangement should be formalised in a written employment contract at the beginning of the employment relationship.

This contract should clarify whether the employee is a full-time, part-time or casual employee and whether they are engaged on a maximum term or permanent basis.

In addition, the appropriate Fair Work Information Statement should be provided before the start of the employment relationship. This will be the:

- Fair Work Information Statement
- Casual Employment Information Statement, or
- from 6 December 2023, Fixed Term Contract Information Statement

While an employment contract is the basis of the terms of an employment relationship, these terms are subject to:

- certain minimum standards set out by the National Employment Standards found in the *Fair Work Act 2009* (Cth) (**Fair Work Act**), and
- any applicable modern award or enterprise agreement under the Fair Work Act

More information

See the Fair Work Ombudsman website for information on hiring employees, including information on getting your employment contracts right.

Note – changes to fixed-term contracts from 6 December 2023

Changes to the Fair Work Act from 6 December 2023 will limit both the length and number of fixed term contracts an employer may offer to an employee to perform essentially the same work.

For more information about these changes, see the Department of Employment and Workplace Relations fact sheet 'Limiting the use of fixed-term contracts'.

The National Employment Standards

All employees are entitled to 11 minimum standards of employment. These minimum standards are set out in the Fair Work Act and called the National Employment Standards (**NES**).

All employers must comply with the NES. A monetary penalty can apply to employers that don't comply with the NES. The Fair Work Ombudsman has the power to investigate suspected non-compliance.

Each of the 11 minimum standards is summarised below.

More information

See the Fair Work Ombudsman website for more information on the National Employment Standards.

NES 1 – maximum ordinary weekly hours of work

An employer can't request or require an employee to work more than their ordinary hours each week (for full-time employees, this is 38 hours) unless the additional hours are reasonable.

An employee may refuse to work additional hours if they are unreasonable.

In determining whether additional hours are reasonable or unreasonable, factors that must be taken into account include:

- any risk to the employee's health and safety from working the additional hours
- the employee's personal circumstances, including family responsibilities
- the needs of the workplace

- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or is paid a level of remuneration that reflects an expectation of working additional hours
- if notice has been given by the employer of a request or requirement to work the additional hours
- if notice has been given by the employee of their intention to refuse to work the additional hours
- the usual patterns of work in the industry, or the part of an industry, in which the employee works
- the nature of the employee's role, and the employee's level of responsibility
- whether the additional hours are in accordance with averaging terms included in a modern award or enterprise agreement that applies to the employee, or an averaging arrangement agreed to by an employer and an award or agreement-free employee, and
- any other relevant matter

Example

It may not be reasonable to ask an employee to work additional hours if they need to pick up their children from school immediately after their usual finishing time. However, it may be reasonable to ask this employee to work additional hours if they are given adequate notice of the request (so they could arrange for someone else to pick up their children) and this was a one-off request.

NES 2 – requests for flexible working arrangements

Making a request

An employee may request a change in working arrangements to assist them if the employee:

- is the parent, or has responsibility for the care, of a child who is school aged or younger
- is a carer (under the *Carer Recognition Act 2010* (Cth))
- has a disability
- is 55 years or older
- is experiencing family or domestic violence, or a member of their immediate family or household requires care or support because they are experiencing family or domestic violence, or
- (from 6 June 2023) is pregnant

The employee must have completed at least 12 months of continuous service at the workplace before they can make this request.

To satisfy the service requirement, casual employees must be employed regularly and systematically for at least 12 months with a reasonable expectation that they will continue working regularly and systematically.

The employee must make the request in writing, outline the nature of the change they are seeking and the reasons for this change.

An employer must provide a written response within 21 days of receiving the request.

The request may only be refused on ‘reasonable business grounds’.

What are 'reasonable business grounds'?

'Reasonable business grounds' can include where the employer suspects the request will:

- have a negative financial impact, or a negative impact on efficiency, productivity or customer service of the organisation
- have a negative impact on the working arrangements of other employees, or
- make it difficult to recruit new employees

Refusing a request

From 6 June 2023, before refusing a request, an employer must first:

- discuss the request with their employee
- genuinely try to reach an agreement, and
- have regard to the consequences for the employee if changes in working arrangements aren't made

If the request is refused, an employer must in their written response:

- include details of the reasons for the refusal
- set out the business grounds for refusing the request and explain how those grounds apply to the request
- outline changes they are willing to make to accommodate the employee's circumstances, or state that there are no such changes, and
- outline Fair Work Commission dispute and arbitration options

Examples

Anna has asked her employer if she can work from home because her disability makes it hard for her to travel to the office. Anna has worked for her employer for 12 months and has made this request in writing outlining the change she is seeking. Anna can make this request because her request relates to her disability **and** she has met the requirements of putting the request in writing and having at least 12 months' service.

James wants to change his hours from 9am to 5pm to 8am to 4pm so he can pick up his son from childcare. James has been with his employer for more than 12 months so decides to request flexible working arrangements to help him care for his son. His employer considers the request but is unable to agree as James would miss an important meeting on Fridays. Instead of refusing the request, James' employer discusses it with him. They agree to an arrangement that James will work 8am to 4pm four days a week and 9am to 5pm on Friday so that he can attend the meeting. James' employer gives him a written response, setting out details of the reasons for the refusal of the initial request, as well as a statement of the revised agreed arrangements.

More information

For more information, see the Department of Employment and Workplace Relations fact sheet 'Right to request flexible work arrangements'.

NES 3 – offers and requests to convert from casual to permanent employment

The NES provides for casual employees to access a pathway to become a permanent employee. This is known as 'casual conversion'.

Employers must offer casual employees who have worked for them for 12 months the option to convert to full-time or part-time permanent employment in writing within 21 days after the employee's 12-month anniversary.

While small businesses are exempt from the requirement to make this offer, all eligible casual employees can request to convert to permanent employment irrespective of the size of their employer.

An eligible casual employee working for a small business employer can request to convert to permanent employment at any time on or after their 12-month anniversary. Other eligible casual employees can request to convert to permanent employment from 21 days after their 12 month anniversary.

When the employee is eligible to request casual conversion	To be eligible to request casual conversion, the employee: • must have been employed for at least 12 months • must have worked a regular pattern of hours on an ongoing basis for at least the last six months, and • could continue working these hours as a full-time or part-time employee without significant changes
When the employee is not eligible to request casual conversion	An employee will **not** be eligible to request casual conversion if, in the last six months: • they refused an offer from their employer to convert to permanent employment • their employer has told them in writing that they won't be making an offer because there was a reasonable ground to not make an offer • their employer has refused another request for casual conversion because there was reasonable grounds to do so

Employers must respond to a request within 21 days.

Refusing a request	Before refusing a request, an employer must discuss the request with the employee and then decide if there are reasonable grounds to refuse. The employer must provide a written response outlining reasons for the refusal to the employee. Reasonable grounds for refusing a request for casual conversion include: • in the next 12 months the employee's position will not exist • in the next 12 months the employee's hours of work will significantly reduce • in the next 12 months the employee's days or time of work will significantly change, and that can't be accommodated within the employee's available days or times for work • making the offer would not comply with the recruitment or selection process required by law • the employer would have to make a significant adjustment to the employee's work hours for them to be employed full-time or part-time

An employer cannot change an employee's hours of work or terminate their employment to avoid having to offer or accept a request for casual conversion.

More information

See the Fair Work Ombudsman website for more information, including a checklist and template letter for responding to casual conversion requests.

NES 4 – parental leave

Unpaid parental leave

Permanent employees are entitled to 12 months of unpaid parental leave in relation to the birth or adoption of a child (under 16) if they have, or will have, responsibility for the care of the child.

To be eligible for this leave, the employee must have completed at least 12 months of continuous service at the workplace by the date of birth or adoption of the child or when the leave starts (after another person cares for the child or takes parental leave) before they can make this request.

Casual employees are also eligible for parental leave if they have been employed by their employer for at least 12 months on a regular and systematic basis and there is a reasonable expectation they will continue work on a regular basis, had it not been for the birth or adoption of a child.

Parental leave must be taken in one continuous period. The only exception to this is where a couple (where both people are employed and covered by the Fair Work Act) are entitled to take up to eight weeks unpaid parental leave at the same time provided that:

- the concurrent leave period doesn't start before the date of birth of the child or day of placement of the child (unless otherwise agreed by the employer), and
- the concurrent leave may be taken in separate periods however each period must be at least two weeks (unless otherwise agreed by the employer)

Caution

When temporarily replacing the person on parental leave, you must notify the replacement employee that the position is temporary.

An employee may request an extension of unpaid parental leave for a further period of up to 12 months, (provided their partner has not already taken 12 months of leave). The employer must provide a written response to the request within 21 days and may refuse the request only on reasonable business grounds. If the employer refuses the request, they must provide the employee with a written response setting out similar information to when responding to a request for flexible working.

If the employer refuses the request, they must first have discussed the request with the employee and make a genuine attempt to reach an agreement.

The Fair Work Act contains a 'return to work guarantee' for employees returning from parental leave, which means they must be placed in their pre-parental leave position or, if that position no longer exists, an available position for which the employee is qualified and suited nearest in status and pay to their old position. However, if no role exists that is similar in status and pay, there is no obligation on an employer to create a role.

More information

For more information, see the Department of Employment and Workplace Relations fact sheet 'Unpaid parent leave'.

Parental Leave Pay

Primary carers are currently entitled to 18 weeks of Parental Leave Pay, a federal government benefit, at the rate of the National Minimum Wage. The Department of Human Services facilitates this payment on application by the employee.

Note – changes to Parental Leave Pay from 1 July 2023

The entitlement to Parental Leave Pay will increase from 18 weeks to 20 weeks and claimants will also be able to accept the payment in multiple blocks, (as small as a day at a time).

In addition, the notion of 'primary', 'secondary' and 'tertiary' claimants and the requirement that the primary claimants of parental leave pay must be the birth parent will be removed so that families can decide who will claim first and how they will share the entitlement.

More information

See the Services Australia website for more information on the Parental Leave Pay scheme.

NES 5 – annual leave

Employees (other than casual employees) are entitled to four weeks of paid annual leave for each year of service. Some shift workers are entitled to five weeks. Annual leave accrues progressively throughout the year and accumulates from year to year if the leave is unused. It also accumulates during paid leave, community service leave and long service leave, but not during periods of unpaid leave.

The employee is to be paid their base rate of pay while on annual leave (be aware that some modern awards provide that leave loading may also need to be paid). If the employment ends, the employer must pay the employee what they would have received if they had taken annual leave while remaining employed.

An employee may cash out annual leave (ie. have the value of the leave paid out to them rather than take it) in certain circumstances, however an employee must leave four weeks leave in their balance. Modern awards and enterprise agreements may also contain additional conditions for cashing out annual leave, limiting the amount of annual leave an employee can cash out in a 12 month period and creating a requirement to put these requests in writing.

If an employee is not covered by a modern award or an enterprise agreement, the employer may be able to direct them to take annual leave if the direction is reasonable (for example, a December/January shutdown period). For award-covered employees, there provisions in each award addressing when employees can be directed to take leave.

Note

Annual leave must be taken by agreement between the employer and the employee. However, an employer must not unreasonably refuse to agree to a request to take annual leave.

NES 6 – personal/carers leave, compassionate leave and unpaid family and domestic violence leave

Personal/carer's and compassionate leave is the consolidation of what was previously known as 'carer's leave' and 'sick leave'.

Full-time employees are entitled to 10 days of paid personal/carer's leave each year and part-time employees are entitled to this leave on a pro-rata basis Casual employees are not entitled to paid personal/carer's leave.

This leave accrues progressively throughout the year and accumulates year on year if the leave is unused. Personal/carer's leave is normally not paid out to an employee on termination of employment.

Personal/carer's leave can be taken:

- if the employee is unable to work because of a personal illness or injury, or
- to care or support a member of the employee's immediate family or household member who requires care or support because of personal illness or injury or an unexpected emergency

When taking this leave, the employee generally must give the employer:

- notice of the taking of leave as soon as practicable (which may be after the leave has commenced)
- the expected length of the leave, and
- evidence of the reason for the leave (for example, a medical certificate or statutory declaration)

Personal/carer's leave can generally not be cashed out unless this is expressly permitted by a modern award or and enterprise agreement.

Employees are also entitled to:

- two days of paid compassionate leave when an immediate family or household member gets an injury or illness that threatens their life, or dies, (casual employees are entitled to two days of unpaid leave in these circumstances), and
- two days of unpaid carer's leave (if all their paid carer's leave has been used, or if they are a casual employee) when an immediate family or household member requires care or support because of personal illness or injury or an unexpected emergency

Note – family and domestic violence leave

From 1 February 2023, all employees of non-small business employers (employing 15 or more people) are entitled to 10 days of paid family and domestic violence leave each year, with the full entitlement available from the start of employment.

From 1 August 2023, all employees of small business employers (employing less than 15 people) are entitled to 10 days of paid family and domestic violence leave each year. Until then, these employees are entitled to five days of unpaid family and domestic violence leave.

NES 7 – community service leave

Employees who engage in eligible community service activities are entitled to be absent from work in certain circumstances.

Eligible community services activities means:

- jury service (including attendance for jury selection), or
- a 'voluntary emergency management activity' where:
  - the activity deals with an emergency or natural disaster

- the employee engages in the activity on a voluntary basis as a member of, or has a member-like association with, a 'recognised emergency management body', and
- the body requests the employee to engage in the activity

Recognised emergency management bodies include the State Emergency Service (**SES**), Country Fire Authority (**CFA**), and the RSPCA (in respect of animal rescue during emergencies or natural disasters)

The period of leave includes reasonable travel and rest time.

Employees must provide reasonable notice and evidence for each period of leave and the leave must be 'reasonable in all the circumstances'. The notice must be given as soon as practicable (which may be after the absence has started) and advise the employer of the expected period of absence.

For jury service only, an employer must pay an employee their base rate of pay, minus any jury service pay received by the employee, for their ordinary hours of work for the first 10 days only. All other community service leave is unpaid.

State and territory laws also apply to employees where they provide more beneficial entitlements than those guaranteed in the NES (for example, payment beyond the first 10 days of jury duty or payment for casual employees during jury duty).

More information

See the Fair Work Ombudsman website for more information on state and territory laws regarding jury duty.

NES 8 – long service leave

Entitlements to long service leave arise from state and territory laws (except for long service leave entitlements in relation to awards that existed before 1 January 2010).

More information

The long service laws for the states and territories are set out in the following acts:

- *Long Service Leave Act 2018* (Vic)
- *Long Service Leave Act 1955* (NSW)
- *Industrial Relations Act 2016* (Qld)
- *Long Service Leave Act 1958* (WA)
- *Long Service Leave Act 1987* (SA)
- *Long Service Leave Act 1981* (NT)
- *Long Service Leave Act 1976* (ACT)
- *Long Service Leave Act 1976* (Tas)

Example

In NSW, the *Long Service Leave Act 1955* (NSW) provides for two months paid leave after 10 years' service.

NES 9 – public holidays

An employee is entitled to be absent from work on public holidays.

An employer can ask an employee to work on a public holiday if the request is reasonable. The employee may refuse the request to work if:

- the request is not reasonable, or
- the employee's refusal is reasonable

Employees must be paid at their base rate of pay if they are absent from work on a public holiday and would have otherwise been required to work but for the public holiday.

Note – reasonable request

The following must be considered when deciding if a request or refusal is reasonable:

- the employee's personal circumstances
- the employer's operational requirements, and
- whether the level of remuneration reflects an expectation to work on a public holiday

NES 10 – notice of termination and redundancy pay

Notice of termination

An employer who terminates the employment of an employee (other than a casual employee) must provide the employee with a written notice of termination stating the employee's last day of employment.

The minimum period of notice that must be given under the law depends on the length of the employee's continuous service with the employer. This notice is calculated from the end of the day the notice is given.

The table below sets out the legal requirements for how much notice is required. Note, however, that a contract or policy of the employer may prescribe a greater notice period. In this event, the employee is entitled to receive the more beneficial entitlement (ie. the longer notice period).

Employers can either provide employees with the notice and require them to work for the duration of the notice period or can make a payment to the employee equivalent to what the employee would have received had they worked the notice period (known as 'payment in lieu').

Period of continuous service	Period of notice
Not more than one year	one week
More than one year but not more than three years	two weeks
More than three years but not more than five years	three weeks
More than five years	four weeks

The period of notice is increased by one week if the employee is over 45 years old and has completed at least two years of continuous service.

Employees terminated during a probationary period are entitled to notice of one week as per the above table. However, a contract of employment may specify a greater notice period than this.

In certain circumstances (such as where the employee is terminated for serious misconduct), the employer will not need to give notice of termination or provide payment in lieu of notice.

Note

The Fair Work Commission describes ‘serious misconduct as when an employee:

- causes serious and imminent risk to the health and safety of another person or to the reputation or profits of their employer’s business
- theft, fraud, assault, sexual harassment, or
- deliberately behaves in a way that is inconsistent with continuing their employment

Examples of serious misconduct include theft, fraud, assault, or refusing to carry out a lawful and reasonable instruction that is part of the job.

Redundancy

An employee will be entitled to redundancy pay if their employment is terminated:

- because the employer no longer requires their job to be done by anyone, or
- because of the insolvency or bankruptcy of the employer

The amount of redundancy pay payable is based on the length of the employee's continuous service with the employer at the time of termination.

Amount of service	Redundancy pay
At least one year but less than two years	four weeks
At least two years but less than three years	six weeks
At least three years but less than four years	seven weeks
At least four years but less than five years	eight weeks
At least five years but less than six years	10 weeks
At least six years but less than seven years	11 weeks
At least seven years but less than eight years	13 weeks
At least eight years but less than nine years	14 weeks
At least nine years but less than 10 years	16 weeks
At least 10 years	12 weeks

An employer will not have to pay redundancy pay in certain circumstances including where:

- the employee is a casual employee
- the employee is engaged for a ‘fixed term’ of employment
- the employee has less than 12 months of service
- the employer is a small business employer (see Note below)
- the employment is terminated for serious misconduct
- there is a transfer of employment from one employer to another (unless the new employer refuses to recognise the employee’s prior period of service), or
- the employee is an apprentice

If the employer obtains other acceptable employment for the employee or can't pay the redundancy amount, the employer can apply to the Fair Work Commission for the redundancy pay to be reduced. The Fair Work Commission may reduce the amount if it considers it appropriate.

Note – small business

A small business employer is one which employs fewer than 15 employees at the time the notice of redundancy is provided. This involves a simple headcount of employees, including the employee to be dismissed, but doesn't include casual employees (unless they are employed on a regular and systematic basis). Refer to the Fair Work Ombudsman's best practice guide for small business owners and managers.

NES 11 – Fair Work Information Statement and the Casual Employment Information Statement

A Fair Work Information Statement contains information about the NES and the rights and entitlements of employees.

An employer must give each employee a Fair Work Information Statement before, or as soon as is reasonably practicable after, the employee starts employment. The statement can be provided in person, by post, fax or email, or by providing a link to the relevant page of the Fair Work website.

The statement includes information on:

- the National Employment Standards
- the right to request flexible working arrangements
- modern awards
- making agreements under the Fair Work Act
- individual flexibility arrangements
- freedom of association and workplace rights (general protections)
- termination of employment
- right of entry, and
- the role of the Fair Work Ombudsman and the Fair Work Commission

Note

An employer must give every new casual employee a Casual Employment Information Statement (**CEIS**) before, or as soon as possible after, they start their new job.

From 6 December 2023, fixed term employees must be provided with a new Fixed Term Employment Information Statement.

Industrial instruments

What legal entitlements are our employees entitled to (apart from the NES)?

In addition to the NES, employees have other legal entitlements which come from industrial instruments.

The industrial instrument may be the relevant modern award or enterprise agreement, or a determination of the Fair Work Commission.

These entitlements add to the NES for that particular kind of employee or industry.

For example, while the NES sets out the right of an employee to be absent on a public holiday, a modern award may add to this by stating if an employee works on the public

Modern awards	Modern awards set out minimum employment entitlements for employees in particular industries or occupations. The entitlements in modern awards apply on top of the minimum conditions in the NES. Employers must identify which modern awards apply to their employees, if any, and ensure they comply with these. Some employees are award free.
Enterprise agreements	Enterprise agreements are created through negotiation between an employer and employees collectively – often with involvement from a union. Not all employees will have an enterprise agreement in place with their employer. Enterprise agreements can't exclude the minimum conditions in the NES or provide terms and conditions less beneficial than an employee would receive had the modern award applied to their employment. Usually, but not always, when an enterprise agreement is in place the modern award will not apply.

In addition to any monetary entitlements under a relevant modern award or enterprise agreement, an employee may be entitled to **non-monetary entitlements**. For example, an employee may be entitled to meal breaks at certain times or to receive certain information at the start of their employment.

An employer should make sure they are familiar with any modern award or enterprise agreement that applies to their employees and ensure they provide entitlements that are consistent with this.

More information

If you're not sure whether an award, agreement or determination applies to your new employee, or for more information, go to the Fair Work Commission website.

You might also like to contact a peak body for employers, like Jobs Australia, to check that you are meeting your obligations.

For more information, see:

- our fact sheet on modern awards and enterprise agreements, and
- the Department of Employment and Workplace Relations fact sheets on bargaining and workplace relations

Probationary period

A probationary period can be set by your organisation in the employment contract. It is typically between three and six months in length, but can be up to 12 months if the employer is a small business.

During this period, the employee has the same entitlements as those who are not on their probationary period.

More information

For more information on the employee's entitlements during their probationary period, see the Fair Work Ombudsman website.

Surveillance

In some states and territories, an employee is entitled to notice that your organisation may conduct computer, camera or tracking surveillance in the workplace.

More information

For more information on workplace surveillance visit the Australian Law Reform Commission website and the Office of the Australian Information Commission website.

Note

There are additional entitlements for employees working in Australia under a temporary work visa (subclass 457). For more information about these entitlements, go to the Fair Work Ombudsman's website.

General protections and adverse action

What general protections are our employees entitled to (apart from the NES)?

Under the Fair Work Act, 'general protections' provisions contain protections for employers, employees, prospective employees and independent contractors relating to:

- workplace rights and the exercise of those rights
- freedom of association and involvement in lawful industrial activities
- being free from undue influence or pressure in negotiating individual arrangements
- discrimination, and
- sham arrangements (for instance, where employment is misrepresented as an independent contracting arrangement)

See below for further information on sham arrangements.

Caution

As an employer, you need to make sure you comply with the general protections provisions. If you don't, the courts can make orders against you (such as penalties and the payment of compensation for loss suffered by the contravention).

What is ‘adverse action’?

Many of the general protections provisions make it unlawful to take certain steps, or take adverse action, against an employee or prospective employee because they have a workplace right.

Adverse action includes the following:

- dismissing an employee
- injuring an employee in their employment (for example, standing them down without pay)
- altering the position of an employee to the employee’s disadvantage
- discriminating between an employee and other employees
- offering a potential employee different (and unfair) terms and conditions for the job, compared to other employees, or
- refusing to employ a prospective employee

It’s also possible for not-for-profit organisations to engage in adverse action against independent contractors (who are working for them) if they do things like:

- terminate the contract for services, or
- refuse to hire an independent contractor for a prohibited reason

A prohibited reason can be having or using a workplace right, belonging or not belonging to a union, taking or not taking part in industrial activity or having a protected attribute (for example, a disability).

Employees that want to allege adverse action in a dismissal dispute must do so in the Fair Work Commission within 21 days of the alleged action. Allegations that don’t involve an employee being dismissed can be lodged by employees, contractors and prospective employees up to six years from the day the alleged contravention occurred.

If a person alleges in the Fair Work Commission that adverse action has been taken against them by their employer for a prohibited reason, a ‘reverse onus’ applies. This means that the employer must prove to the Fair Work Commission that the action was not taken for the prohibited reason alleged.

Example

If a prospective employee alleges they were unsuccessful in obtaining employment because of their disability (or other prohibited reason) the employer must show that the job was not offered to the prospective employee because of some other legitimate reason.

Employees and, in some instances, independent contractors, have workplace rights under the Fair Work Act.

What are ‘workplace rights’?

A workplace right is:

- being entitled to the benefit of an enterprise agreement or modern award (if the person is covered by one or the other)
- having a role or responsibility under a workplace law (such as being an employee representative or occupational health and safety representative elected under an enterprise agreement)
- being able to take court proceedings against their employer (for instance, for discriminating against them or failing to pay them their correct wage)
- taking certain steps to attempt to reach agreement with their employer on an enterprise agreement (for instance, taking protected industrial action), and
- being able to make complaints under workplace laws (such as making complaints under work health and safety legislation)

Example

Where an employee raises a complaint with a manager about safety conditions at work (exercising a workplace right), it’s unlawful for the employer to respond in a way that is detrimental to the employee, for example by reducing their number of shifts, demoting them, dismissing them or even excluding them from team activities.

The general protections provisions make it unlawful for an employer to:

- take adverse action against an employee or an independent contractor
  - because they have a workplace right
  - because they have exercised or have not exercised a workplace right, or
  - to prevent them from exercising a workplace right,
- coerce an employee or independent contractor to exercise or not exercise a workplace right (or exercise it in a particular way)
- exert undue influence or pressure to enter into arrangements under the Fair Work Act, or
- make false or misleading statements or representations about the workplace rights of others, or the effect of a workplace right

Example

A community organisation may not comply with the general protections provisions if they demote an employee because the employee has made a complaint to Safe Work Australia, or refuse to hire a person because they are a member of a union.

Sexual harassment

The Fair Work Act prohibits sexual harassment connected to work, including in the workplace. It covers workers, future workers and people conducting a business or undertaking (self-employed people or sole traders).

A person or company may be liable for sexual harassment committed by an employee or agent in connection with work unless they can prove that they took all reasonable steps to prevent the sexual harassment. The onus is on the employer to provide that it took all reasonable steps.

What is sexual harassment?

Sexual harassment is:

an unwelcome sexual advance or request for sexual favours to the person who is harassed, or

other unwelcome conduct of a sexual nature in relation to the person who is harassed

More information

For more information, see the Department of Employment and Workplace Relations fact sheet 'Prohibiting sexual harassment in the Fair Work Act'.

Freedom of association and involvement in lawful industrial activities

Employees are free to either, join a union (and undertake lawful activities on behalf of the union), or not join a union.

Note

If your community organisation is required to make redundancies, the individual redundancies must be genuine and decisions must not be taken on the basis of, for example, a history of union activity or family responsibilities.

Protection of freedom of association

The general protection provisions make it unlawful for an employer or union to take adverse action against a person because:

- they are or are not a member of an industrial association (such as, a union)
- they participate or propose to participate in lawful industrial activity, or
- they don't participate or propose not to participate in industrial activity

More information

For more information, see our fact sheet on unions in the workplace.

Discrimination and 'adverse action'

Employers can't take adverse action against an employee or a prospective employee on the basis of their race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, place of birth or ancestry ('national extraction') or social origin.

In addition to the Fair Work Act, a number of equal opportunity laws at federal, state and territory level provide anti-discrimination protections for employees along with prohibiting harassment, victimisation, bullying and vilification in the workplace.

More information

For more information, see:

- our webpages on discrimination laws and work health and safety laws, and
- the Department of Employment and Workplace Relations fact sheet 'Strengthening protections against discrimination'

What are sham contracting arrangements?

A sham contracting arrangement is when an employer tries to disguise an employment relationship as an independent contracting arrangement.

An employer can't:

- represent to a person that is an employee (or a potential employee) that they are an independent contractor
- dismiss or threaten to dismiss an employee in order to engage them as an independent contractor to perform the same or substantially the same work , or
- make a knowingly false statement to persuade or influence an employee to become an independent contractor to perform the same, or substantially the same work

Caution

There are serious penalties, including fines, for sham contracting arrangements.

Fair Work may also apply to the Courts for injunctions to prevent an employer from dismissing an employee for the purpose of employing them as an independent contractor.

More information

Employees and independent contractors can request assistance from the Fair Work Ombudsman if they feel their rights have been contravened.