

Introduction to the *Fair Work Act 2009* - Employment changes for 1 January 2010

This guide gives you an overview of the Federal Government's new changes to the Australian workplace relations system which come into effect on the 1st of January 2010.

For more information or clarification on anything in this document please visit www.fairwork.gov.au.

INTRODUCTION

Since the last federal election the Labor Government has been working to revamp Australia's Workplace Relations Act, the result is called the *Fair Work Act 2009*. The *Fair Work Act 2009* changes many aspects of Workplace Relations in Australia, it is important that both Employers and Employees are familiar with *Fair Work Act 2009*, its contents and its application; this guide seeks to provide you with an outline of the changes which the *Fair Work Act 2009* introduces.

WHO DOES THE NEW ACT EFFECT?

The new *Fair Work Act 2009* applies to all 'national system employers'; this means all Australian businesses who are an incorporated entity and are actually trading. If your business is located in Victoria, the ACT or the Northern Territory then the new Act applies to your business regardless of your incorporation and trading status.

WHEN DOES IT BEGIN?

Some aspects of the new Act began on the 1st of July 2009, the next round of changes begins on the 1st of January 2010.

Effective from 1 January 2010

- 10 National Employment Standards
- Modernised Awards

Effective from 1 July 2009

- Fair Work Ombudsman Active
- Fair Work Australia Active
- New Unfair Dismissal Rules
- New Transfer of Business Rules
- New Collective Bargaining Framework
- New Right of Entry Rules for Union Officials

If you need further information regarding the changes which came into effect on the 1st of July LawLive recommends you visit www.fairwork.gov.au.

WHAT IS GOING TO CHANGE?

From the 1st of January 2010 two major changes will begin to apply, the new 10 National Employment Standards will come into effect and the new Modern Awards.

National Employment Standards (NES) are 10 employment conditions which must apply as a minimum to all employees in Australia who work for a company to which the *Fair Work Act 2009* applies. These conditions will automatically override any provision of an Employment Contract which provides less than the NES requires. Although some conditions in the new Awards can be negotiated down in a Contract, the NES cannot be reduced under any circumstances.

The new Modern Awards which come into effect replace; the old federal awards (except those applying to a single enterprise), notional agreements preserving state awards (NAPSA's) and any state reference transitional awards. The new Modern Awards provide a minimum set of conditions which apply to workers in certain



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industries in addition to the 10 NES. If the Award provides for higher conditions than a NES then the Award will override that particular NES.

It is important to note that if you employ staff using Common Law Contracts the new changes will only effect the minimum entitlements which you must provide. You may still use Common Law Contracts; however these should only be used if you are providing entitlements which are above the Award or if there is no applicable Award for the employee's role.

LawLive strongly recommends you review any Employment Contracts you have in place to ensure they provide equal to or higher standards than the NES before 1 January 2010.

THE 10 NATIONAL EMPLOYMENT STANDARDS (NES)

MAXIMUM WEEKLY HOURS OF WORK

All employees must only work a maximum of 38 hours each week, however an employer can request an employee to work 'reasonable additional hours', an employee can refuse to work these additional hours if the feel the request is 'unreasonable'.

These 38 hours can be averaged over a period of 26 weeks to provide for situations where the employee's working cycle fluctuates from week to week.

A wide range of factors can be taken into account when assessing if a request to work additional hours is reasonable, these can include;

- Risks to the employee's health and safety;
- The employee's personal circumstances including family responsibilities;
- The needs of the employing entity;
- Any remuneration or compensation given in return for working the additional hours;
- The amount of notice given by the employer;
- The usual patterns of the industry in which the entity operates;
- The nature of the employee's role and the employee's responsibility; and,
- Any other factors which are relevant to the situation.

REQUESTS FOR FLEXIBLE WORKING ARRANGEMENTS

Employees will be able to apply to their employer for flexible working arrangements, for example, if they are responsible for the care of another individual or a child they can apply to; have their hours of work reduced or their start/finish times altered, change their work patterns (split shifts or job sharing arrangements) or change the location of work (i.e. work from home).

To be eligible to apply for flexible working arrangements the employee must be a parent, or have the responsibility for the care of a child, and;

- Must have completed a minimum of 12 months continuous service with the employer before making the request;
- If a casual employee the employee must have a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and,
- Must have care of a child who is either under school age or who is under 18 and has a disability.

The Employer is only able to reject the employees request on 'reasonable business grounds', 'reasonable business grounds' can include;



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- There would be a negative impact on the finances, efficiency, productivity or customer service of the business;
- The inability to recruit a replacement employee;
- The inability to organise work among existing staff; or,
- The practicality of arrangements which need to be put in place to accommodate the employees' request.

PARENTAL LEAVE AND RELATED ENTITLEMENTS

Both parents can take up to 12 months unpaid leave following the birth or adoption of a child, although not at the same time. It also allows one parent to request to extend their leave period by a further 12 months. Any request must be made at least 4 weeks prior to the end of the original leave period.

The employer is bound to agree to any request unless 'reasonable business grounds' exist for refusal.

ANNUAL LEAVE

All full time employees are entitled to 4 weeks annual leave for each 12 month period of service. Shift workers receive an additional 1 week of annual leave making their total entitlement 5 weeks for each 12 month period of service.

Some Awards may allow for the 'cashing out' of these leave entitlements.

PERSONAL/CARERS LEAVE AND COMPASSIONATE LEAVE

Each employee is entitled to 10 days paid personal/carer's leave plus 2 days unpaid carer's leave if required, sick leave is a form of personal leave. Each employee is also entitled to 2 days paid compassionate leave, compassionate leave is unpaid for casual employees.

Some Awards may allow for the 'cashing out' of these leave entitlements.

COMMUNITY SERVICE LEAVE

Community services leave includes both jury service and any 'voluntary emergency management activity'. All community services leave is unpaid with the exception of jury service which has an entitlement to 10 days paid leave for employees excluding casual employees.

There is no limit to the amount of community services leave which can be taken by an employee however the amount must be 'reasonable'.

LONG SERVICE LEAVE

The long service leave NES is still being finalised by the government, until a uniform system is developed the existing state legislation still applies.

PUBLIC HOLIDAYS

An employee is entitled to payment for not working on a public holiday only if their normal working routine falls on the public holiday, a part time employee who's regular hours do not fall on a public holiday is not entitled to payment for that particular day. The NES recognised public holidays are;

- 1 January (New Year's Day);
- 26 January (Australia Day);
- Good Friday;



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- Easter Monday;
- 25 April (ANZAC Day);
- Queens birthday holiday (which may fall on a different day across some States and Territories);
- 25 December (Christmas Day);
- 26 December (Boxing Day); and,
- Any other day, or part-day, declared or prescribed by the laws of a State or Territory must be recognised by employers in that State or Territory.

Employers may request that an employee work on a public holiday and the employee may refuse, both the request and the refusal both need to be 'reasonable'. 'Reasonable' is determined in the same manner as for requests to work additional hours.

NOTICE OF TERMINATION AND REDUNDANCY PAY

On the day of termination employers must provide an employee with a written notification regarding their termination. In the event of redundancy the NES sets out a minimum amount of redundancy pay which is required to be given by an employer, in some cases the Modern Award may set out a higher amount, this amount is then applicable. The minimums specified by the NES are;

Employee's period of continuous service		Redundancy Pay
At Least	But less than	
- 1 year	- 2 years	- 4 weeks
- 2 years	- 3 years	- 6 weeks
- 3 years	- 4 years	- 7 weeks
- 4 years	- 5 years	- 8 weeks
- 5 years	- 6 years	- 10 weeks
- 6 years	- 7 years	- 11 weeks
- 7 years	- 8 years	- 13 weeks
- 8 years	- 9 years	- 14 weeks
- 9 years	- 10 years	- 16 weeks
- 10 years		- 12 weeks

Note: the long service leave entitlements provide a rationale for the diminishing Redundancy entitlements for employees with 10 years or more service,

Employers with fewer than 15 full time staff are exempt from the requirement to pay redundancy to staff members who are terminated for genuine redundancy reasons.

PROVISION OF A FAIR WORK INFORMATION STATEMENT

All employers must provide new employees with a copy of the Fair Work Information Statement. This statement gives each employee a summary of their entitlements under the *Fair Work Act 2009* and provides them with contact details of Fair Work Australia.

Copies of the fact sheet are easily obtained from Fair Work Australia.

MODERN AWARDS

The new Modern Awards system will replace over 4000 federal and state awards with 130 new, updated Awards. These new Awards should not result in any employee having less take home pay than they currently did under the old system, in the event this occurs the employee can apply to Fair Work Australia to restore



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their take home pay to the previous level. There is also an ongoing commitment to review each award every four years.

Each Modern Award contains a number of provisions which apply to the employee in addition to the 10 National Employment Standards, these provisions relate to;

- Minimum wages;
- Types of employment (e.g. Full-time, Part-time and casual);
- Overtime and penalty rates;
- Work arrangements (e.g. rosters and variations to work hours);
- Annualised wage or salary arrangements;
- Allowances (e.g. travel allowances);
- Leave, leave loading and taking leave;
- Superannuation;
- Consultation procedures; and,
- Dispute settlement and representation.

All Modern Awards also contain a flexibility provision which allows employers and employees to negotiate changes to meet their individual needs.

In some cases where pay rates and other conditions in the Modern Award are higher than the employee's previous entitlements the Modern Award will include a provision to phase those provisions in over the next 5 years.

If a Modern Award which is relevant for your business contains a provision for the phasing in of entitlements see www.fairwork.gov.au for details on how to phase in the revised provisions. If a Modern Award does not include a phasing in provision then the revised provisions need to be provided in full from 1 January 2010/

To view a full list of new modern awards go to the Australian Industrial Relations Commission website; www.airc.gov.au.

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