

Modern awards and enterprise agreements

Legal information for community organisations

This fact sheet covers:

- ▶ what governs employment relationships under the *Fair Work Act 2009*?
- ▶ what is a modern award?
- ▶ when does a modern award apply?
- ▶ what is an enterprise agreement?



Disclaimer

This fact sheet provides information on modern awards and enterprise agreements. 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.

An employment contract determines the terms of an employment relationship. However, these terms can be changed by a modern award or an enterprise agreement.

If an employment contract provides an entitlement that is less than an applicable modern award or enterprise agreement, the lesser provision does not have effect – the more beneficial entitlement applies to the employee.



Caution

Employers may be required to pay a monetary penalty for breaching a term of a modern award or enterprise agreement.

Employees can claim back pay for a period of up to six years, if they have not received their entitlements under a modern award or enterprise agreement.

Modern awards



What is a modern award?

Modern awards set out the minimum employment entitlements for employees in a particular industry or occupation.

Modern awards can't include entitlements that are less beneficial to employees than the minimum wage or National Employment Standards (**NES**). The NES are 11 minimum standards of employment that apply to all employers and employees covered by the *Fair Work Act 2009 (Cth)* (**Fair Work Act**).



More information

For more information on the NES, see our [fact sheet on employee entitlements](#).

There are approximately 122 modern awards that cover most occupations and industries in Australia.

Modern awards include terms concerning:

- the engagement of full-time, part-time and casual employees
- rosters and breaks
- minimum rates of pay
- penalty rates for overtime, shift work and weekend work
- leave, and
- allowances to be paid

When does a modern award apply?

A modern award applies to employees who work in the industry or occupation it covers. Each modern award includes specific coverage provisions.

The provisions of an award do not apply to 'High income employees' (those who earn more than \$162,000 as of 1 July 2022) if they have a contractual guarantee of annual earnings at or above this level.

If an employee is covered by an enterprise agreement, the modern award that would otherwise cover the employee will not apply (although some award terms may be incorporated into the enterprise agreement). If the enterprise agreement ends, the appropriate modern award will then apply.

It is not possible to contract out of modern award coverage.



Tip

Work out which modern award applies to their employees (if there isn't an enterprise agreement in place) and carefully review the modern award to check you comply with its terms and provide sufficient payments and benefits to your staff.

Finding the relevant modern award

To identify the modern award that covers your employees, you must consider the industry in which you operate, and the employee's job type and duties.



Tip

Check the 'coverage' clause (usually under section 4) of a modern award to see if it covers you and your employees. For example, the Social, Community, Home Care and Disability Services Industry Award 2010 says the award applies to employers in the social and community services sector (as well as other sectors) and applies to employees listed in the classifications found in the award..

How to find the relevant modern award

Modern awards list

To determine the Award that is most likely to apply to an employee in your organisation, based on either the industry you operate in or your employee's occupation, check the [alphabetical listing of Modern Awards on Fair Work Australia's website](#):

Common awards for NFPs are:

- Social, Community, Home Care and Disability Services Industry Award 2020 (the Social Award)
- Clerks - Private Sector Award 2020
- Miscellaneous Award 2020
- Registered and Licensed Clubs Award 2020

Check coverage clause

Once you have selected a Modern Award by industry or occupation, go to the 'Coverage' clause of the Award (usually around clause 4).

This clause sets out in detail the industry, employers and employees the Award covers.

If more than one award could apply?

Where more than one award could apply:

- contact the Fair Work Ombudsman for guidance on which award is the correct one for your employees. Call 13 13 94, or
- contact a lawyer for advice

Check classifications

Each award groups employees into certain 'classifications' by outlining the type of work they perform, their qualifications and managerial levels.

The Award then allocates each classification a minimum weekly wage and other benefits. For example, Schedule B of the Social Award sets out 8 classification levels - from level 1 (a clerical and/or support role), to level 8 (a managerial role) and allocates a different minimum wage for each of these 8 classifications.

Rates of pay

Once an employee's classification is determined this will guide you in determining their rates of pay and entitlements.

See the [Fair Work Ombudsman Pay Calculator tool](#)

Subscribe to updates

Subscribe to award updates to be notified of changes to the award (for example, pay rate increases) on the [Fair Work Ombudsman website](#).



More information

The [Fair Work Ombudsman](#) can also help you find the applicable modern award using its 'Find my award tool'. This tool allows searches by occupation and industry to help determine the applicable modern award.



Caution

There are both industry-based and occupational-based awards. This means that multiple awards may appear to cover your employees. For example, a call centre operator employed in the social and community services sector could potentially come under both the Clerks – Private Sector Award 2010 and the Social, Community, Home Care and Disability Services Industry Award 2010.

You must take care to determine which award is the most appropriate by comparing the coverage clauses (clause 4) of the awards to your employees' job type, duties and industry. Some awards may contain exclusions which indicate which award takes priority. If not, the correct award will be that which is most appropriate to the work performed by the employee and the environment in which the employee normally performs the work.

You may need help from a lawyer to determine this question.

Common awards for not-for-profit organisations:

Social, Community, Home Care and Disability Services Industry Award 2020

This award applies to employers and employees engaged in:

- the crisis assistance and the supported housing sector
- the social and community services sector; the home care sector, and
- the family day care scheme sector

Clerks - Private Sector Award 2020

This award applies to employers and employees in the private sector throughout Australia regarding employees engaged wholly or primarily in clerical work, including administrative duties of a clerical nature (for example, filing and photocopying, answering calls and attending a reception desk).

Miscellaneous Award 2020

This award applies to employees not covered by any other Modern Award, who are unskilled, semi-skilled or trade qualified, and not performing managerial or professional work. This award may also cover certain charities in limited circumstances.



Caution

Employees in the social and community services sector are subject to special pay arrangements. Visit the [Fair Work Ombudsman webpage on Social & community services industry pay rates](#) for more information.

Enterprise agreements



What is an enterprise agreement?

An enterprise agreement is an agreement made between one or more national system employers and their employees about the employment relationship between them and the terms and conditions of employment of those employees.

An enterprise agreement is normally negotiated and agreed between the employer and employees collectively, often with the assistance of a union, and must then be approved by the Fair Work Commission.

Specific terms must be included and excluded in an enterprise agreement. For example, a coverage term explaining who and what work is covered must be included, but unlawful terms cannot be included.

An enterprise agreement can't provide entitlements that are overall less beneficial than those provided by the modern award that would otherwise apply to the employees.

A modern award will not apply to an employee when an enterprise agreement applies to them. If the enterprise agreement is terminated and not replaced by a subsequent enterprise agreement, the appropriate modern award will then apply.

An enterprise agreement must not exclude the NES. To the extent that it does so, it will have no effect.



Example

The NES provides that employees (other than casual employees) are entitled to four weeks of paid annual leave (or five weeks in the case of shift workers).

If a term of an enterprise agreement provides that employees are only entitled to three weeks' paid annual leave, this term would not comply with the NES and would have no effect. The NES entitlement of four weeks' annual leave will automatically apply.

An enterprise agreement must also pass the Better Off Overall Test (**BOOT**) (discussed below) – this means the employees are better off under the enterprise agreement than under the relevant modern award.

How is an enterprise agreement made?

An enterprise agreement is made through collective bargaining between an employer (or employers) and employees. It can be a complex process because:

- employers must comply with a number of steps when negotiating an enterprise agreement with their employees, and
- there are certain terms that:
 - must be included
 - may be included, and
 - can't be included



More information

For more information on how an enterprise agreement is made, see the [Fair Work Ombudsman's fact sheet on enterprise bargaining](#).

Bargaining representatives

When negotiating an enterprise agreement, the parties will usually have bargaining representatives.

An employer will generally be their own bargaining representative. If employees are members of a union, the union will usually be the employees' bargaining representative. However, the employees can appoint anyone to be their bargaining representative (including themselves), so long as the representative complies with the Fair Work Act.

Bargaining process

Once bargaining has begun (because the employer has agreed to bargain or a Fair Work Commission order initiates bargaining), the employer must give employees a [Notice of Employee Representational Rights](#) within 14 days. You can download the template (which must be followed) on the [Fair Work Commission website](#).

All bargaining representatives must bargain in good faith and comply with the good faith bargaining requirements. These requirements include:

- attending and participating in meetings at reasonable times
- disclosing relevant information
- responding to proposals from other representatives in a timely manner
- giving genuine consideration to the proposals of other representatives, and
- refraining from 'capricious' or unfair conduct

As long as the bargaining representatives have bargained in good faith, they don't have to agree to the proposed agreement.

At any time (21 or more days after the Notice of Representational Rights is issued), an employer may put a proposed enterprise agreement to the vote. An agreement is made if 50% plus 1 of eligible employees vote on the agreement, and 50% plus 1 of the voters vote in support of the agreement.



Note – changes to the bargaining process

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* made changes to the Fair Work Act regarding the bargaining process.

For more information, see the [Department of Employment and Workplace Relations fact sheets on bargaining and workplace relations](#) including:

- [bargaining disputes](#)
- [cooperative workplaces bargaining stream](#)
- [initiating bargaining - single enterprise agreements](#)
- [simplifying enterprise agreement approval requirements](#)

Approval of the enterprise agreement by the Fair Work Commission – the Better Off Overall Test

Once a lawful enterprise agreement is reached, the Fair Work Commission must approve the enterprise agreement.

To approve an enterprise agreement, the Fair Work Commission must be satisfied:

- the employer has followed all the necessary steps
- the agreement is genuinely agreed to by the employees, and
- the agreement contains appropriate terms



Note – Statement of Principles on Genuine Agreement Instrument 2023

The Fair Work Commission must consider the [Statement of Principles on Genuine Agreement Instrument 2023](#) when determining whether an enterprise agreement has been genuinely agreed to by the employees. These principles provide guidance to employers about what they must do to ensure employees have genuinely agreed to the agreement.

Modern awards are used by the Fair Work Commission as the benchmark for assessing enterprise agreements before approval. The Fair Work Commission will apply the 'Better Off Overall Test' (BOOT).

The BOOT requires the Fair Work Commission to assess whether, globally, the employees are better off overall than if the relevant modern award applied to their employment. As a result employers must identify what modern award would apply to the employment relationship (if the enterprise agreement did not apply) and make sure the agreement will meet the BOOT. You can find the relevant award at '[Find an award](#)' on the [Fair Work Commission website](#).



More information

For more information see the Fair Work Commission webpages on the [application of the BOOT test](#) and the [approval process for enterprise agreements](#).



Note – changes to the Better Off Overall Test

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* made changes to the Fair Work Act that simplify the operation of the BOOT.

For more information, see the [Department of Employment and Workplace Relations fact sheet on the Better Off Overall Test](#).