



Employment Law Summary



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NB: Information contained in this brochure was current as at 1 July 2020 and is subject to change.



Application of Federal Laws

As a general rule of thumb, all NSW employers (with the exception of the State Government) are bound by the Fair Work Act 2009. This includes both incorporated and unincorporated employers.

Minimum Adult Wage

The Federal minimum wage as of 1 July 2020 is set at \$19.84 per hour (\$753.80 per 38 hour week).

Unfair Dismissal

The following restrictions apply:

1. an employee cannot bring a claim if they are terminated within a minimum employment period: 6 months usually, but extended to 12 months for small employers (less than 15 full time equivalent employees).
2. an employee cannot bring a claim if they are paid over the 'high income threshold', adjusted annually, currently \$153,600.
3. claims must be brought within 21 days of termination.

Employers should ensure that the following questions are asked before a decision is made to terminate an employee:

1. is this harsh, unjust or unreasonable?
2. is the action of the employee so serious as to warrant immediate dismissal, and if not, was the employee on notice that such conduct would cause their termination if repeated?
3. is a lesser consequence more appropriate?
4. how well documented are any warnings, or evidence of the misconduct/poor performance?

Small business employers should follow the Fair Dismissal Code.



Unlawful Termination

It is unlawful for an employer to terminate an employee for certain reasons including the following:

1. temporary absence from work due to illness or injury;
2. trade union membership;
3. race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
4. absence from work during maternity leave or other parental leave;

All employers are exposed to unlawful termination claims from all employees, regardless of period of service or the head count of employees.

General Protections

The Fair Work Act also contains a number of 'General Protections', including a prohibition on adverse action against an employee due to the fact that they:

1. have a workplace right;
2. have, or have not exercised that workplace right;
3. propose or propose not to, have at any time proposed or not proposed to exercise that workplace right.

An employee has a workplace right if they are:

1. entitled to the benefit of, or have a role or responsibility under a workplace law, instrument or order made by an industrial body; or
2. able to initiate or participate in a process under workplace law; or
3. able to make a complaint or inquiry to a body having the capacity under workplace law to seek compliance with that law, or able to make a complaint with respect to their employment.

There are also prohibitions on coercion, undue influence and discrimination. These new laws overlap with many aspects of unlawful dismissal and anti-discrimination legislation. Directors can be held personally liable in circumstances where they are found to have conspired to deprive employees of entitlements.

National Employment Standards (NES)

Maximum weekly hours of work:

Full time employees can work a maximum of 38 hours per week, plus “reasonable additional hours”. There is no express limit on the number of hours that will be considered reasonable, but an employee has a right to refuse to work if the hours or timing are unreasonable.

Flexible working arrangements:

Employees with a minimum of 12 months continuous service, and who are responsible for children of school age or younger, are carers, have a disability, or are 55 or over (among others) can request flexible working arrangements. Employers cannot refuse such a request unless there are “reasonable business grounds” for refusal.

Parental Leave:

Parents are entitled to 12 months parental leave with an option to request an extension for an additional 12 months. The employer may refuse the extension on “reasonable business grounds”. Employees are also able to claim for up to 18 weeks paid parental leave (at the Federal Minimum Wage) from the Government if they are eligible.

Annual Leave:

The entitlement is 4 weeks paid leave per year (pro rata for part time employees). Genuine shift workers are entitled to 5 weeks per year.

Personal/Carers and Compassionate Leave:

The entitlement is 10 days (pro rata for part time employees) paid personal/carer’s leave per year, excluding casual employees. This leave is cumulative. All employees are entitled to 2 days unpaid compassionate leave per instance as required.

Long Service Leave:

The NES defers to award conditions for the calculation of Long Service Leave. Many Awards refer to the relevant state legislation.

Notice of Termination and Redundancy:

Employers are usually required to give an employee notice of termination. The minimum notice period is calculated using a sliding scale which relates to the employee’s age and length of service. Notice of termination by the employer must be in writing.

Employees are entitled to be paid redundancy on a sliding scale (depending on their length of service) if their position is made redundant.

Employers with fewer than 15 full time equivalent employees will be exempt from this redundancy requirement. There are exceptions to these redundancy laws and advice should be sought prior to taking any steps in this regard.

Modern Awards

Modern awards apply to the majority of employees in Australia. Employers should seek legal advice to ensure compliance with modern awards.

Enterprise Agreements

Enterprise Agreements can be negotiated between employers and employees to create a set of workplace conditions that may be more applicable to a particular business than the generic award.

Employees must be 'better off overall' under the Enterprise Agreement than they would otherwise have been under the relevant award.

Individual flexibility arrangements can be negotiated with employees who are under a modern award, but there are compliance requirements.

Workers Compensation and Occupational Health & Safety

These laws remain state based. In NSW, an employer must ensure the safety of its workers and any visitors to its place of work. When an employee notifies the employer of a workers compensation claim, the employer must immediately pass this onto their insurer.

Discrimination

It is unlawful to discriminate against an employee because of their race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

The exception to this rule is where in some circumstances due to the inherent requirements of the position, a person with particular characteristics is unsuitable.

Restraint of Past Employees

Restraints should be reasonable as to length and geographical scope, to protect an actual business interest of the employer, be for adequate consideration, and not prevent the employee from working altogether. Injunctions can be obtained preventing breaches of restraint of trade clauses, or alternatively, damages can be awarded. Restraints of trade are notoriously difficult to enforce, so accurate drafting is essential.

Bullying and harassment laws

Anti-bullying provisions were inserted in the Fair Work Act on 1 January 2014. The provisions allow employees who reasonably believe they have been bullied at work, to make an application to the Fair Work Commission to stop the bullying. The Commission will make an order to stop bullying where there is a risk that the employee will continue to be bullied. Non-compliance with FWC orders may attract civil penalties.

Superannuation

Currently the minimum super guarantee is 9.50%.

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