



## Fair Work Information Statement and the National Employment Standards

### Australia's new workplace relations system

From 1 July 2009, most Australian workplaces are governed by a new system created by the *Fair Work Act 2009*.

The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. We provide education, information and advice, investigate workplace complaints, and enforce relevant Commonwealth workplace laws.

The provision of the Fair Work Information Statement (the Statement) forms part of the National Employment Standards (NES). As of 1 January 2010, the NES apply to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment.

Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES, and have no effect. An employer must not contravene a provision of the NES. A contravention of a provision of the NES may result in penalties of up to \$6,600 for an individual and \$33,000 for a corporation.

### Overview

The Statement must be given to each new employee commencing employment from 1 January 2010.

The Statement is published by the Fair Work Ombudsman and must be published in the *Commonwealth Government Notices Gazette* (the *Gazette*). If the Fair Work Ombudsman changes the Statement in any way, they must publish the new version in the *Gazette*.

### What information must be contained in the Statement?

The Statement contains information about the following:

- the NES
- modern awards
- agreement-making under the *Fair Work Act 2009*
- the right to freedom of association

- the role of Fair Work Australia and the Fair Work Ombudsman
- termination of employment
- individual flexibility arrangements
- right of entry (including the protection of personal information by privacy laws)
- an explanation of the effect on an employee's entitlements under the NES if both of the following occur:
  - a transfer of a business occurs as described in the *Fair Work Act 2009*
  - the employee becomes a transferring employee.

### Who must receive the Statement?

An employer must give each new employee the Statement before (or as soon as practicable after) the employee starts his or her employment. The employer is not required to give the employee the Statement more than once in 12 months.

Employers must give the Statement to an employee.

This may occur by any means, for example:

- the employer gives it to the employee personally
- the employer sends it by pre-paid post to:
  - the employee's residential address or
  - a postal address nominated by the employee
- the employer sends it to:
  - the employee's work email address or
  - another email address nominated by the employee

- the employer sends to the employee's work email address (or to another email address nominated by the employee):
  - an electronic link to the Fair Work Ombudsman website on which the Statement is located or
  - an electronic link that takes the employee directly to a copy of the Statement on the employer's intranet
- the employer faxes it to:
  - the employee's work fax number or
  - the employee's home fax number or
  - another fax number nominated by the employee.

## Further Information

The Fair Work Ombudsman has published a fact sheet on each NES entitlement. For further information on a specific NES entitlement, please see the relevant fact sheets at [www.fwo.gov.au](http://www.fwo.gov.au)

For further information, visit [www.fairwork.gov.au](http://www.fairwork.gov.au) or contact Fair Work Online **13 13 94**.

## Related Publications

*Introduction to the NES*

*Maximum working hours and the NES*

*Requests for flexible working arrangements and the NES*

*Parental leave and related entitlements and the NES*

*Annual leave and the NES*

*Personal/carer's leave and compassionate leave and the NES*

*Community service leave and the NES*

*Long service leave and the NES*

*Public holidays and the NES*

*Notice of termination and redundancy pay and the NES*

### Contact us

Fair Work Online: [www.fairwork.gov.au](http://www.fairwork.gov.au)

Fair Work Infoline: **13 13 94**

Monday to Friday, between 8.00am–6.00pm

### Need language help?

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### Hearing & speech assistance

Call through the National Relay Service (NRS):

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## Introduction to the National Employment Standards

### Australia's new workplace relations system

From 1 July 2009, most Australian workplaces are governed by a new system created by the *Fair Work Act 2009*.

The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. We provide education, information and advice, investigate workplace complaints, and enforce relevant Commonwealth workplace laws.

As of 1 January 2010, the National Employment Standards (NES) replace the Australian Fair Pay and Conditions Standard. Together with modern awards (also from 1 January 2010), the NES make up a new safety net for employees covered by the national workplace relations system.

In addition to the NES, an employee's terms and conditions of employment generally come from an award or agreement. All references to an award or agreement in this fact sheet include modern awards, enterprise agreements, and award or agreement-based transitional instruments.

### What are the 10 NES entitlements?

The NES are set out in the *Fair Work Act 2009* and comprise 10 minimum standards of employment. Each standard is covered in detail in separate fact sheets (see below), but in summary, the NES involve the following minimum entitlements:

- **Maximum weekly hours of work** – 38 hours per week, plus reasonable additional hours.
- **Requests for flexible working arrangements** – an entitlement allowing parents or carers of a child under school age, or of a child under 18 with a disability, to request a change in working arrangements to assist with the care of the child.
- **Parental leave and related entitlements** – up to 12 months unpaid leave per employee, plus a right to request an additional 12 months unpaid leave, plus other forms of maternity, paternity and adoption-related leave.
- **Annual leave** – four weeks paid leave per year, plus an additional week for certain shift workers.
- **Personal/carer's leave and compassionate leave** – 10 days paid personal/carer's leave, two days unpaid carer's leave as required, and two days compassionate leave (unpaid for casuals) as required.
- **Community service leave** – unpaid leave for voluntary emergency activities and leave for jury service, with an entitlement to be paid for up to 10 days for jury service.
- **Long service leave** – a transitional entitlement for employees as outlined in an applicable pre-modernised award, pending the development of a uniform national long service leave standard.
- **Public holidays** – a paid day off on a public holiday, except where reasonably requested to work.
- **Notice of termination and redundancy pay** – up to five weeks notice of termination and up to 16 weeks severance pay on redundancy, both based on length of service.
- **Provision of a Fair Work Information Statement** – must be provided by employers to all new employees, and contains information about the NES, modern awards, agreement-making, the right to freedom of association, termination of employment, individual flexibility arrangements, union rights of entry, transfer of business, and the respective roles of Fair Work Australia and the Fair Work Ombudsman.

## Who do the NES apply to?

The NES apply to all employees covered by the national workplace relations system (however only certain entitlements apply to casual employees).

There are two NES entitlements that apply to all full-time and part-time employees, whether they are covered by the national workplace relations system or not.

These are:

- parental leave and related entitlements (this also applies to casual employees who have been employed for at least 12 months by an employer on a regular and systematic basis and with an expectation of ongoing employment)
- notice of termination.

However, only certain NES entitlements apply to casual employees, which are:

- two days unpaid carers leave and two days compassionate leave per occasion
- maximum weekly hours
- community service leave (except paid jury service)
- to reasonably seek a day off on a public holiday
- provision of the Fair Work Information Statement.

In addition, casual employees who have been employed for at least 12 months by an employer on a regular and systematic basis and with an expectation of ongoing employment are entitled to:

- make requests for flexible working arrangements
- parental leave.

## How do the NES apply?

The NES apply to all employees covered by the national workplace relations system regardless of the applicable industrial instrument or contract of employment. Terms in awards, agreements, and employment contracts cannot exclude or provide for an entitlement less than the NES, and have no effect.

However, awards and agreements are specifically allowed to affect the operation of the NES in certain ways.

For example, they may specify terms that deal with:

- averaging an employee's ordinary hours of work
- the cashing out and taking of paid annual leave
- the cashing out of paid personal/carer's leave
- the substitution of public holidays
- situations in which redundancy pay entitlements do not apply.

They may also supplement the NES by providing entitlements that are more favourable for employees.

In addition, employers and award/agreement-free employees (meaning they are not covered by an award or agreement) may also make agreements that affect the operation of the NES in certain ways.

They may make agreements about the following:

- averaging of hours of work
- the cashing out or taking of paid annual leave
- the substitution of public holidays
- extra annual leave in exchange for foregoing an equivalent amount of pay
- extra personal/carer's leave in exchange for foregoing an equivalent amount of pay.

Otherwise, employment contracts can only have effect to the extent that they provide entitlements that are similar or more favourable to the employee.

An employer must not contravene a provision of the NES. A contravention of a provision of the NES may result in penalties of up to \$6,600 for an individual and \$33,000 for a corporation.

## Further information

The Fair Work Ombudsman has published a fact sheet on each NES entitlement. For further information on a specific NES entitlement, please see the relevant fact sheets at [www.fwo.gov.au](http://www.fwo.gov.au)

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## Annual leave and the National Employment Standards

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### Annual leave and the National Employment Standards

Annual leave forms part of the National Employment Standards (NES). As of 1 January 2010, the NES apply to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment.

Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES, and have no effect. An employer must not contravene a provision of the NES. A contravention of a provision of the NES may result in penalties of up to \$6,600 for an individual and \$33,000 for a corporation.

In addition to the NES, an employee's terms and conditions of employment generally come from an award or agreement. All references to an award or agreement in this fact sheet include modern awards, enterprise agreements, and award or agreement-based transitional instruments.

#### Overview

The NES establish the minimum entitlements to annual leave, the circumstances about when annual leave can be taken, and the rate of pay employees should be paid.

The NES also set out what happens with annual leave when there is a transfer of employment, and the arrangements that apply to the cashing out of annual leave.

An employee is still entitled to annual leave accrued prior to 1 January 2010, subject to the rules for taking or cashing out annual leave contained under the NES.

### What are the minimum entitlements to annual leave?

An employee (other than a casual employee) is entitled to four weeks of paid annual leave for each year of service with the employer. An employee's entitlement to annual leave accrues on a continuous basis according to the number of ordinary hours they worked.

An employee classified as a 'shiftworker' is entitled to five weeks paid annual leave. This is the case if an award or agreement applies to the employee, and defines or describes the employee as a shiftworker for the purposes of the NES.

An award or agreement-free employee can also qualify for the shiftworker entitlement of five weeks annual leave if all of the following apply to the employee:

- they are employed in an enterprise where shifts are continuously rostered 24 hours a day for seven days a week
- they are regularly rostered to work those shifts
- they regularly work on Sundays and public holidays.

Awards and agreements may supplement the NES by providing for additional annual leave entitlements. Award or agreement-free employees may agree with their employer to purchase extra annual leave in exchange for forgoing an equivalent amount of pay.

### When can paid annual leave be taken?

Annual leave under the NES does not have to be taken each year, as the entitlement can accumulate. It is up to each employer and employee to agree on when and for how long paid annual leave may be taken.



However, the employer must not unreasonably refuse an employee's request to take paid annual leave. There is no maximum or minimum period of annual leave that may be taken.

An employee is not on paid annual leave if the period during which an employee takes paid annual leave:

- includes a day or part-day that is a public holiday
- includes a period of any other leave (other than unpaid parental leave), or a period of absence from employment due to community service leave.

In certain circumstances, an employer can direct an employee to take annual leave. In order for an employer to be able to do this, an award or agreement must include terms that require an employee to take paid annual leave, or allow the employee to be directed to take leave. The requirement in the award or agreement must be reasonable. Similarly, the NES allow an employer to require an award or agreement-free employee to take a period of annual leave, but only if the requirement is reasonable.

A requirement to take paid annual leave may be reasonable if, for example:

- the employee has accrued an excessive amount of paid annual leave
- the employer's enterprise is being shut down for a period (such as between Christmas and New Year).

In assessing reasonableness, the following factors are relevant:

- the needs of the employee and the employer's business
- any agreed arrangement with the employee
- custom and practice of the business
- timing of the direction or requirement to take leave
- reasonableness of the period of notice given.

An award or agreement can include terms dealing with the taking of paid annual leave. An employer and an award or agreement-free employee may agree on when and how paid annual leave may be taken.

Matters that could be either incorporated into an award or agreement, or agreed upon, include:

- that paid annual leave may be taken in advance of accrual
- that paid annual leave must be taken within a fixed period of time after it is accrued
- that a specified period of notice must be given before taking paid annual leave.

## What payments are required when annual leave is taken?

When annual leave is taken, the minimum requirement is that an employee must be paid at their base rate of pay for the ordinary hours they would have worked during the period. An employee's base rate of pay (other than a pieceworker) is the rate of pay payable to an employee for his or her ordinary hours of work, but not including any of the following:

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

On termination of employment, an employer must pay an employee in respect to any period of untaken paid annual leave.

## Is annual leave payable on a transfer of employment?

The 'transfer of employment' provisions under the *Fair Work Act 2009* essentially apply when an employee moves from one employer (the old employer) to another employer (the new employer) within three months, and there is a transfer of business involved (through a transfer of assets, outsourcing, insourcing), or the two employers are associated entities.

If these conditions are satisfied, the period of service with the old employer will generally count as service with the new employer for the purposes of entitlements under the *Fair Work Act 2009*. If this applies, an employee is not entitled to be paid for a period of untaken annual leave under the NES in relation to termination of their employment with the old employer.

However, there are exceptions to this general principle. A new employer that is not an associated entity of the old employer has the option to not recognise a transferring employee's previous service for the purposes of NES entitlements to annual leave. If the new employer does not recognise an employee's service in relation to annual leave, the old employer will be required to pay out the employee's untaken annual leave.

For more information on the transfer of business provisions and the impact on employee entitlements, please see the *Fair Work Ombudsman Fact Sheet – Transfer of Business*.

## Can annual leave be cashed out?

For employees covered by an award or agreement, cashing out of annual leave is permitted if the award or agreement allows the practice. Award or agreement-free employees may agree to cash out annual leave at any time.

However, in all cases the following applies:

- the employee must retain an entitlement to at least four weeks paid annual leave
- there must be a separate agreement in writing on each occasion
- the employee must be paid at least the full amount that would have been payable had the employee taken the leave the employee has cashed out.

It is unlawful for an employer to force (or try to force) an employee to make (or not make) an agreement to cash out annual leave. For more information, please see the *Fair Work Ombudsman Fact Sheet - General Workplace Protections*.

## Further Information

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## Community service leave and the National Employment Standards

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Community service leave forms part of the National Employment Standards (NES). As of 1 January 2010, the NES apply to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment.

Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES, and have no effect. An employer must not contravene a provision of the NES. A contravention of a provision of the NES may result in penalties of up to \$6,600 for an individual and \$33,000 for a corporation.

In addition to the NES, an employee's terms and conditions of employment generally come from an award or agreement. All references to an award or agreement in this fact sheet includes modern awards, enterprise agreements, and award or agreement-based transitional instruments.

### Overview

From 1 January 2010, there is an entitlement to certain forms of community service leave under the NES.

This provides employees with a right to be absent from work to engage in prescribed community service activities, such as emergency service duties and jury service.

### What is community service leave?

Employees, including casual employees, are entitled to be absent from work for the purpose of performing certain community service activities such as:

- a 'voluntary emergency management activity'
- jury service (including attendance for jury selection) that is required by or under a law of the Commonwealth, a State or a Territory.

### What is a voluntary emergency management activity?

An employee engages in a voluntary emergency management activity only if they:

- engage in an activity that involves dealing with an emergency or natural disaster
- the employee engages in the activity on a voluntary basis
- the employee is a member of, or has a member-like association with, a 'recognised emergency management body' and either:
  - the employee was requested by or on behalf of the body 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.



## What is a recognised emergency management body?

A recognised emergency management body is:

- a body or part of a body, that has a role or function under a plan that:
  - is for coping with emergencies and/or disasters
  - is prepared by the Commonwealth, a State or a Territory
- a fire-fighting, civil defence or rescue body, or part of such a body
- any other body, or part of a body, which substantially involves:
  - securing the safety of persons or animals in an emergency or natural disaster
  - protecting property in an emergency or natural disaster
  - otherwise responding to an emergency or natural disaster.

This would include bodies such as the State Emergency Service (SES), Country Fire Authority (CFA) or the RSPCA (in respect of animal rescue).

## How much leave is an employee entitled to?

There is no set limit on the amount of community service leave an employee is entitled to.

An employee is entitled to be absent from his or her employment:

- for the time that the employee is engaged in the eligible community service activity, including reasonable travelling time associated with the activity, and reasonable rest time immediately following the activity
- if the absence is reasonable in all the circumstances (jury service is taken to always be reasonable).

## Are there notice and evidence requirements?

An employee's absence from his or her employment is not covered by community service leave unless the employee complies with the notice and evidence requirements under the *Fair Work Act 2009*.

An employee who wants an absence from his or her employment to be covered by community service leave must give his or her employer:

- notice of the absence as soon practicable
- the period or expected period of absence.

An employer may require an employee, who has given notice of taking community service leave, to provide evidence that would satisfy a reasonable person that the employee is entitled to the leave.

## Is there a requirement to be paid for community service leave?

Community service leave under the NES is unpaid, except in relation to jury service where an employee (other than a casual) is entitled to 'make-up pay' for the first 10 days that the employee is absent for a period of jury service. Make-up pay is the difference between any jury service pay the employee receives (excluding any expense-related allowances) and the employee's 'base rate of pay' for the ordinary hours they would have worked. Base rate of pay excludes incentive-based payments and bonuses, loadings, monetary allowances, overtime and penalty rates, or any other separately identifiable amounts.

An employer may require the employee to provide evidence that would satisfy a reasonable person:

- that the employee has taken all necessary steps to obtain any amount of jury service pay to which the employee is entitled and
- the total amount of jury service pay that has been paid, or is payable, to the employee for the period (even if there was no jury service payment).

If the employer requires evidence, then the employer is only required to pay the employee upon receipt of the evidence.

However, the *Fair Work Act 2009* allows State and Territory laws to continue to apply to employees where they provide more beneficial entitlements than the NES in relation to eligible community service activities. For example, the *Fair Work Act 2009* would not apply to the exclusion of a State or Territory law where it provided for a casual employee to be paid jury service pay.

## Further information

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## Long service leave and the National Employment Standards

### Australia's new workplace relations system

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Long service leave forms part of the National Employment Standards (NES). As of 1 January 2010, the NES apply to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment.

Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES, and have no effect. An employer must not contravene a provision of the NES. A contravention of a provision of the NES may result in penalties of up to \$6,600 for an individual and \$33,000 for a corporation.

In addition to the NES, an employee's terms and conditions of employment generally come from an award or agreement. All references to an award or agreement in this fact sheet includes modern awards, enterprise agreements, and award or agreement-based transitional instruments.

### Overview

The NES set out the entitlement to long service leave. This entitlement is a transitional entitlement pending the development of a uniform national long service standard.

### What entitlements to long service leave will apply?

Under the NES, an employee is entitled to long service leave in accordance with their applicable pre-modernised award. Modern awards (from 1 January 2010) cannot include terms dealing with long service leave.

However, an employee's long service leave entitlement derived from a pre-modernised award does not apply where:

- a collective agreement, an Australian Workplace Agreement (AWA) made after 26 March 2006, or an Individual Transitional Employment Agreement (ITEA) came into operation before the commencement of the NES, and applies to the employee or
- one of the following kinds of instruments came into operation before the commencement of the NES, applies to the employee, and expressly deals with long service leave:
  - an enterprise agreement - agreements made after 1 July 2009 and approved by Fair Work Australia
  - a preserved State agreement - an agreement made in the State system before 26 March 2006
  - a workplace determination - made by Fair Work Australia
  - a certified agreement - an agreement made before 26 March 2006
  - an AWA - made before 26 March 2006
  - a section 170MX award - an award made by the Australian Industrial Relations Commission (AIRC) before 26 March 2006 after terminating a bargaining period
  - an old IR agreement - an agreement approved by the AIRC before December 1996.

When one of the above specified instruments ceases to operate, an employee is entitled to long service leave in accordance with an applicable pre-modernised award.

## Interaction between State and Territory long service leave laws and enterprise agreements

The content of an enterprise agreement made during the period 1 July 2009 – 31 December 2009 will prevail over State or Territory long service leave laws.

From 1 January 2010, if a pre-modernised award does not apply to an employee, any entitlement to long service leave will be derived from applicable State or Territory long service leave laws. The State or Territory long service leave laws generally prevail over any provisions in an enterprise agreement to the extent that they are inconsistent with those laws.

## Agreement-derived long service leave entitlements

In some circumstances, Fair Work Australia can make an order which preserves long service leave entitlements contained in a collectively bargained agreement (such as enterprise agreements, collective agreements, pre-reform certified agreements and old IR agreements). In this instance, the agreement terms prevail over the State or Territory long service leave laws.

This can occur where:

- the agreement came into operation prior to 1 January 2010
- the agreement has terms dealing with long service leave
- the agreement applies to employees in more than one State or Territory
- the agreement provides entitlements which are equal to or greater than the relevant State or Territory long service leave laws
- there are no applicable long service leave entitlements derived from a pre-modernised award which applies to the employees.

## What if there are no applicable award or agreement-derived long service leave entitlements?

If there are no award or agreement terms regarding long service leave as set out above, the entitlement to long service leave comes from State and Territory laws. These laws are subject to the interaction with any transitional instrument that applies to the employees. Generally, these transitional instruments prevail to the extent of any inconsistency over any State or Territory long service leave laws.

## What are the minimum long service leave entitlements?

Depending on the relevant State/Territory law or industrial instrument (such as an award or agreement), an employee may be entitled to long service leave after a period of continuous service ranging from seven to 15 years with the same or a related employer.

Untaken long service leave is usually paid on termination, although this can depend on the circumstances of termination. Depending on the relevant law or instrument, an employee may be eligible for a pro-rata payment on termination after a minimum period of five years continuous service.

## Can an enterprise agreement discount periods of service for long service leave?

Where an enterprise agreement replaces a collective or individual agreement or other specified instrument (such as a workplace determination) that operated before the commencement of the NES, and stated the employee was not entitled to long service leave, an employee's service under the former agreement can be discounted for the purpose of long service leave.

The enterprise agreement may include terms that an employee's service with the employer during a specified period does not count as service for determining long service leave entitlements under either the NES or a State or Territory law. The period is some or all of the period when an employee was covered by the collective or individual agreement or other specified instrument (such as a workplace determination).

If the enterprise agreement includes terms excluding prior service, it does not count as service for determining long service leave entitlements under either the NES or a State or Territory law. However, the period for long service leave entitlement purposes can be reinstated by a later agreement, either through an enterprise agreement or a contract of employment.

## Further Information

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In addition to the NES, an employee's terms and conditions of employment generally come from an award or agreement. All references to an award or agreement in this fact sheet includes modern awards, enterprise agreements, and award or agreement-based transitional instruments.

### Overview

The NES establish the maximum weekly hours for employees, as well as the circumstances in which an employee may refuse a request or requirement to work additional hours if the hours are unreasonable.

They also set out arrangements for the averaging of hours of work under an award or agreement, or by agreement between an employer and an award/agreement-free employee.

### What are the maximum weekly hours of work?

An employer must not request or require an employee to work more than the following hours of work in a week, unless the additional hours are reasonable:

- for a full-time employee, 38 hours or
- for an employee other than a full-time employee, the lesser of:
  - 38 hours
  - the employee's ordinary hours of work in a week.

The hours an employee works in a week must be taken to include any hours of leave or absence (paid or unpaid) that is authorised:

- by the employer or
- by or under a term of the employee's employment or
- by or under a Commonwealth, State or Territory law, or an instrument in force under such a law.

An employee may refuse to work additional hours if they are unreasonable.

### What factors determine whether additional hours are reasonable?

In determining whether additional hours are reasonable or unreasonable, the following must be taken into account:

- any risk to employee health and safety
- the employee's personal circumstances, including family responsibilities
- the needs of the workplace or enterprise

- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for (or a level of remuneration that reflects an expectation of) working additional hours
- any notice given by the employer to work the additional hours
- any notice given by the employee of his or her intention to refuse to work the additional hours
- the usual patterns of work in the industry
- the nature of the employee's role and the employee's level of responsibility
- whether the additional hours are in accordance with averaging provisions included in an award or agreement that is applicable to the employee, or an averaging arrangement agreed to by an employer and an award/agreement-free employee
- any other relevant matter.

## What averaging arrangements can apply to hours of work?

### *Averaging of hours of work under awards or agreements*

An award or agreement may include provisions for the averaging of hours of work over a specified period that is greater than a week.

The average weekly hours over the period must not exceed:

- for a full-time employee, 38 hours or
- for an employee other than a full-time employee, the lesser of:
  - 38 hours
  - the employee's ordinary hours of work in a week.

An award or agreement can provide for average weekly hours that are greater than the hours above if those additional hours are considered reasonable.

In either case, hours worked in excess of the above average weekly hours will be treated as additional hours. The averaging provisions are relevant in determining whether the additional hours are reasonable or not.

### *Illustrative example*

The award regulating Malcolm's employment includes averaging arrangements in relation to hours of work, so that full-time employees would ordinarily work 152 hours over four weeks (an average of 38 hours per week). Over a four week period, Malcolm's work pattern is as follows:

Week 1 – worked 21 hours

Week 2 – worked 60 hours

Week 3 – worked 38 hours

Week 4 – worked 33 hours

The averaging arrangement would be relevant in determining the reasonableness of the additional 22 hours that Malcolm was required to work in Week 2. Other factors such as Malcolm's family responsibilities, his health and safety, and the notice he was given of having to work the additional 22 hours would also be relevant.

### *Averaging of hours of work for award/agreement free employees*

Employers and award/agreement-free employees may agree in writing to an averaging arrangement to average their ordinary hours of work. However, the maximum averaging period is 26 weeks.

Again, the average weekly hours over the period must not exceed:

- for a full-time employee, 38 hours or
- for an employee other than a full-time employee, the lesser of:
  - 38 hours
  - the employee's ordinary hours of work in a week.

Alternatively, the agreement can provide for average weekly hours that are greater than the hours above if those additional hours are considered reasonable.

In either case, hours worked in excess of the above in a week will be treated as additional hours. The averaging arrangement agreed between the employer and employee will be relevant in determining whether the additional hours are reasonable or not.

### *Do I have to enter into an averaging arrangement?*

There is no requirement for an employer and employee to enter into an averaging arrangement.

Under the general workplace protections provisions of the *Fair Work Act 2009*, it is unlawful for an employer to force (or try to force) an employee to make (or not make) an averaging arrangement.

The Fair Work Ombudsman can investigate allegations of contraventions of the general protections provisions. Where identified, the Fair Work Ombudsman can initiate legal action for penalties of up to \$6,600 for an individual and \$33,000 for a corporation.

For more information on general protections, please see the *Fair Work Ombudsman Fact Sheet – General workplace protections*.





## Notice of termination and redundancy pay and the National Employment Standards

### Australia's new workplace relations system

From 1 July 2009, most Australian workplaces are governed by a new system created by the *Fair Work Act 2009*.

The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. We provide education, information and advice, investigate workplace complaints, and enforce relevant Commonwealth workplace laws.

Notice of termination and redundancy pay forms part of the National Employment Standards (NES). As of 1 January 2010, the NES apply to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment.

Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES, and have no effect. An employer must not contravene a provision of the NES. A contravention of a provision of the NES may result in penalties of up to \$6,600 for an individual and \$33,000 for a corporation.

In addition to the NES, an employee's terms and conditions of employment generally come from an award or agreement. All references to an award or agreement in this fact sheet includes modern awards, enterprise agreements, and award or agreement-based transitional instruments.

### Overview

The NES establish the minimum period of notice, or payment in lieu of notice, that an employer must give an employee to terminate their employment. The provisions about notice of termination apply to all employees (other than casuals), not just those covered by the national workplace relations system.

The NES also set out what redundancy pay may be applicable to an employee on the termination of their employment. The redundancy entitlement under the NES only applies to employees covered by the national workplace relations system.

### Notice of termination

An employer must not terminate an employee's employment (subject to the exceptions set out below) unless they have given the employee **written notice** of the day of the termination.

An employer may give notice to the employee by:

- delivering it personally or
- leaving it at the employee's last known address or
- sending it by pre-paid post to the employee's last known address.

### What amount of notice must be given?

An employer must not terminate an employee unless they have:

- given the minimum period of notice (see table below) or
- paid the employee in lieu of notice at the full rate of pay for at least the hours the employee would have worked had the employment continued until the end of the minimum period of notice (see table below).

An employee's full rate of pay (other than a pieceworker) is the rate of pay payable to an employee, including all the following:

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

Employee's period of continuous service with the employer at the end of the day the notice is given	Period
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

If the employee is over 45 years old, and has completed at least two years of service at the end of the day notice is given, the employee receives an additional one week notice.

The minimum periods of notice apply to all employees employed in Australia (subject to the exceptions noted below).

An award or agreement may include terms specifying the period of notice an employee must give in order to terminate his or her employment.

### Does notice of termination apply to all employees?

An employer does not need to provide notice of termination (or payment in lieu of notice) to any of the following employees:

- an employee employed for a specified period of time, for a specified task, or for the duration of a specified season
- an employee whose employment is terminated because of serious misconduct (for example, an employee who has, in the course of their employment, engaged in theft, fraud or assault)
- a casual employee
- an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement
- a daily hire employee working in the building and construction industry (including working in connection with the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures)
- a daily hire employee working in the meat industry in connection with the slaughter of livestock
- a weekly hire employee working in connection with the meat industry and whose termination of employment is determined solely by seasonal factors.

## Redundancy pay

An employee is entitled to redundancy pay (subject to the exceptions set out below) from the employer if the employee is terminated:

- at the employer's initiative because they no longer require the job to be done by the employee or anyone (except where this is due to the ordinary and customary turnover of labour) or
- because of the insolvency or bankruptcy of the employer.

Based on the table below, the amount of redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out at their 'base rate of pay' for ordinary hours worked.

An employee's base rate of pay (other than a pieceworker) is the rate of pay payable to an employee for his or her ordinary hours of work, but not including any of the following:

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

Employee's period of continuous service with the employer on termination	Redundancy pay period
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks
At least 9 years but less than 10 years	16 weeks
At least 10 years	12 weeks*

\* There is a reduction in redundancy pay from 16 weeks to 12 weeks for employees with at least 10 years continuous service. This is consistent with the *2004 Redundancy Case* decision made by the Australian Industrial Relations Commission.

It is possible for an employer to apply to Fair Work Australia for a determination reducing the liability to pay redundancy pay to a specified amount (that may be nil) if Fair Work Australia considers it appropriate. The employer may apply for the determination if an employee is entitled to redundancy pay, and the employer finds other acceptable alternative employment or cannot pay the amount.

## Does redundancy pay apply to all employees?

An employer who is a small business employer is not required to provide redundancy pay on the termination of an employee's employment. A small business employer for the purpose of determining redundancy pay is an employer who, at a particular time, employs fewer than 15 employees.

When calculating the number of employees employed at a particular time, the following factors are to be taken into account:

- all employees employed by the employer at that time are to be counted
- a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis
- associated entities are taken to be one entity
- the employee being terminated and any other employees being terminated at that time are counted.

In addition, redundancy pay will not be payable to any of the following:

- an employee whose period of continuous service with the employer is less than 12 months
- an employee employed for a specified period of time, for a specified task, or for the duration of a specified season
- an employee whose employment is terminated because of serious misconduct
- a casual employee
- an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement
- an apprentice
- an employee to whom a industry-specific redundancy scheme in a modern award applies
- an employee to whom a redundancy scheme in an enterprise agreement applies if:
  - the scheme is an industry-specific redundancy scheme that is incorporated by reference (and as in force from time to time) into the enterprise agreement from a modern award that is in operation
  - the employee is covered by the industry-specific redundancy scheme in the modern award.

An award that is in operation may include a term specifying other situations in which redundancy pay does not apply to the termination of an employee's employment.

## Is redundancy pay payable on a transfer of employment?

The 'transfer of employment' provisions under the *Fair Work Act 2009* apply when an employee moves from one employer (the old employer) to another employer (the new employer) within three months, and there is a transfer of business involved. This may occur through a number of connections between the two employers, including a transfer of assets, outsourcing and insourcing, or where the two employers are associated entities.

If these conditions are satisfied, the period of service with the old employer will generally count as service with the new employer for the purposes of entitlements under the *Fair Work Act 2009*. If this applies, an employee is not entitled to redundancy pay under the NES in relation to termination of their employment with the old employer.

However, there are exceptions to this general principle. A new employer that is not an associated entity of the old employer has the option to not recognise a transferring employee's previous service for the purposes of NES entitlements to redundancy pay. If the new employer does not recognise an employee's service in relation to redundancy pay, the old employer will be required to pay out the employee's redundancy pay.

Further, subject to an order from Fair Work Australia, an employee is not entitled to redundancy pay under the NES in relation to the termination of his or her employment with the old employer if:

- the employee rejects an offer of employment made by another employer that:
  - is on terms and conditions substantially similar to, and, on an overall basis, no less favourable than the employee's terms and conditions of employment with the old employer immediately before the termination
  - recognises the employee's service with the old employer for the purposes of redundancy pay
- had the employee accepted the offer, there would have been a transfer of employment.

For more information on the transfer of business provisions and the impact on employee entitlements, please see the *Fair Work Ombudsman Fact Sheet – Transfer of Business*.



## Parental leave and related entitlements and the National Employment Standards

### Australia's new workplace relations system

From 1 July 2009, most Australian workplaces are governed by a new system created by the *Fair Work Act 2009*.

The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. We provide education, information and advice, investigate workplace complaints, and enforce relevant Commonwealth workplace laws.

Parental leave and related entitlements form part of the National Employment Standards (NES). As of 1 January 2010, the NES apply to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment.

Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES, and have no effect. An employer must not contravene a provision of the NES. A contravention of a provision of the NES may result in penalties of up to \$6,600 for an individual and \$33,000 for a corporation.

In addition to the NES, an employee's terms and conditions of employment generally come from an award or agreement. All references to an award or agreement in this fact sheet include modern awards, enterprise agreements, and award or agreement-based transitional instruments.

### Overview

The NES establish minimum entitlements to unpaid parental leave and related entitlements, which apply to **all** employees in Australia.

Parental leave provisions include birth-related leave and adoption-related leave, and also recognise same sex de facto relationships.

In addition to unpaid parental leave, the NES also provide the following related entitlements:

- unpaid special maternity leave
- a right to transfer to a safe job in appropriate cases, or take paid 'no safe job leave'
- consultation requirements

- a return to work guarantee
- unpaid pre-adoption leave.

### Which employees are eligible for unpaid parental leave?

All employees in Australia are eligible to unpaid parental leave if they have completed at least 12 months of continuous service with their employer.

This includes casual employees, but only if:

- they have been employed by the employer on a regular and systematic basis for a sequence of periods over at least 12 months
- had it not been for the birth (or expected birth) or adoption (or expected adoption) of a child, they would have a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

### What is the entitlement to parental leave?

Each eligible member of an employee couple may take a separate period of up to 12 months of unpaid parental leave. However, if only one person is taking leave, or if one member of an employee couple wishes to take more than 12 months leave, the employee may request a further period of up to 12 months, from their employer.

An 'employee couple' is where two employees are in a spousal or de facto relationship.

Parental leave is only available to employees who have or will have responsibility for the care of a child.

The leave must be associated with:

- the birth of a child to the employee, the employee's spouse, or the employee's de facto partner or
- the placement of a child under 16 with the employee for adoption.

The 'child of a person' is defined by the *Family Law Act 1975* as someone who is a person's biological, adopted or step child.

An employee's 'de facto partner' is defined as a person who, although not legally married to the employee, lives with them in a relationship as a couple on a genuine domestic basis. Former de facto partners are also included.

The *Fair Work Act 2009* ensures that same sex de facto relationships are recognised for unpaid parental leave entitlements. This means that the same sex de facto partner of either a person who gives birth or a biological parent may be eligible to take unpaid birth-related leave.

## What are the rules for taking unpaid parental leave?

There are different rules for taking unpaid parental leave, depending on:

- if one employee takes leave or
- if both members of an employee couple take leave.

### One employee taking unpaid parental leave

The following rules apply where one employee (or only one member of an employee couple) takes leave:

- leave must be taken in a single continuous period (paid leave, such as annual leave, may be taken at the same time)
- leave starts at the birth or placement of the child or, in the case of a pregnant employee, up to six weeks before the expected date of birth
- leave may start at any time within 12 months after the birth or placement of the child if:
  - the employee has a spouse or de facto partner who is not an employee
  - the spouse or de facto partner has responsibility for the care of the child.

### Both members of an employee couple taking leave

The following rules apply to an employee couple if both employees take unpaid parental leave:

- both employees may at the same time each take up to three weeks unpaid parental leave (reducing their overall entitlement) either immediately after the birth or placement of a child or, by agreement with the employer, at any time during an extended period starting before the birth and ending no later than six weeks after the birth or placement.

- remaining leave must be taken separately in a single continuous period (paid leave, such as annual leave, may be taken at the same time)
- if the employee who takes leave first is pregnant or gives birth, they may start their leave up to six weeks before the expected date of birth
- if the employee who takes leave first is not pregnant, their leave must start on the date of birth or placement of a child
- the second employee must start their leave immediately after the first employee's leave finishes
- they are entitled to no more than 24 months between them.

## Can an employee extend their unpaid parental leave?

An employee taking 12 months parental leave may request an extension of a further 12 months leave (up to 24 months in total), unless they are a member of an employee couple and the other member has already taken 12 months of leave.

The request must be in writing and given to the employer at least four weeks before the end of the employee's initial period of parental leave. The employer must respond in writing within 21 days, stating whether they grant or refuse the request. They may only refuse if there are reasonable business grounds to do so, and must detail their reasons in writing.

The NES do not define 'reasonable business grounds' for refusing a request, but relevant factors may include:

- the effect on the workplace (e.g. the impact on finances, efficiency, productivity, customer service)
- the inability to manage the workload among existing staff
- the inability to recruit a replacement employee.

## Can a pregnant employee be required to take parental leave within six weeks before the birth?

A pregnant employee wanting to work the six weeks before birth may be asked by the employer to provide a medical certificate containing the following:

- a statement of whether the employee is fit for work
- if the employee is fit for work, a statement of whether it is inadvisable for the employee to continue in her present position because of:
  - illness or risks arising out of the employee's pregnancy or
  - hazards connected with the position.



The employer may require the employee to take a period of unpaid parental leave as soon as possible if the employee:

- fails to provide the requested medical certificate within seven days of the request or
- provides a certificate within seven days stating that they are not fit for work or
- provides a certificate stating they are fit for work, but that it is inadvisable to continue in the present position due to illness, risk to the pregnancy, or job-related hazards
- is not entitled to transfer to a safe job or to 'no safe job leave' (see below).

This form of directed leave runs until the end of the pregnancy or until the planned leave was due to start, and is deducted from the employee's unpaid parental leave entitlement. It is exempt from the rules about when the leave must start, that it be taken in a continuous period, and notice requirements.

## What are the notice and evidence requirements for taking parental leave?

An employee is not entitled to take unpaid parental leave unless they:

- inform their employer of their intention to take unpaid parental leave by giving at least 10 weeks notice (unless it is not possible to do so)
- specify the intended start and end dates of the leave
- at least four weeks before the intended start date:
  - confirm the intended start and end dates or
  - advise the employer of any changes to the intended start and end dates (unless it is not possible to do so).

An employer may require evidence that would satisfy a reasonable person of the actual or expected date of birth of a child (e.g. a medical certificate), or the day or expected day of placement of a child under 16.

## Other entitlements related to parental leave

### Unpaid special maternity leave

An eligible pregnant employee is entitled to take unpaid special maternity leave if the employee is not fit for work because of:

- a pregnancy-related illness or
- the pregnancy ends, not in the birth of a living child, within 28 weeks of the expected date of birth.

An employee must give their employer notice they are taking unpaid special maternity leave as soon as possible (which may be after the leave has started), and the expected period of leave.

An employer may require evidence that would satisfy a reasonable person (e.g. a medical certificate).

The entitlement to unpaid parental leave is reduced by the amount of any unpaid special maternity leave taken by the employee while they are pregnant.

### Transfer to a safe job or 'paid no safe job leave'

An eligible pregnant employee has in specified circumstances an entitlement to be transferred to an 'appropriate safe job'. An appropriate safe job is a safe job that has:

- the same ordinary hours of work as the employee's present position or
- a different number of ordinary hours agreed to by the employee.

This entitlement applies if the employee:

- is entitled to unpaid parental leave
- has complied with the notice and evidence requirements for accessing that unpaid parental leave
- has provided evidence (e.g. a medical certificate) that would satisfy a reasonable person that they are fit for work, but that it is inadvisable for them to continue in their present position during a period because of:
  - illness or risks arising out of the pregnancy or
  - hazards connected with that position.

If these requirements are met and there is an appropriate safe job available, the employee must be transferred to that job for the risk period, with no other change to the employee's terms and conditions of employment. The employer must pay the employee at their full rate of pay<sup>1</sup> for the position they were in before the transfer, for the hours they work in the risk period.

If there is no appropriate safe job available, the employee is entitled to take paid 'no safe job leave' for the risk period, and be payed at their base rate of pay<sup>2</sup> for ordinary hours of work in the risk period.

<sup>1</sup> The full rate of pay is the rate of pay payable to the employee plus incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, and any other separately identifiable amounts.

<sup>2</sup> The base rate of pay is the rate of pay payable to the employee for their ordinary hours of work, but not including incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, and any other separately identifiable amounts.

If an employee is on paid no safe job leave during the six week period before the expected date of birth, the employer may ask the employee to give the employer a medical certificate stating whether they are fit for work.

The employer may require the employee to take a period of unpaid parental leave as soon as practicable if:

- the employee does not give the employer a medical certificate within seven days after the request or
- within 7 days after the request, the employee provides a certificate stating they are not fit for work.

The no safe job leave ends when the period of unpaid parental leave starts.

### **Consultation requirements on unpaid parental leave**

Employees on unpaid parental leave are entitled to be kept informed of decisions by their employer that will have a significant effect on the status, pay or location of their pre-parental leave position. The employer must take all reasonable steps to give the employee information about (and an opportunity to discuss) the effect of any such decisions on the employee's position.

The employee's pre-parental leave position is the position they held before starting the unpaid parental leave, or the position they held before they were transferred to a safe job or reduced their hours due to the pregnancy.

### **Return to work guarantee**

An employee is guaranteed a return to work immediately following a period of unpaid parental leave, entitling them to:

- their pre-parental leave position or
- if that position no longer exists, an available position for which they are qualified and suited, which is nearest in status and pay to their pre-parental leave position.

### **Unpaid pre-adoption leave**

All employees (regardless of their length of service) are entitled to up to two days of unpaid pre-adoption leave to attend any interviews or examinations required for the adoption of a child.

This leave may be taken as:

- a single continuous period of up to two days or
- any separate periods to which the employee and employer agree.

An employer may, however, direct an employee to take another form of leave (e.g. paid annual leave) before accessing their unpaid pre-adoption leave entitlement.

An employee must give their employer notice they are taking unpaid pre-adoption leave and the expected duration as soon as possible (which may be after the leave has started) and, if required, evidence that would satisfy a reasonable person.

### **Further Information**

The Fair Work Ombudsman has published a fact sheet on each NES entitlement. For further information on a specific NES entitlement, please see the relevant fact sheets at [www.fwo.gov.au](http://www.fwo.gov.au)

For further information, visit [www.fairwork.gov.au](http://www.fairwork.gov.au) or contact Fair Work Online **13 13 94**.

### **Related publications**

*Introduction to the NES*

*Maximum weekly hours and the NES*

*Requests for flexible working arrangements and the NES*

*Annual leave and the NES*

*Personal/carer's leave and compassionate leave and the NES*

*Community service leave and the NES*

*Long service leave and the NES*

*Public holidays and the NES*

*Notice of termination and redundancy pay and the NES*

*Fair Work Information Statement and the NES*

#### **Contact us**

Fair Work Online: [www.fairwork.gov.au](http://www.fairwork.gov.au)

Fair Work Infoline: **13 13 94**

Monday to Friday, between 8.00am–6.00pm

#### **Need language help?**

Contact the Translating and Interpreting Service (TIS) on 13 14 50

#### **Hearing & speech assistance**

Call through the National Relay Service (NRS):

- For TTY: 13 36 77. Ask for the Fair Work Infoline 13 13 94
- Speak & Listen: 1300 555 727. Ask for the Fair Work Infoline 13 13 94



## Personal/carer's leave and compassionate leave and the National Employment Standards

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Personal carer's leave and compassionate leave forms part of the National Employment Standards (NES). As of 1 January 2010, the NES apply to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment.

Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES, and have no effect. An employer must not contravene a provision of the NES. A contravention of a provision of the NES may result in penalties of up to \$6,600 for an individual and \$33,000 for a corporation.

In addition to the NES, an employee's terms and conditions of employment generally come from an award or agreement. All references to an award or agreement in this fact sheet include modern awards, enterprise agreements, and award or agreement-based transitional instruments.

### Overview

The NES establish minimum entitlements for employees to receive:

- paid personal/carer's leave
- unpaid carer's leave
- paid or unpaid compassionate leave.

These forms of leave are designed to help an employee deal with personal illness, caring responsibilities, family emergencies, and the death or serious illness of close family members.

Casual employees are eligible for unpaid carer's leave and unpaid compassionate leave.

### Personal/carer's leave

#### What are the minimum entitlements to personal/carer's leave?

The term 'personal/carer's leave' effectively covers both sick leave and carer's leave. The minimum entitlement to paid personal/carer's leave for an employee (other than a casual employee) is 10 days per year.

An employee's entitlement to paid personal/carer's leave accrues progressively during a year of service according to the number of ordinary hours worked, and can accumulate from year to year.

#### When can paid personal/carer's leave be taken?

An employee may take paid personal/carer's leave:

- if they are unfit for work because of their own personal illness or injury or
- to provide care or support to a member of their immediate family or household, because of a personal illness, injury or unexpected emergency affecting the member. A member of the employee's immediate family means a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of an employee; or a child, parent, grandparent, grandchild or sibling of the employee's spouse or de facto partner.

However, if the period during which an employee takes paid personal/carer's leave includes a day or part-day that is a public holiday, the employee is not on paid personal/carer's leave on that public holiday.

### ***What payments are required when personal/carer's leave is taken?***

When paid personal/carer's leave is taken, the minimum requirement is that an employee must be paid at their base rate of pay for the ordinary hours they would have worked during the period. An employee's 'base rate of pay' (other than a pieceworker) is the rate of pay payable to an employee for his or her ordinary hours of work, but not including any of the following:

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

### ***Can paid personal/carer's leave be cashed out?***

For employees covered by an award or agreement, cashing out of paid personal/carer's leave is permitted if all of the following applies:

- the award or agreement allows the practice
- there is a separate agreement in writing on each occasion
- the employee retains a balance of at least 15 days of untaken paid personal/carer's leave
- the employee is paid at least the full amount that would have been payable had the employee taken the leave they have cashed out.

It is unlawful for an employer to force (or try to force) an employee to make (or not make) an agreement to cash out personal/carer's leave under a term included in an award or agreement.

An award/agreement-free employee is not able to cash out paid personal/carer's leave.

## **Unpaid carer's leave**

### ***What are the minimum entitlements to unpaid carer's leave?***

An employee (including a casual employee) is entitled to two days of unpaid carer's leave for each occasion when a member of the employee's immediate family or household requires care or support because of a personal illness, injury, or an unexpected emergency.

An employee may take unpaid carer's leave for each occasion as a single continuous period of up to two days, or any separate periods to which the employee and his or her employer agree. An employee cannot take unpaid carer's leave during a particular period if the employee could instead take paid personal/carer's leave. (This does not apply to casuals who have no entitlement to paid personal/carer's leave.)

## **Compassionate leave**

### ***What are the minimum entitlements to compassionate leave?***

An employee (including a casual employee) is entitled to two days of compassionate leave to spend time with a member of their immediate family or household who has sustained a life-threatening illness or injury. Compassionate leave may also be taken after the death of a member of the employee's immediate family or household.

An employee may take compassionate leave for each occasion as:

- a single continuous two day period or
- two separate periods of one day each or
- any separate periods to which the employee and his or her employer agree.

### ***What payments are required when compassionate leave is taken?***

If an employee (other than a casual employee) takes a period of compassionate leave, the employer must pay the employee at the employee's base rate of pay for the ordinary hours they would have worked during the period.

As mentioned above, casual employees are not entitled to any paid personal/carer's leave or compassionate leave. However, casuals are entitled to unpaid carer's leave or compassionate leave.

### ***Are there notice and evidence requirements?***

For all periods of personal/carer's leave or compassionate leave, an employee must give his or her employer notice of the taking of such leave.

The notice must be given to the employer as soon as practicable (which may be a time after the leave has started), and must advise the employer of the period, or expected period, of the leave.

An employer is entitled to request evidence that would substantiate the reason for leave. A failure to either provide notice or, if required, evidence that would satisfy a reasonable person to substantiate the reasons for the leave, means the employee is not entitled to the leave.

An award or agreement may include terms relating to the kind of evidence that an employee must provide in order to be entitled to paid personal/carer's leave, unpaid carer's leave or compassionate leave. For example, an employer may request that the employee provides a medical certificate.



## Public holidays and the National Employment Standards

### Australia's new workplace relations system

From 1 July 2009, most Australian workplaces are governed by a new system created by the *Fair Work Act 2009*.

The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. We provide education, information and advice, investigate workplace complaints, and enforce relevant Commonwealth workplace laws.

Public holidays form part of the National Employment Standards (NES). As of 1 January 2010, the NES apply to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment.

Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES, and will have no effect. An employer must not contravene a provision of the NES. A contravention of a provision of the NES may result in penalties of up to \$6,600 for an individual and \$33,000 for a corporation.

In addition to the NES, an employee's terms and conditions of employment generally come from an award or agreement. All references to an award or agreement in this fact sheet include modern awards, enterprise agreements, and award or agreement-based transitional instruments.

### Overview

The NES provide an entitlement for employees to be absent from work on a day or part-day that is a public holiday.

The NES protect an employee's workplace right to reasonably refuse to work on a public holiday, and will guarantee payment where an employee is absent from work because of a public holiday.

Employees are protected from adverse action for having, using, or seeking to use their workplace right to reasonably refuse to work on a public holiday.

### What days are public holidays?

The following days are public holidays under the NES:

- 1 January (New Year's Day)
- 26 January (Australia Day)
- Good Friday
- Easter Monday
- 25 April (Anzac Day)
- Queen's birthday holiday (the day on which it is celebrated in a State or Territory or a region of a State or Territory)
- 25 December (Christmas Day)
- 26 December (Boxing Day)
- any other day or part-day declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory (or a region of the State or Territory) as a public holiday.

### Can a public holiday be substituted for another day?

If, under the law of a State or Territory, a day or part-day is substituted for any of the above days or part-days, then the substituted day or part-day is the public holiday.

An award or agreement may include provisions for an employer and employee to agree to substitute the above days or part-days for another day or part-day. Furthermore, an employer and an award/agreement-free employee may agree to substitute the above days or part-days for another day or part-day.

An employer must not exert undue influence or pressure on an employee in relation to agreeing to substitute a public holiday for another day or part-day.



## What are reasonable grounds for requesting or refusing to work on a public holiday?

In determining whether a request (or a refusal of such a request) to work on a public holiday is reasonable, the following must be taken into account:

- the nature of the employer's workplace (including its operational requirements) and the nature of the work performed by the employee
- the employee's personal circumstances, including family responsibilities
- whether the employee could reasonably expect that the employer might request work on the public holiday
- whether the employee is entitled to receive overtime payments, penalty rates, additional remuneration or other compensation that reflects an expectation of work on the public holiday
- the type of employment (e.g. 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
- the amount of notice in advance of the public holiday given by the employee in refusing the request
- any other relevant matter.

## What payment is required for an absence from work due to a public holiday?

If an employee is absent from work on a day or part-day that is a public holiday, the employer must pay the employee (other than a casual employee) the base rate of pay for the employee's ordinary hours of work on that day or part-day. The base rate of pay to be paid excludes incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, or any other separately identifiable amounts.

However, an employee is not entitled to payment if they do not have ordinary hours of work on the public holiday.

For example, a part-time employee is not entitled to payment if their part-time hours do not include the day of the week on which the public holiday falls.

### *Illustrative example*

Stephanie is a full-time employee who usually works overtime in addition to her ordinary hours of work on Tuesdays. She receives penalty rates for these overtime hours under the applicable modern award. Stephanie is absent on the public holiday on Tuesday, 26 January 2010, and is entitled to her base rate of pay for her ordinary hours. She is not entitled to payment for the overtime hours she would have usually worked had it not been a public holiday.

Stephanie's colleague John is a part-time employee who is rostered to work Wednesday to Friday each week. As John's ordinary hours of work do not include Tuesdays, he is not entitled to payment for the public holiday on 26 January 2010.

## Further Information

The Fair Work Ombudsman has published a fact sheet on each NES entitlement. For further information on a specific NES entitlement, please see the relevant fact sheets at [www.fwo.gov.au](http://www.fwo.gov.au)

For further information, visit [www.fairwork.gov.au](http://www.fairwork.gov.au) or contact Fair Work Online **13 13 94**.

## Related publications

*Introduction to the NES*

*Maximum working hours and the NES*

*Requests for flexible working arrangements and the NES*

*Parental leave and related entitlements and the NES*

*Annual leave and the NES*

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- Speak & Listen: 1300 555 727. Ask for the Fair Work Infoline 13 13 94



## Requests for flexible working arrangements and the National Employment Standards

### Australia's new workplace relations system

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The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. We provide education, information and advice, investigate workplace complaints, and enforce relevant Commonwealth workplace laws.

Requests for flexible working arrangements form part of the National Employment Standards (NES). As of 1 January 2010, the NES apply to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment.

Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES, and have no effect. An employer must not contravene a provision of the NES. A contravention of a provision of the NES may result in penalties of up to \$6,600 for an individual and \$33,000 for a corporation.

In addition to the NES, an employee's terms and conditions of employment generally come from an award or agreement. All references to an award or agreement in this fact sheet includes modern awards, enterprise agreements, and award or agreement-based transitional instruments.

### Overview

The NES include a right for certain employees to request flexible working arrangements (such as changes in hours of work) from their employer. An employer can only refuse such a request on 'reasonable business grounds'.

### Who is eligible to make a request for a flexible working arrangement?

An employee who is a parent, or has responsibility for the care of a child, may request a change in their working arrangements.

This request may be made by an employee to assist them to care for their child if the child is:

- under school age (i.e. the age at which the child is required by the applicable State or Territory law to start attending school)
- under 18 and has a disability.

Examples of changes in working arrangements may include:

- changes in hours of work (e.g. reduction in hours worked, changes to start/finish times),
- changes in patterns of work (e.g. working 'split-shifts' or job sharing arrangements)
- changes in location of work (e.g. working from home or another location).

Employees are not entitled to make the request unless they have completed at least 12 months of continuous service with their employer immediately before making the request.

Casual employees are entitled to make a request if:

- they have been employed by the employer on a regular and systematic basis for a sequence of periods of employment of at least 12 months immediately before making the request
- there is a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

## What are the requirements for making and approving a request for a change to working arrangements?

The request must be made in writing and set out details of the change sought and reasons for the change.

Employers must give employees a written response to the request within 21 days, stating whether they grant or refuse the request. Employers may refuse the request only on reasonable business grounds. If the employer refuses the request, the written response must include the reasons for the refusal.

## What are reasonable business grounds for refusing a request?

The *Fair Work Act 2009* does not provide a definition of what constitutes reasonable business grounds for refusing a request.

However, factors that may be relevant could include:

- the effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service
- the inability to organise work among existing staff
- the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request.

The NES do not require the employer to choose between granting an employee's request in full or refusing the request. Rather, employers and employees are encouraged to discuss their working arrangements and, where possible, reach an agreement that balances both their needs.

### Illustrative example

Greg would like to start work at 10am, four days a week, to enable him to take his three year old son to pre-school. He submits a written request to his employer setting out the reasons for requesting the change in hours. His employer considers the request, but is unable to agree, as Greg would miss an important nationwide teleconference each morning.

However, instead of simply refusing the request, Greg's employer discusses the situation with him. They agree to an arrangement where Greg will start work at 10am, four days a week, and participate in the teleconference by phone hook-up before he leaves home. He will attend in person the most important weekly agenda-setting meeting.

Greg's employer gives him a written response, setting out details of the reasons for the refusal of the initial request, as well as a statement of the revised agreed arrangements.

## Can a refusal of a request be challenged?

Employers must either approve or refuse an employee's request in writing within 21 days. If the request is refused, the employer must also include reasons for the refusal. It is a contravention of the *Fair Work Act 2009* if an employer does not respond according to these requirements.

There is no requirement for an employer to agree to a request for flexible working arrangements. However, the *Fair Work Act 2009* empowers Fair Work Australia or some other person to deal with a dispute about whether an employer had reasonable business grounds for refusing a request. This generally only happens if the parties to the dispute have agreed in an employment contract, enterprise agreement or other written agreement for that to occur.

In addition, the *Fair Work Act 2009* allows State and Territory laws to continue to apply to employees where they provide more beneficial entitlements than the NES in relation to flexible work arrangements. In Victoria, for example, provisions of the *Equal Opportunity Act 1995* prohibit an unreasonable refusal to accommodate an employee's responsibilities as a parent or carer.

An employee may also have remedies under relevant discrimination legislation, including the discrimination provisions under the *Fair Work Act 2009*, if an employee considers they have been discriminated against by the employer's handling or refusal of their request.

For more information on unlawful workplace discrimination, please see the *Fair Work Ombudsman Fact Sheet – Unlawful workplace discrimination*.

## Further information

For further information on developing family-friendly flexible workplace strategies and their benefits, please see the *Fair Work Ombudsman Best Practice Guide – Work & family*.

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