

# Legal obligations if you want to terminate an employee's employment

## Legal information for community organisations

### This fact sheet covers:

- ▶ things to consider before terminating employment
- ▶ notice requirements
- ▶ final pay
- ▶ record keeping obligations
- ▶ visa requirements
- ▶ exit procedures
- ▶ redundancy
- ▶ what happens if an employee objects to termination of their employment
- ▶ unfair dismissal claims
- ▶ general protections or adverse action claims, and
- ▶ other potential claims

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**Terminating an employee's employment ('termination') can also be referred to as 'dismissing' or 'sacking' an employee. Termination can be stressful for the people concerned and involves a number of legal requirements.**



### Disclaimer

This fact sheet provides general information on legal obligations when terminating an employee's employment. 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.



For more information about termination of employment, see the [Fair Work Ombudsman website](#).

The Fair Work Commission (Australia's national workplace relations tribunal) also has information on its ['Job loss or dismissal' webpage](#).



# Things to consider before terminating employment

If you are thinking about terminating an employee's employment, your organisation should:

- ensure it has complied with its legal obligations, which may be set out in
  - the *Fair Work Act 2009 (Cth)* (**Fair Work Act**)
  - an enterprise agreement or modern award (if one applies to the employee)
  - the employee's employment contract, and
  - your organisation's policies (if those policies form part of the employee's employment contract), and
- take steps to mitigate the risk of any claims the employee may make, which may vary depending on the employee's circumstances

The key legal obligations (including in relation to notice of termination and termination payments) and common claims employees may make (including unfair dismissal and general protections claims) are summarised below.



## Note

While employees should be given fair warning and support to improve their performance before a decision is made to terminate their employment, there is no legal requirement to comply with a 'three-strikes policy'.



## Note – constructive dismissal

An employee who resigns because they felt forced to do so or because they felt they had no other choice as a result of their employer's conduct may claim they have been 'constructively dismissed' by their employer. In these circumstances, the employee might be eligible to make certain claims that they would not otherwise be eligible to make if they had resigned (for example, unfair dismissal).

Constructive dismissal is complex. If you think this issue may be relevant to a particular employee who has or may resign, seek legal advice.

## Notice requirements

The Fair Work Act sets minimum periods of notice for termination of employment. The minimum notice period increases with an employee's length of continuous service. Generally, you must not terminate an employee's employment unless you have given the employee written notice of the day of termination. If you don't want your employee to serve the full applicable period of notice, you may be able to pay them in lieu of part or all of that notice period.

An employee may be entitled to a longer period of notice if this is provided for in an applicable modern award, enterprise agreement or employment contract. For example, if you are required to give an employee two weeks' notice under the Fair Work Act based on the employee's length of service, but the employee's employment contract provides for four weeks' notice, you must give the employee four weeks' notice.

There are some exceptions to the obligation to provide written notice of termination under the Fair Work Act, such as in relation to casual employees, fixed-term or specified-task employees, certain trainees, and employees whose employment is terminated for serious misconduct. However, these exceptions are also



subject to the terms of any applicable modern award, enterprise agreement or employment contract. If your organisation is considering terminating an employee's employment without providing written notice, you should seek legal advice.

## What can an employee do during the notice period?

During the notice period, an employee can:

- take paid annual leave, if the employer agrees, and
- take paid sick or carer's leave, if the employee complies with any applicable notice and evidence requirements

You may be able to direct an employee to perform their normal duties, perform reduced duties or perform no duties during their notice period. This may depend on the terms of the employee's employment contract and any applicable modern award or enterprise agreement, and whether the direction is lawful and reasonable.

## Serious misconduct

If an employee has committed serious misconduct, there may be scope to proceed with dismissal without providing the employee with notice of termination (also known as 'summary dismissal').

Serious misconduct includes:

- wilful or deliberate conduct that is inconsistent with the continuation of the employment contract
- conduct that causes serious and imminent risk to the health or safety of a person or to the reputation, viability or profitability of the employer's business
- engaging in theft, fraud, assault, or sexual harassment in the course of employment
- in some instances, unsafe conduct
- being intoxicated at work, and
- refusing to carry out a lawful and reasonable instruction that is consistent with the employee's employment contract

These circumstances have all been found by the Fair Work Commission to constitute serious misconduct. However, each case will turn on its own facts, so you should get legal advice before taking any action where you suspect an employee has committed serious misconduct.

As there is a greater risk of claims if an employee has been terminated without notice of termination, employers should exercise caution by carefully considering whether summary dismissal is appropriate in the circumstances. This includes ensuring that an employee accused of serious misconduct is given an opportunity to respond to any allegation of serious misconduct before termination of their employment.



### Caution

Serious misconduct can provide a basis to dismiss an employee without providing any notice to the employee.

In these circumstances, the employer must still pay the employee's outstanding entitlements, including payment for time worked, accrued annual leave and, in some cases, long service leave. If your organisation is unsure what final payment the employee is entitled to, you should seek legal advice.



# How do you calculate final payments?

To calculate the final payments that you owe a terminated employee – check the award, enterprise agreement or employment contract that applies. Call the Fair Work Ombudsman for confirmation regarding final pay entitlements from the Fair Work Act, an award or an enterprise agreement. If you need additional guidance about what you must pay your employees, you should seek legal advice

At a minimum, employees are entitled to:

- outstanding wages or salary for all time worked (including superannuation contributions, loadings, monetary allowances, overtime and penalty rates)
- a payment in lieu of accrued but untaken annual leave (which may include leave loading)
- a payment in lieu of notice of termination if the employee is not going to work for the full period of notice of termination (unless an exception to the notice requirements applies, such as termination for serious misconduct), and
- a payment in lieu of accrued but untaken long service leave entitlements or pro-rata long service leave, if required under the applicable long service leave legislation, modern award or enterprise agreement

Special tax rules apply to some termination payments so it's important to get advice from your accountant to make sure you comply with applicable tax laws.

Employees are not generally entitled to a payment in respect of accrued but untaken personal (sick/carer's) leave. However, it's important to check any applicable modern award, enterprise agreement or employment contract to confirm whether you are required to pay for accrued but untaken personal (sick/carer's) leave or any other accrued entitlements (for example, RDOs) on termination of employment.



The Fair Work Ombudsman has published tools on its ['Final pay' webpage](#) to help employers work out an employee's final pay.

When processing an employee's final pay, you should also:

- check with the Australian Taxation Office to see if any part of a lump sum payment to an employee is an eligible termination payment, which attract a different tax treatment under taxation laws
- pay any remaining superannuation contributions to the employee's superannuation fund
- include relevant pay as you go (**PAYG**) withheld amounts in your next Business Activity Statement (**BAS**), and
- if applicable, collect information for your next fringe benefits tax (**FBT**) report (for example, an employee declaration about the FBT benefits they have received)

Rules may also apply about when the employee's final pay must be paid. For example, some modern awards state that employers must make their final payment to employees within seven days of their last day of employment.



For more information about notice and final pay, see the [Fair Work Ombudsman's webpage 'Ending employment'](#).



## Caution

Check with the Fair Work Ombudsman and the Australian Taxation Office or your accountant to make sure the final payment is correct.



## Record keeping obligations

Under the Fair Work Act, an employer must make and keep certain kinds of employee records for seven years.

Relevantly, if an employee's employment is terminated, the employer must make and keep a record that sets out:

- whether the employment was terminated by consent, by notice, summarily or in some other manner (specifying the manner), and
- the name of the person who acted to terminate the employment

There are also specific obligations that apply in respect of the form of the records that must be kept, including that the records must be legible, in English and readily accessible if an inspector from the Fair Work Ombudsman asks for the records.

## Visa holders

If the employee holds a visa to work in Australia, you may have an obligation to tell the Department of Home Affairs that the employee's employment has ended.



For more information, see the [Department of Home Affairs webpage 'Change of situation'](#).

## Exit procedures

To streamline your processes when an employee's employment is terminated, consider developing a standard exit procedure, which could include the following steps:

- if practical and appropriate, make a time with the employee to complete a handover of duties
- confirm the employee's contact details
- remind the employee of any contractual obligations that continue after their employment ends, such as the need to comply with post-employment restraints and obligations around using confidential information and intellectual property
- make sure the employee returns security passes and other property of the organisation (including phones, laptops, and electronic and physical files)
- make sure any confidential information is returned and deleted
- update or cancel any accounts, access codes and passwords after the employee leaves, and
- update your human resources and payroll systems to record the employee's termination, including details of payments made to employee on termination

If appropriate in the specific circumstances, you may also wish to organise an exit interview with the employee to gather feedback on their experience with your organisation and improvement areas.

You are not typically required to provide a reference or a formal statement of employment for an employee who is leaving but you should check to make sure the employee's employment contract and any applicable modern award or enterprise agreement doesn't provide differently. If you do decide to provide a reference or statement of employment, you should make sure everything you say is accurate.

## Redundancy

An employee's role is redundant if an employer no longer requires the employee's role to be performed by anyone (for example, if the business experiences a downturn and only needs one person to do a role originally performed by two people).

If an employee's role is redundant, they may be redeployed into another role or their employment may be terminated on the basis of redundancy. If an employee's employment is terminated on the basis of



redundancy the employer must give them notice of termination and redundancy pay, unless an exception applies.

The Fair Work Act sets minimum redundancy pay entitlements, which depend on an employee's length of continuous service. An employee may be entitled to a higher redundancy payment if this is provided for in an applicable modern award, enterprise agreement or employment contract. For example, if you are required to give an employee six weeks' redundancy pay under the Fair Work Act based on the employee's length of service, but the applicable enterprise agreement provides for eight weeks' redundancy pay, you must give the employee eight weeks' redundancy pay.

There are some exceptions to the obligation to provide redundancy pay under the Fair Work Act, such as if the employee has been employed for less than 12 months or if the employer is a small business employer.

You should consider whether there are any other obligations with respect to the redundancy, such as consultation obligations in an applicable modern award or enterprise agreement.

### Unfair dismissal exception

If an employee's employment is terminated on the basis of redundancy and the employee makes an unfair dismissal application, the dismissal will not be unfair if it was a case of genuine redundancy.

A genuine redundancy occurs where:

- the organisation no longer needs the person's job to be performed by anyone because of changes in the organisation's operational requirements
- the organisation complies with the consultation requirements in an applicable award, enterprise agreement or other industrial instrument (if any) that applies, and
- it is not reasonable in all the circumstances for the employee to be redeployed within the organisation or an associated entity



For more information, see the [Fair Work Ombudsman's webpage 'Redundancy'](#).



### Caution

This is a complex area of employment law. If your organisation is considering making an employee's role redundant you should seek legal advice to protect your organisation from risk.

## What happens if an employee objects to the termination?

There are a number of different avenues through which an employee may pursue a claim in connection with the termination of their employment. Some of the common claims that employees may make are summarised below.

As many claims relating to dismissal are subject to strict time limits and exceptions, it's important to get legal advice if you receive a claim.

## Unfair dismissal claims



### What is unfair dismissal?

A person has been unfairly dismissed if the Fair Work Commission is satisfied that:

- the person was dismissed, which may include termination of the employee's employment by the employer or constructive dismissal (ie. where the employee felt they had no choice other than to resign, due to the employer's conduct);
- the dismissal was **harsh, unjust or unreasonable**
- the dismissal was not consistent with the [Small Business Fair Dismissal Code](#) (if applicable), and
- the dismissal was not a case of genuine redundancy (see 'What is a redundancy?' below)

An employee is eligible to make an unfair dismissal claim if they have completed the minimum employment period (see below) and one or more of the following applies:

- the employee is covered by a modern award
- an enterprise agreement applies to the employee, or
- the employee earns less than the high income threshold (this amount is indexed on 1 July each year and from 1 July 2025 is \$183,100 per annum)

### Factors the Fair Work Commission must consider

The factors that the Fair Work Commission must consider in deciding whether the dismissal was harsh, unjust or unreasonable include:

- whether there was a valid reason for the dismissal related to the person's capacity or conduct, including its effect on the safety and welfare of other employees (for example, if the dismissed employee sexually harassed another person in connection with their employment)
- whether the person was notified of that reason
- whether the person was given an opportunity to respond to any reason related to their capacity or conduct
- any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal
- the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal
- if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; the degree to which the absence of dedicated human resources management specialists or expertise in the enterprise would be likely to impact on procedures followed in effecting the dismissal, and
- any other matters that the Fair Work Commission considers relevant. This gives the Fair Work Commission a broad discretion to consider matters such as the employee's personal circumstances (which includes, but is not limited to, factors such as the employee's age, family responsibilities and ability to get another job)

### Orders the Fair Work Commission can make

If the Fair Work Commission determines that a person has been unfairly dismissed, the Commission may order the employer to:

- reinstate the person to their former position or another person and potentially pay the person for lost remuneration, or
- pay the person financial compensation, which is capped at the lesser of half the high income threshold and half the person's annual remuneration



## Minimum employment period

An employee will not be eligible to make an unfair dismissal application if they haven't served the minimum employment period:

- for a Small Business (fewer than 15 employees, including casual employees employed on a regular and systematic basis), the minimum employment period is one year, and
- for an employer that is not a Small Business, the minimum employment period is 6 months

The minimum employment period is calculated backwards from the earlier of the time when the person is given notice of their dismissal or immediately before their dismissal (ie. the day the termination takes effect).

Note that an employee who has not served the minimum employment period to make an unfair dismissal claim may still be able to make other claims (for example, a general protections claim).



For more information, see the [Fair Work Ombudsman's 'Unfair dismissal' webpage](#).



### Caution

Your organisation should get legal advice before dismissing an employee.

Laws around termination of employment are complex and there are many factors that may influence how your organisation should manage any proposed employment termination. It's important to understand what laws may apply and to manage any risk in connection with these laws.



### Note

If your organisation is a small business employer (ie. it has fewer than 15 employees, including casuals employed on a regular and systematic basis) and the Fair Work Commission is satisfied that you have followed the Small Business Fair Dismissal Code in relation to the dismissal, the Commission can't make a finding that the dismissal was unfair.

## General protections and adverse action claims

Under the Fair Work Act, an employer must not take adverse action against an employee because of a prohibited reason. If an employee makes a claim that their employer has taken adverse action against them for a prohibited reason, this is called a general protections claim. All employees are eligible to make general protections claims, regardless of their earnings and whether they are covered by a modern award or enterprise agreement.

Adverse action includes dismissing an employee, but could also include other action (for example, issuing a warning).

**Prohibited reasons** for dismissing an employee include:

- to prevent the exercise of a workplace right
- because the employee has a workplace right
- because the employee has or has not exercised a workplace right
- because the employee proposes to or proposes not to exercise a workplace right



- because the employee is or is not, or was or was not, an officer or member of an industrial association such as a union or employer association
- because the employee is engaged or not engaged, or proposed to engage or to not engage, in lawful industrial activity (such as a strike)
- discriminatory reasons (such as because of the employee's age, race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin)
- because the employee is temporarily absent from work due to illness or injury (provided certain conditions are met), or
- to engage the employee of the employer as an independent contractor to perform the same or substantially the same work

An employee has a **workplace right** if the employee:

- has an entitlement to a benefit, or has a role or responsibility, under a workplace law (for example, the Fair Work Act), workplace instrument (for example, a modern award or enterprise agreement) or order made by an industrial body (for example, the Fair Work Commission or the Federal Court of Australia)
- is able to initiate or participate in a process or proceedings under a workplace law or workplace instrument
- is able to make a complaint or inquiry to a person or body with capacity under a workplace law to seek compliance with a workplace law or workplace instrument, or
- is able to make a complaint or inquiry in relation to their employment



## Examples

Examples of exercising a workplace right include when an employee:

- makes a complaint or inquiry in relation to their employment
- takes leave or exercises other rights in accordance with the National Employment Standards or an applicable industrial instrument
- is temporarily absent from work due to illness or injury, or
- makes a request for flexible working arrangements

Adverse action will be taken 'because' of a prohibited reason if the prohibited reason is a substantial and operative reason for the employer's decision to take the action against the employee. Importantly, the prohibited reason does not need to be the only reason – this means that if there were lawful reasons for dismissing an employee as well as prohibited reasons, the dismissal could still be unlawful adverse action.

It is also important to understand that a 'reverse onus' applies in respect of general protections claims. This means that if an employee alleges that they were dismissed for a prohibited reason, it is presumed that the employer dismissed them because of the prohibited reason, unless the employer can prove otherwise. Proving that a decision to dismiss an employee was made for a lawful, non-prohibited reason will usually require the employer to provide evidence from the person (or persons) who made the decision to dismiss the employee.



For more information, see the [Fair Work Commission's webpage 'Dismissal under general protections'](#).



### Caution

Be careful about terminating an employee's employment if they have made a recent complaint or inquiry about their employment. This area can be complex and you should seek legal advice. An employer can be ordered to pay uncapped compensation for a breach of the general protections provisions.

## Other potential claims

An employee who is dismissed may make various other claims against their former employer, including (but not limited to) claims that their dismissal constituted:

- a breach of their employment contract (for example, on the basis that the employer did not comply with its obligations under the contract, such as the obligations regarding notice of termination or termination pay)
- unlawful discrimination under anti-discrimination legislation (for example, on the basis that the employer dismissed the employee because of their race, sex, age, disability or other protected attribute)
- unlawful detrimental conduct under the Corporations Act (for example, on the basis that the employer dismissed the employee because they had made or intended to make a protected whistleblower disclosure)
- a breach of the applicable workers' compensation legislation (for example, on the basis that the employer dismissed the employee because they could not perform their job due to a work-related injury)

You should seek legal advice before dismissing an employee, especially if you are not sure what specific claims might be available to the employee in the circumstances and the steps you should take to mitigate the risk of any such claims.