

# Legal obligations when an employee resigns

## Legal information for community organisations

### This fact sheet covers:

- ▶ written acknowledgement
- ▶ notice requirements
- ▶ final pay
- ▶ record keeping, and
- ▶ exit procedures

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**Your organisation may face legal issues if you miss essential steps when an employee resigns.**

We have set out steps below to help you avoid legal difficulties when an employee resigns.



### Disclaimer

This fact sheet provides information on legal obligations when an employee resigns. 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.



### 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.



# Acknowledge an employee's resignation in writing

An employee can resign verbally or in writing. Preferably, you should ask the employee to provide their resignation in writing so that you have a record of the resignation.

Following receipt of an employee's verbal or written resignation, it is a good idea for your organisation to acknowledge the resignation in writing and specify the employee's final day of work to avoid any confusion.

# Honour the employee's notice requirements, or come to an agreement

When an employee resigns, they are typically required to give their employer the minimum notice period that applies in respect of their employment.

Check your employee's conditions of employment to see what they say about the employee's notice period on resignation. Your employee's notice requirements might be set out in the terms of an enterprise agreement modern award (if one applies to the employee) or the employee's employment contract. If the employee wants to vary the notice period so that their employment ends immediately or otherwise before the end of the applicable notice period, and you agree to that arrangement, then the employee's employment will end on the agreed date and they will not be required to 'work out' the remainder of the applicable notice period. In such circumstances, it is best practice to record the agreed termination date in writing, for example in a letter or email to the employee, and you will only have to pay the employee until the agreed termination date.

If you require the employee to continue working during the notice period, and the employee refuses to do so, the employee is not entitled to be paid for time not worked.

If you don't want the employee to continue working for all or part of the notice period, you may be able to pay the employee in lieu of the balance of the notice period (ie. for the part of the notice period that they do not work), depending on the employee's employment contract and any applicable enterprise agreement or modern award.

## 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.



For more information on notice periods, see [the Fair Work Ombudsman's 'Resignation' webpage](#).



# Work out the employee's accrued entitlements and final payments

Some accrued but untaken entitlements must be paid to the employee on the termination of their employment. 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 under the *Fair Work Act 2009 (Cth)* (**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 annual leave loading), and
- a payment in lieu of accrued long service leave entitlements if applicable (see 'Long service leave' below)

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 lieu 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.

## Long service leave

In some cases, employees may be entitled to a payment for accrued long service leave (or a pro-rata amount) when they resign. This will depend on the employee's length of service and requirements under the applicable long service leave legislation, or any modern award or enterprise agreement providing for long service leave entitlements.

For most employees, their entitlement to long service leave comes from the long service leave legislation that applies in the state or territory that the employee works in.

When calculating accrued long service leave, organisations should be aware that some states and territories have 'portable' long service leave schemes for certain industries (such as building and construction), which allow employees to retain their long service leave entitlements even when they move between different employers in the industry. Long service leave is complex. If you or your organisation have



questions about whether an employee who has resigned is eligible for long service leave entitlements, you should consider seeking legal advice.



The [Fair Work Ombudsman website](#) has further information on long service leave, as well as links to the long service leave agency in each state and territory.

## Record keeping obligations

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

- basic employment details, including employee and employer names, employment status and type (ie. whether an employee is full-time, part-time or casual) and employment start date
- pay
- overtime hours, allowances and penalty rates
- averaging of hours arrangements
- leave entitlements
- superannuation contributions
- termination of employment (including the nature of the termination of the employment, for example, resignation)
- individual flexibility arrangements
- guarantees of annual earnings

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
- if practical and appropriate, fill the vacancy before the present employee finishes, so the employee can help train their replacement
- 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 or physical files)
- make sure any confidential information is returned and deleted
- update or cancel any accounts, access codes and passwords after the employee leaves
- update your human resources and payroll systems to record the employee's termination, including details of payments made to the 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.