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Australian Government

Fair Work
OMBUDSMAN

Best Practice Guide

Small business & the Fair Work Act

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Working at best practice

The *Fair Work Act 2009* (FW Act) sets out a number of requirements that businesses, including small businesses, need to be aware of.

Best practice involves knowing your rights and obligations and knowing who to contact if you need assistance.

Aspects of the FW Act commenced on 1 July 2009 including new unfair dismissal laws and the Small Business Fair Dismissal Code, as well as requirements for employees and employers to bargain in good faith when making enterprise agreements. The National Employment Standards (NES) and modern awards commenced operation on 1 January 2010.

This Best Practice Guide explains:

- the safety net of minimum employment conditions
- the obligation to bargain in good faith at the enterprise level
- obligations to keep records and provide pay slips
- unfair dismissal laws that apply to small business
- protections for employees and obligations of employers
- the functions of the Fair Work Ombudsman (FWO) and the Fair Work Commission.

There is also a checklist to help check your awareness of the FW Act.

This guide illustrates best practice for small businesses to be aware of key aspects of the FW Act. For specific information regarding minimum legal obligations and entitlements, contact the organisations listed under the 'For more information' section at the end of this guide.

The Fair Work Act

The FW Act commenced on 1 July 2009. The FW Act requires small businesses to comply with:

- A safety net of minimum employment conditions including the National Employment Standards (NES) and modern awards
- unfair and unlawful dismissal laws
- agreement making obligations
- transfer of business rules, and
- workplace rights specified in the FW Act.

The cornerstone of the system is fairness and flexibility. Both employers and employees have rights and responsibilities to help achieve this.

What are the National Employment Standards?

All national system employers must provide 10 minimum entitlements to full-time and part-time employees. These minimum entitlements are called the National Employment Standards (NES). Some of these entitlements do not apply to casual employees. You can visit www.fairwork.gov.au or contact the Fair Work Infoline on 13 13 94 to find out more. Parental leave entitlements and rules about notice of termination apply to all employees (including those covered by state or territory industrial laws).

In summary, the NES minimum entitlements are:

Hours of work	A maximum standard working week of 38 hours (plus reasonable additional hours) for a full-time employee.
Right to request flexible arrangements	Where an employee has at least 12 months continuous service, the right for parents/carers to request flexible work arrangements until the employee's child reaches school age and, for parents of a disabled child, until the child reaches 18 years of age. Flexible work arrangements may include changes in hours of work, changes in patterns of work and changes in location of work. The employee's request must be in writing and should set out the details of change sought and the reasons for the change. You must respond in writing to the employee's request within 21 days stating whether the request is granted or refused. If the request is refused you must include the reasons for the refusal in your response. You may only refuse such a request from an employee on reasonable business grounds.

Parental leave	Where an employee (including some casual employees) has at least 12 months continuous service they generally have a right to 12 months of unpaid parental leave after the birth or adoption of a child, and the right to request to extend the period by a further 12 months (which can only be refused on reasonable business grounds). Parental leave entitlements are extended to all employees, not just national system employees.
Annual leave	Four (4) weeks paid annual leave (other than for casual employees). Five (5) weeks paid annual leave for certain shift workers. Part-time employees get a proportion of this depending on how much they work. Paid annual leave may be taken at a time agreed between you and your employee. You may only refuse the taking of annual leave when it is reasonable to do so.
Personal/carer's leave & Compassionate leave	Ten (10) days paid personal/carer's leave each year for full-time, non-casual employees. Part-time employees get a proportion of this depending on how much they work. All employees (including casuals) can also access two (2) days unpaid carer's leave for each permissible occasion. Two (2) days paid compassionate leave for each permissible occasion when a member of the employee's immediate family or household sustains a serious illness, serious injury or dies. Casual employees have access to two (2) days unpaid compassionate leave in these circumstances.

Reasonable business grounds for refusing a request from an employee may include, for example:

- 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; and,
- 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.

Community service leave	The right to community service leave for eligible community service activities such as jury service or activities dealing with an emergency or natural disaster. An eligible employee is entitled to leave for the period of the actual activity and associated reasonable travel time and/or rest time immediately following the activity. Community service leave is unpaid, with the exception of jury service. Payment for jury service is capped at ten (10) days. An employee must give you notice of their absence as soon as reasonably practicable and must tell you how long they expect to be absent from work.
Long service leave	The right to accrue long service leave.
Public holidays	The right to a day off on public holidays and if the employee would usually have worked on that day, the right to be paid for their ordinary hours of work on that day. You may ask employees to work on a public holiday if this request is reasonable. An employee is entitled to refuse to work if your request is not reasonable or their reason for refusing is reasonable. What is 'reasonable' will depend on factors such as the kind of business run by the employer, the nature of the work performed by the employee, the employee's personal circumstances (including family responsibilities) and how much notice was given to the employee.
Notice and Redundancy Pay	A minimum amount of notice (in writing) prior to termination of the employment (or payment in lieu of notice). The amount of notice that must be provided depends on how long the employee has worked for you. Generally, this entitlement applies to all employees, not just national system employees. There is an entitlement to redundancy pay in some cases if the employee's employment is terminated either because the employer no longer requires the employee's job to be done by anyone or because of the insolvency or bankruptcy of the employer. Generally, the obligation to provide redundancy pay does not apply to employers with less than 15 employees or where an employee has had less than 12 months service. The amount of redundancy pay is calculated using the employee's base rate of pay and their length of service with the employer. The Fair Work Commission can also order a lesser amount of redundancy if the employer finds similar alternative employment that is no less favourable for a redundant employee or the business is unable to pay.
Fair Work Information Statement	Employers are required to provide a copy of the 'Fair Work Information Statement' to all new employees before or as soon as practicable after the commencement of employment. The Fair Work Information Statement is published by the Fair Work Ombudsman.

What are modern awards?

Modern awards have replaced existing state and federal awards so that they are industry or occupation-based and easier for employers and employees to use and understand. Modern awards cover most employers and employees in the fair work system. The Fair Work Commission is responsible for administering, varying and making modern awards.

Many managers or higher income employees may not be covered by a modern award even if there is a relevant modern award for the industry in which they work. Moreover, while a modern award might cover a particular employee, it will not apply to those employees who have a written guarantee of annual earnings at or above $138,900 (indexed annually).

Modern awards apply in addition to the National Employment Standards and may include conditions such as:

- minimum wages
- types of employment (for example, full-time, part-time or casual)
- overtime and penalty rates
- work arrangements (for example, rostering or variations to working hours)
- annualised wage or salary arrangements
- allowances (for example, travel allowances for employees who travel as part of their job)
- leave, leave loading and arrangements for taking leave
- superannuation
- procedures for consultation, representation and dispute settlement.

All modern awards also contain a flexibility term which allows an employer and an individual employee to agree on an arrangement which varies the effect of certain terms of a modern award. These are known as individual flexibility arrangements (IFAs). IFAs can only be made in order to meet the genuine needs of the employer and an individual employee and any variations to the effect of a modern award must result in the employee being better off overall. For more information on IFAs see Best Practice Guide No 3 'Use of individual flexibility arrangements'.

Transitional arrangements in most modern awards allow for pay rates to be phased in over four years from 1 July 2010. For more information about transitional arrangements and phasing, visit www.fairwork.gov.au, or call the Fair Work Infoline on 13 13 94.

A modern award will not apply if the employer has an enterprise agreement that covers the employees that would otherwise be covered by the modern award. However, the base rate of pay in the enterprise agreement cannot be less than the relevant rate in a modern award or the national minimum wage.

What are enterprise agreements?

Some employers and employees prefer to create their own enterprise agreements that will cover the wages and conditions which apply to their business. An enterprise agreement can offer significant benefits to a small business because it is tailored to that workplace's needs.

The FW Act requires that employers and employees bargain in good faith when making enterprise agreements. Enterprise agreements must result in employees being better off overall. For more information see Best Practice Guide No 11 'Improving workplace productivity in bargaining'.

Your obligations to keep records and provide pay slips

You need to keep records in respect of each employee containing certain information, including:

- your business name
- the employee's name
- whether the employee's employment is full-time or part-time
- whether the employee's employment is permanent, temporary or casual
- the date on which the employee's employment began
- Your Australian Business Number (if any).

You also need to provide your employees with a pay slip within one working day of paying them. The *Fair Work Regulations 2009* specify what records must be kept and what information must be contained on pay slips. Record keeping and payslip information and templates are available to access and download at www.fairwork.gov.au. Employers that do not comply with these obligations can be liable for penalties.

What are the unfair dismissal laws?

New unfair dismissal laws commenced on 1 July 2009.

Employers cannot dismiss their employees in circumstances that are "harsh, unjust or unreasonable". What is harsh, unjust or unreasonable will depend on the circumstances of each case. However, it is important to be fair to employees particularly when it comes to termination of employment. They should be given reasons for dismissal and an opportunity to respond to those reasons.

Importantly, employers that employ fewer than 15 employees are covered by special dismissal arrangements which are different to those that apply to larger businesses. The special arrangements that apply to employers with fewer than 15 employees are:

- employees will need to have worked for the business for 12 months in order to be eligible to make a claim for unfair dismissal, and
- if a small business employer strictly follows the Small Business Fair Dismissal Code and the dismissal of their employee is not harsh, unjust or unreasonable, then the dismissal will be deemed to be fair.

It is best practice to follow the code and fill out the Small Business Fair Dismissal Code Checklist at the time an employee is dismissed and you should keep the Checklist with your records as it will assist you if an employee makes an unfair dismissal claim. A link to the Code and Checklist is available at the 'For more information' section at the end of this guide.

You should also ensure that you provide the employee with their entitlements such as notice and any annual leave that they have accrued. For more information on the entitlements you may owe after termination, visit www.fairwork.gov.au or contact the Fair Work Infoline on 13 13 94.

Other obligations

Employees are protected against unlawful dismissal under the FW Act. There are no exemptions for a small business in this area. Examples of unlawful dismissal include dismissing someone because of their race, sex, colour, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. It is also unlawful to terminate an employee's employment if they are temporarily absent from work because of illness or injury, because of union involvement or non-involvement or because of absence from work during parental leave.

The FW Act also states that an employer cannot take *adverse action* against an employee because they exercised a workplace right or engaged in industrial activity. Examples of adverse action include dismissing an employee, injuring or altering the employee's employment, discriminating between one employee and others or refusing to hire a prospective employee. Employers can be liable for penalties if they subject their existing or prospective employees to adverse action.

What is the Fair Work Ombudsman and the Fair Work Commission?

The FWO and the Fair Work Commission perform many of the functions previously performed by several government bodies, including Fair Work Australia, the Australian Industrial Relations Commission, the Workplace Authority and the Workplace Ombudsman.

The Fair Work Commission is responsible for helping employers and employees resolve their workplace disputes. It also has the power to create and vary modern awards, make minimum wage orders, as well as orders about good faith bargaining and industrial action. The Fair Work Commission will determine unfair dismissal claims.

FWO is responsible for educating employers and employees. FWO is also responsible for ensuring compliance with national workplace laws and can bring court proceedings against employers, employees and/or their representatives that breach national workplace laws.

Best practice checklist

- ✓ Have you found out which award your business was covered by before 1 January 2010, and which modern award you are covered by from 1 January 2010?
- ✓ Are arrangements in place so that the business is compliant with the National Employment Standards?
- ✓ Are you keeping the required records and giving employees pay slips?
- ✓ Are you aware of your options for making an enterprise agreement with employees?
- ✓ Do you understand how to bargain in good faith if you want to make an enterprise agreement with employees?
- ✓ Do you understand and are you able to comply with the Small Business Fair Dismissal Code if terminating an employee's employment?
- ✓ Is your business equipped to prevent unlawful dismissals or adverse action matters from arising?

Acronyms used in this guide

FW Act	*Fair Work Act 2009*
FWO	Fair Work Ombudsman
IFA	Individual Flexibility Arrangement
NES	National Employment Standards

Disclaimer

The Fair Work Ombudsman is committed to providing you with advice that you can rely on.

The information contained in this Best Practice Guide is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or a workplace relations professional.

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