Employee entitlements and protections

Legal information for community organisations

This fact sheet covers:

- employee entitlements under the Fair Work Act
- the National Employment Standards
- industrial instruments, and
- general protections and 'adverse action', including workplace rights, industrial activities, sham contracting arrangements, sexual harassment, discrimination, and the right to disconnect

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 general information about [insert]. This information is 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 temporary (fixed or maximum term) or permanent basis.

In addition, the employer must give the employee a copy of the Fair Work Information Statement before, or as soon as possible after, the start of the employment relationship. In addition, at the same time:

- a casual employee must be given a copy of the Casual Employment Information Statement, and
- an employee entering a fixed term contract must be given a copy of the 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 (**NES**) found in the *Fair Work Act 2009* (Cth) (**Fair Work Act**), and
- any applicable modern award or enterprise agreement under the Fair Work Act

See the Fair Work Ombudsman's webpage 'Hiring employees' for information on hiring employees, including information on getting your employment contracts right.

Note – changes to fixed term contracts

An employer must not enter into a contract of employment with an employee, or prospective employee, for an identifiable period longer than two years (including any extensions), or a contract which may be renewed or extended more than once. There are also restrictions on some consecutive contracts. Consecutive contracts cannot be used to extend the identifiable period beyond two years.

For more information, our fact sheet on fixed term contracts and the Fair Work Ombudsman's webpage 'Fixed term contract employees'.

The National Employment Standards

Most employees are entitled to 12 minimum standards of employment. Casual employees are only entitled to some of these entitlements. 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.

NES 1	Maximum weekly hours of work
NES 2	Requests for flexible working arrangements
NES 3	Employee choice about casual conversion
NES 4	Parental leave
NES 5	Annual leave
NES 6	Personal/carers leave, compassionate leave and paid family and domestic violence leave
NES 7	Community service leave
NES 8	Long service leave
NES 9	Public holidays
NES 10	Superannuation contributions
NES 11	Notice or termination and redundancy pay
NES 12	Information statements (Fair Work Information Statement, Casual Employment Information Statement, and Fixed Term Contract Information Statement)

Each of the 12 minimum standards is summarised below.

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

NES 1 – maximum 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.

Factors that must be considered in determining whether additional hours are reasonable or unreasonable 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.

Averaging of hours of work

Where an employee is award or enterprise agreement free, they may agree in writing to an **averaging arrangement** under which their hours of work over a specified period of not more than 26 weeks are averaged.

The average weekly hours over the specified period must not exceed 38 hours for a full-time employee or, for an employee who is not full-time, the lesser of 38 hours or the employee's weekly ordinary hours of work. The averaging arrangement may average higher weekly hours if the excess hours are reasonable.

A modern award or enterprise agreement may also include terms for averaging hours of work over a specified period. The average weekly hours over the period must not exceed 38 hours for a full-time employee, or, for an employee who is not full-time, the lesser of 38 hours or the employee's weekly ordinary hours of work.

NES 2 – requests for flexible working arrangements

Making a request for flexible working arrangements

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

- is pregnant
- 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 old or older, or
- 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

Where the employee is the parent, or has responsibility for the care, of a child who is school aged or younger and is returning to work after taking leave in relation to the birth or adoption of the child, they may request to work part-time to assist the employee to care for the child.

The employee must have completed at least 12 months of continuous service with the employer before they can make a request for flexible work.

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

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

An employer must provide a written response to a request for flexible working arrangements within 21 days of receiving the request.

After the steps outlined below are taken, the request may only be refused on 'reasonable business grounds'.

What are 'reasonable business grounds'?

'Reasonable business grounds' can include where the employer considers that:

- the request will have a negative financial impact, or a negative impact on efficiency, productivity or customer service of the organisation
- there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested, or
- it would be impractical to change the working arrangements of other employees or recruit new employees

Responding to a request for flexible working arrangements

Before refusing a request, an employer must first:

- discuss the request with their employee
- genuinely try to reach an agreement about the changes to the employee's working arrangement, 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
- outline that to resolve a dispute about flexible working arrangements, the parties must attempt to resolve the dispute at the workplace level by discussions, and
- outline the 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 and the reasons for the changes. 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 the details of the reasons for the refusal of the initial request, as well as a statement of the revised agreed arrangements.

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

NES 3 – employee choice about casual conversion

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

From 26 August 2024, the Fair Work Act will be amended to include a new pathway for casual employees to become permanent employees.

After six months of employment (or 12 months for small business employers), a casual employee may notify their employer of their intention to convert to permanent employment if they believe their employment relationship no longer meets the new casual employee definition (see 'New casual employee definition' below).

Responding to a notification

Before giving a response to a notification, the employer must first consult with the employee about the notification and, if the employer is accepting the notification, discuss the details of what will change.

A response must be in writing and include:

- a statement that the employer either accepts the notification or does not accept the notification on one or more of the following grounds:
  - having regard to the definition of casual employee and the employee's current employment relationship, the employee still meets the requirements of those subsections
  - there are fair and reasonable operational grounds for not accepting the notification, including:
    - substantial changes would be required to the way in which work in the enterprise is organised
    - there would be significant impacts on the operation of the enterprise
    - substantial changes to the employee's terms and conditions would be reasonably necessary to ensure the employer does not contravene a term of a fair work instrument that would apply to the employee as a full-time employee or part-time employee
  - accepting the notification would result in the employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or a state or a territory

- if the employer accepts the notification:
  - whether the employee is changing to full-time employment or part-time employment
  - the employee's hours of work after the change takes effect
  - the day the employee's change to full-time employment or part-time employment takes effect

- if the employer does not accept the notification – the reasons for the decision

New casual employee definition

From 26 August 2024, a new meaning of 'casual employee' will apply under the Fair Work Act, in which an employee will only be a casual employee if (subject to exceptions):

- the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work, and
- they would be entitled to a casual loading or a specific rate of pay for casual employees

Whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work will be assessed:

- on the basis of the real substance, practical reality and true nature of the employment relationship

- on the basis that a firm advance commitment can be in the form of the contract of employment or, in addition to the terms of that contract, in the form of a mutual understanding or expectation inferred from conduct of the parties after entering into the contract or from how it is performed, and

- having regard to, but not limited to, the following considerations:
  - whether there is an inability of the employer to elect to offer, or not offer, work or an inability of the employee to elect to accept or reject work (and whether this occurs in practice)
  - whether, having regard to the nature of the employer's enterprise, it is reasonably likely that there will be future availability of continuing work in that enterprise of the kind usually performed by the employee
  - whether there are full-time employees or part-time employees performing the same kind of work in the employer's enterprise that is usually performed by the employee, and
  - whether there is a regular pattern of work for the employee

See the Fair Work Ombudsman webpage Casual employment changes.

Employers must give each casual employee a Casual Employment Information Statement before, or as soon as practicable after, the employee starts employment.

NES 4 – parental leave

Unpaid parental leave

Permanent employees are entitled to 12 months of unpaid parental leave if the employee or the employee's de facto partner gives birth or the employee adopts a child (under 16) and 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 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 that they would have continued work on a regular basis, had it not been for the birth or adoption of the child.

Parental leave must be taken in one continuous period. Parents may take parental leave concurrently. However, for children born or placed for adoption before 1 July 2024, an employee may, with four weeks' notice, take up to 100 days of flexible unpaid parental leave. It may be taken during the 24-month period starting six weeks before the expected date of birth of the child, or on the date of birth, or the day of placement of the child. Flexible unpaid parental leave can be taken as a single continuous period or separate periods of one or more days each. An employee is also entitled to up to two days of unpaid pre-adoption leave to attend any interviews or examinations required in order to obtain approval for the employee's adoption of a child.

If an employee is pregnant with, or gives birth to, a child, the period of leave may start:

- up to six weeks before the expected date of birth of the child
- earlier, if the employer and employee so agree, or
- during the 24-month period starting on the date of birth of the child,

but must end during the 24-month period starting on the date of birth of the child.

For all other unpaid parental leave, the period of leave must start and end during the 24-month period starting on the date of birth or placement of the child.

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 (24 months in total) immediately following the end of the available parental leave period. 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:

- the employer's particular business grounds for refusing the request and explain how those grounds apply to the request
- whether or not there will be an extension, and if so, the period that the employer would be willing to agree to

- to resolve a dispute about unpaid parental leave, the parties must attempt to resolve the dispute at the workplace level by discussions, and
- the Fair Work Commission dispute and arbitration options

If the employer refuses the request, they must first have discussed the request with the employee, made a genuine attempt to reach an agreement, and had regard to the consequences of the refusal for the employee.

Reasonable business grounds for refusing a request for an extension include:

- that the extension would be too costly for the employer
- that there is no capacity to change the working arrangements of other employees to accommodate the extension
- that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the extension
- that the extension would be likely to result in a significant loss in efficiency or productivity, or
- that the extension would be likely to have a significant negative impact on customer service

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.

Employers must also take all reasonable steps to give an employee who is on unpaid parental leave (other than flexible unpaid parental leave) information about, and an opportunity to discuss, the effect of any decisions the employer makes that will have a significant effect on the status, pay or location of the employee's pre-parental leave position.

The Fair Work Act also contains additional provisions regarding notice and evidence, stillbirths, the death of a child, ceasing to have responsibility for care of child, hospitalised children, keep in touch days, and other entitlements related to parental leave, which may affect unpaid parental leave.

For more information, see:

- The Fair Work Ombudsman's resources on parental leave, and
- the Department of Employment and Workplace Relations fact sheet 'Unpaid parent leave'

Parental Leave Pay

For children born or adopted from 1 July 2024, eligible employees are currently entitled to 22 weeks of Parental Leave Pay (based on a five day work week), a Federal Government benefit, at the rate of the National Minimum Wage. Services Australia facilitates this payment on application by the employee.

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 (other than periods of employment as a casual employee) 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 for the employee's ordinary hours of work in the period 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 agree to 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 accrued leave in their balance.

Modern awards and enterprise agreements may also contain additional conditions for cashing out annual leave, including but not limited to:

- limiting the amount of annual leave an employee can cash out in a 12 month period
- limiting the amount of remaining accrued entitlement
- requiring cashing out of a particular amount of annual leave to be subject to a separate agreement
- requiring that the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone, and
- requiring parental or guardian signatures, if the employee is under 18 years old

If an employee is not covered by a modern award or an enterprise agreement, they may agree on when and how paid annual leave may be taken. The employer may also direct them to take annual leave if the direction is reasonable (for example, a December/January shutdown period). For award-covered employees, there may be provisions in the relevant award addressing when employees can be directed to take leave.

Note

Annual leave is to 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 paid 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 not fit for 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

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 seriously threatens their life, or dies, (casual employees are entitled to two days of unpaid leave in these circumstances)
  - a child is stillborn, where the child would have been a member of the employee's immediate family, or a member of the employee's household, if the child had been born alive, or
  - the employee, or their spouse or de facto partner, has a miscarriage
- 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 affecting the member

  Compassionate leave may be taken in a single continuous two day period, two separate period of one day each, or any separate periods as agreed between the employee and employer.
- 10 days of paid family and domestic violence leave in each 12 month period, when an employee is experiencing family and domestic violence, they need to do something to deal with its impact, and it is impractical for them to do that thing outside of their work hours

  Family and domestic violence leave is available to full-time, part-time, and casual employees, and does not accumulate from year-to-year. Employers should be mindful of the additional confidentiality requirements regarding family and domestic violence leave.

When taking personal/carer's leave, compassionate leave, or paid domestic violence 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
- if required by the employer, evidence of the reason for the leave (for example, a medical certificate or statutory declaration)

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
  - either:
    - the body requests the employee to engage in the activity, or
    - no such request was made, but it would be reasonable to expect that, if the circumstances had permitted the making of such a request, it is likely that such a request would have been made

Recognised emergency management bodies are bodies that have a role or function under a plan that is for coping with emergencies and/or disasters (prepared by the Commonwealth or a state or territory), a fire fighting, civil defence or rescue body, or any other body with a substantial purpose that is involved in securing the safety of others, protecting property, or otherwise responding to an emergency or natural disaster. They 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, unless the activity is jury service, the leave must be 'reasonable in all the circumstances'. Jury service is taken to always be reasonable. 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 (other than a casual employee) their base rate of pay, minus any jury service pay received by, or payable to, 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, certain states may provide for payment beyond the first 10 days of jury duty or payment for casual employees during jury duty).

See the Fair Work Ombudsman webpage 'Jury duty' for more information on state and territory laws about 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 federal pre-modern awards that existed before 1 January 2010).

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 with the same employer.

NES 9 – public holidays

An employee is entitled to be absent from work on a day or part-day that is a public holiday.

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. If the employee does not have ordinary hours of work on the public holiday (such as a casual employee), they will not be entitled to public holiday pay.

In certain circumstances, employees may also substitute a day or part-day for a day or part-day that would otherwise be a public holiday.

Modern awards and enterprise agreements may include additional provisions which provide additional or supplementary entitlements to eligible employees, such as rates of pay.

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

- the employee's personal circumstances, including family responsibilities
- the nature of the employer's workplace or enterprise, including its operational requirements, and the nature of the work performed by the employee
- whether the employee could reasonably expect that the employer might request work on the public holiday
- whether the level of remuneration reflects an expectation to work on a public holiday, including whether the employee is entitled to receive overtime payments, penalty rates or other compensation
- the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork)
- the amount of notice in advance of the public holiday given by the employer when making the request
- in relation to the refusal of a request—the amount of notice in advance of the public holiday given by the employee when refusing the request,
- any other relevant matter

NES 10 – superannuation contributions

Employers are required to make contributions to superannuation funds for the benefit of their employees, so as to avoid liability for a superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* (Cth) (**SGC Act**) in relation to the employees. This requires employers to make superannuation contributions at the rate prescribed under the SGC Act to all eligible employees.

For more information, see the Fair Work Ombudsman webpage 'Tax and superannuation'.

NES 11 – 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 the day of termination

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. Continuous service with the employer does not include periods of employment as a casual employee. This notice is calculated from the end of the day the notice is given.

The table below sets out the legal requirements for the minimum amount of notice required. Note, however, that an employment contract, policy of the employer, modern award or enterprise agreement 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').

Payment in lieu is made at the employee's full rate of pay, which includes the following:

- incentive based payments and bonuses
- loadings
- monetary allowances
- overtime or penalty rates, and
- any other separately identifiable amounts

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 with the employer.

Employees whose employment is terminated during a probationary period are entitled to notice of at least 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's employment is terminated for serious misconduct), the employer will not need to give notice of termination or provide payment in lieu of notice.

Note – serious misconduct includes:

- conduct that causes serious and imminent risk to:
  - the health or safety of a person, or
  - the reputation, viability, or profitability of the employer's business
- theft, fraud, assault, sexual harassment
- wilful or deliberate behaviour that is inconsistent with continuing their employment
- refusing to carry out a lawful and reasonable instruction that is part of the job, and
- being intoxicated at work, in accordance with the *Fair Work Regulations 2009* (Cth)

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, except where this is due to the ordinary and customary turnover of labour, 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 continuous 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 specified period of time, task or season
- the employee has less than 12 months of continuous service with the employer
- the employer is a small business employer (see Note below)
- the employment is terminated for serious misconduct
- a relevant modern award or enterprise agreement specifies other situations in which the redundancy pay provisions do not apply
- an industry specific redundancy scheme in a modern award or enterprise agreement applies
- the employee is an apprentice or a training arrangement applies
- there is a transfer of employment from one employer to another non-associated employer (unless the new employer refuses to recognise the employee's prior period of service), or
- the employee's employment is terminated with an employer and the employee rejects an offer of employment made by another employer that:
  - is on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than, the employee's terms and conditions of employment with the first employer immediately before the termination
  - recognises the employee's service with the first employer, and
  - had the employee accepted the offer, there would have been a transfer of employment in relation to the employee

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 webpages 'Small business and the Fair Work Act' and 'Who doesn't get redundancy pay'.

NES 12 – Information Statements

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 Fair Work Ombudsman provides that 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 Fair Work Information Statement contains information about the NES and the rights and entitlements of employees and includes information on:

- entitlements and protections at work
- other information statements

- minimum pay rates
- the National Employment Standards
- the right to request flexible working arrangements
- modern awards and enterprise agreements
- transfer of business
- 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 – other information statements

An employer must give every new casual employee a Casual Employment Information Statement before, or as soon as practicable after, they start their new employment.

Fixed term employees must also be provided with a Fixed Term Contract Information Statement before, or as soon as practicable after, the contract is entered into.

Industrial instruments

What other legal entitlements are employees entitled to?

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

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

These entitlements add to the NES for that particular occupation 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 that if an employee works on the public holiday, then they are entitled to higher rates of pay (known as penalty rates).

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 requirements. 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 an applicable modern award applied to their employment.

When an enterprise agreement is in place, an otherwise applicable 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** under a modern award or enterprise agreement. 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.

If you're not sure whether an award, agreement or determination applies to your employees, or for more information, see 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

Note – 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 may be extended as agreed between the parties.

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

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

Note – surveillance

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

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

Note – working under a visa

There may be additional entitlements for employees working in Australia under a temporary skill shortage visa.

For more information about these entitlements, see the Fair Work Ombudsman's webpage '482 and 457 visa holders – workplace rights and entitlements'.

General protections and adverse action

What other general protections are employees entitled to?

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
- being free from workplace discrimination and victimisation, and
- sham arrangements (for instance, where employment is misrepresented as an independent contracting arrangement)

Caution

As an employer, you must make sure you comply with the general protections provisions. If you don't, courts can make orders against you including, but not limited to, 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, independent contractor, or employee of an independent contractor, for a prohibited reason, including 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 prejudice
- discriminating between an employee and other employees
- refusing to employ a prospective employee, and
- threatening to do any of the above

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 including (but not limited to):

- terminate the contract for services
- alter the position of the independent contractor to the independent contractor’s prejudice
- discriminate against the independent contractor in the terms or conditions of engagement, 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 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 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 another 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, or has a role, or responsibility under, a workplace instrument such as 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) or an order made by an industrial body
- being able to take, or participate in, a process or proceedings under a workplace law or instrument, such as court proceedings against their employer (for instance, for discriminating against them or failing to pay them their correct wage),
- being able to make complaints or inquiries under a workplace law to keep compliance with the law or in relation to their employment (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, including:
  - under the National Employment Standards
  - under a term of a modern award or enterprise agreement
  - agreeing to, or terminating, an individual flexibility arrangement
  - accepting a guarantee of annual earnings, or
  - agreeing, or not agreeing, to a deduction from amounts payable to the employee in relation to the performance of work, or
- make false or misleading representations about the workplace rights of others, or the exercise or 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.

Sham contracting arrangements

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.

The Fair Work Ombudsman 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.

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

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 made on the basis of, for example, a history of union activity or family responsibilities.

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

- they are or are not, or were or were not, a member of an industrial association (such as a union)
- they engage, or have at any time engaged, or proposed to engage in lawful industrial activity, or
- they don't engage, or have not at any time engaged, or proposed not to participate in industrial activity

Lawful industrial activity arises where the person does or does not:

- become, or remain or cease to be, an officer or member of an industrial association
- become involved in establishing an industrial association
- organise or promote a lawful activity for, or on behalf of, an industrial association
- encourage, or participate in, a lawful activity organised or promoted by an industrial association
- comply with a lawful request made by, or requirement of, an industrial association
- represent or advance the views, claims or interests of an industrial association
- pay a fee (however described) to an industrial association, or to someone in lieu of an industrial association, or
- seek to be represented by an industrial association

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

Sexual harassment

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,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would feel offended, humiliated or intimidated.

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).

Employers and persons conducting a business or undertaking also have a positive duty to take reasonable and proportionate measures to eliminate **unlawful sex-based conduct**, as far as possible.

Unlawful sex-based conduct is:

- discrimination on the ground of sex in a work context
- sexual harassment in connection with work
- sex-based harassment in connection with work
- conduct creating a workplace environment that is hostile on the ground of sex,
- related acts of victimisation.

A person or company may be liable for unlawful conduct, including 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.

For more information, see:

- the Fair Work Ombudsman's webpage 'Sexual harassment in the workplace', and
- the Department of Employment and Workplace Relations' fact sheet 'Prohibiting sexual harassment in the Fair Work Act'

Discrimination

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

For more information, see:

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

Also see the Fair Work Ombudsman's webpage 'Protections at work', for more information and tools.

The right to disconnect

From 26 August 2024, eligible employees will have the right to reasonably refuse to monitor, read or respond to contact or attempts to contact from their employer, or third parties such as customers and clients outside of their working hours.

The reasonableness of the refusal must consider, but will not be limited to, the following factors:

- the reason for the (attempted) contact
- how the (attempted) contact is made and the level of disruption this causes the employee
- the extent to which the employee is compensated (including non-monetary compensation) to remain available to be contacted or perform work outside ordinary working hours, or for working additional hours
- the nature of the employee's role and level of responsibility, and
- the personal circumstances, such as family or caring responsibilities of the employee

Disputes relating to the reasonableness of the right being exercised must be attempted to be resolved at workplace level. Where this is unsuccessful, either party may apply to the Fair Work Commission to make orders to deal with the dispute, with penalties for non-compliance with an order available.

All modern awards will be required to include a right to disconnect clause. Enterprise agreements that already contain right to disconnect clauses will continue to apply if they are more favourable to the employee than those that will be introduced to the Fair Work Act.

Note – the right to disconnect will apply to small business employees from 26 August 2025

The right to disconnect will be a workplace right under the Fair Work Act general protection laws.

For more information, see the Fair Work Ombudsman's webpage 'Right to disconnect'.