

A step by step guide to applying for small claims



If your employer owes you money, you may resolve this debt with a small claim to a court. Employees or former employees can recover up to \$20,000 of their entitlements using the small claims process. A small claim is a simple and affordable solution to resolve work related debts. To make a small claim there are steps you should follow. This guide provides you with an overview of these steps.

There is more detailed information in the Small Claims Guide available at www.fairwork.gov.au/smallclaims



What do I need to do to make a small claims application?



Step 1 - Prepare your application

Before you apply for small claims, you should:

- Check to see if you have enough evidence to support your claim. Courts have to make decisions on evidence and if there isn't enough, they may not be able to agree with the claim. Evidence may include documentary evidence (e.g. pay slips or time sheets), witness testimony or your affidavit (i.e. sworn statement). If your employer has not provided pay slips you may be able to use your own records to support hours worked and/or monies paid. In some cases, your employer may need to provide evidence to the court to disprove your allegations, if they don't have a reasonable excuse for not providing you records. This is known as a 'reverse onus of proof'. For this to apply, your case needs to meet the requirements under section 557C of the Fair Work Act¹ and you would need to ask the court to rely on this section.
- Check your entitlements. Are they based on the legal requirements of the Fair Work Act and the award or enterprise agreement? You can check your entitlements using the Pay and Conditions Tool available at www.fairwork.gov.au/pay. You may also be able to claim amounts owing to you under your employment contract.
- Calculate what you claim you are entitled to. Present your calculations in an easy to understand format. For an example of how to do this, see the Small Claims Guide available at www.fairwork.gov.au/smallclaims.
- Check the legal name of your employer. This may be a company, sole trader or partnership. You must identify your employer correctly on your application. If you work for a company you can check the company is still registered at connectonline.asic.gov.au

You can make a small claims application anytime from when the entitlement was due until 6 years after that time. It is best practice not to delay making a small claims application. As time passes, it can become harder for you to contact your employer and gather the required evidence.



Step 2 – Lodge your application

To start a small claim, you need to:

- Complete the correct application form. You can get this from the court that you are using.
- Compile any documents, such as timesheets, payslips, or contracts that will support your claim.
- Make three copies of the form and any supporting documents.
- Send the three copies of the application and documents (the 'papers') to the court (unless lodging online) with the required application fee (or application for a waiver of, or exemption to, the fee if applicable).
- Keep one copy of the papers to take to court.

You make a small claim in the Federal Circuit Court or a magistrate's court.

Applications for small claims with the Federal Circuit Court can be lodged online at www.federalcircuitcourt.gov.au. To lodge an application with the magistrates' court in your state or territory, you will need to download the application form.

You should check with the court to see which form you need to use.

Links to each of the courts can be found in the checklist at the end of this guide.

Note: When completing the forms you should enter your details as the 'Applicant'. The employer's details should be entered as the 'Respondent'.

1. Section 557C of the *Fair Work Act 2009* (Cth) commenced on 15 September 2017.



Step 3 – Serve your employer

You will receive a 'stamped' copy of your application form from the court as well as a date to attend. You must:

- 'Serve' a copy of the stamped papers on the employer, so they know when to come to court and what the claim is about.
- Complete an 'Affidavit of Service' to show how the court papers were served. You can get instructions and templates from the court's website. It's best to attach the court papers that you served to the Affidavit.
- Provide the completed Affidavit of Service to the court. You must also take a copy of the Affidavit of Service when you attend court.

Effecting service is a compulsory part of the court process. If you can't show that you served the court papers on the other party, the court is unlikely to deal with your application until you can show that you have. Your claim could also be dismissed.

There is no benefit in ambushing the other party by leaving it to the last minute. The court has to ensure a fair process and needs to be satisfied that the other party knows about the dispute and has had a reasonable chance to respond and attend court.

The court does NOT inform the employer about the application – it's the responsibility of the person applying to the court.

When your employer receives the papers, they will have to decide how to handle the claim. They may:

- Admit the claim and agree to pay, either totally or partially.
- Deny the claim by filing a defence or response or in person on the day

If the debt is resolved before the court date, a 'Notice of Discontinuance' form may need to be lodged with the court. This can be done before the court day or in court on the day.

If you are not sure whether settlement has been completed, or whether this form has been lodged, you should still attend court and advise the status of the settlement.

If your employer files a defence or response, they should serve a copy of their response on you at least a few days before the court date.

Even if your employer doesn't agree with the claim, or cannot pay, they should still prepare for and attend court to state their case. If they do not participate in the process, the court may make an order based on your evidence

How to serve court papers

The employer needs to receive (be 'served') the court papers as soon as possible and at least 7 days before the court date. Some courts have a longer notice period, which can be checked with the court.

Companies can be served at their registered office. You will need to purchase a Company Extract document to get this information. Information on how to purchase a Company Extract can be found through the Australian Securities and Investments Commission at connectonline.asic.gov.au

You can also serve the court papers on a company by giving the documents directly to a director.

Sole traders or partnerships have to be served in person (such as at the place of business).

You may hire a 'Process Server' to serve the court papers on your employer, if you prefer not to do this yourself. You may be able to serve the court papers by post. A process server is a business who you pay to serve documents.

To ensure you serve the documents correctly, you should check with the court what rules apply. If your employer isn't properly served, the case can be delayed.



Step 4 – Attend the court

If the matter has not been resolved, you must attend court. What happens on this day depends on the court and the magistrate. On the first date the court may:

- hear the case and make a decision
- ‘adjourn’ the case to a later date
- ask you and your employer to attend a mediation to try to resolve the case without a hearing.

Whatever happens, you should be ready with your evidence to present your case on the first court date. This means you should have copies of the court papers and your supporting evidence, even though the court may already have these documents.

You must follow the court’s orders about how it will hear your case. You can’t be represented by a lawyer in court unless the court allows it. However, you can use lawyers for advice. You can also seek advice from a union or employer association.

You may also take a support person (such as a friend) but that person cannot speak for you.

If you do not attend court at the required time, your case may be dismissed.

What’s it like in court?

Courts are run by a judge or magistrate, who you call ‘your Honour’.

Sitting near the judge or magistrate is the court officer (called the ‘clerk’, or ‘associate’) who assists the court. If you have anything to hand to the court, the court officer will usually come and get it from you, and may give you instructions or answer questions on the day.

Off to one side will be the witness ‘box’ or ‘stand’ where you or witnesses may give evidence.

In front of the judge or magistrate is the bar table. You should sit at this table when your case is being heard. Stand when the judge is talking to you and when you are speaking. Sit when the other party is speaking.

The public gallery is usually at the back or to the side. This is where you sit and wait for your case to be called by the court officer. When you enter and leave the court, you must bow slightly to the judge or magistrate.

Remember to treat everyone with respect in the courtroom and outside, and listen carefully when you are being asked questions or given directions. If you don’t understand something, say so.

If you need an interpreter or have extra accessibility requirements, you should contact the court as soon as possible before the hearing to check and allow the court to make arrangements.



Step 5 – Participate in the hearing

You will need to take part in the hearing of your matter. At the hearing:

- The judge or magistrate will ask both you and your employer to present the case and evidence. Both parties will need evidence to prove their case, such as pay slips, bank statements, contracts and calculations, and must give copies to the other party to consider before court. It is a good idea to prepare some notes of what you want to say and bring extra copies of your documents.
- You usually present your case first. Your employer will then present their case.
- The judge or magistrate may ask you to give evidence supporting your claim from the witness stand. If this happens, your employer has a right to ask you questions about your evidence.
- If you have witnesses, they need to be at court and available to give evidence. You should be ready to ask questions of any witnesses that may be relevant to your case. This includes any witnesses called by your employer.
- The judge or magistrate may ask questions and may need time to look at the evidence before making a decision. If you have anything you want to add about the other party's evidence after you hear it, you can ask to speak again.
- The judge or magistrate may make a decision about the case. This is called an order. This may happen on the day of the hearing or at a later time.
- The judge or magistrate may order that the whole or a part of the debt be paid or that nothing should be paid. It may also make orders about superannuation obligations and interest if you ask for these orders. 'Costs' (where the unsuccessful party has to pay the legal costs of the successful party) will only be ordered in exceptional cases.

The court may make orders based on your evidence only. This is possible if the employer does not attend court on the required day or where there is a reverse onus of proof and your employer is unable to disprove an allegation to the court. If a party can't attend court on the required date, they need to advise the court and the other party as soon as possible.



Step 6 – Enforce the order

If your employer is required to pay an amount to you, this must be paid by the date set by the court. This is usually stated in the court order.

If the employer doesn't pay, you could:

- send them a letter requesting payment
- enforce the orders through the court. Some options include seizing property, forcing bankruptcy and winding up a company.

Enforcing the court order can involve further cost or court action. You should consider whether those steps are right for your circumstances, and whether it is likely that your employer will have funds to pay.

Remember that these options are for the court to order; you should not take matters into your own hands.

If a party doesn't agree with the court's decision, they can appeal. However, parties can only appeal on very limited grounds, such as a mistake in how the law was applied. You can't appeal if you simply don't like or agree with the decision. If the court dismissed the case or made an order against a party because they didn't attend, they can seek advice about re-listing the case if there was good reason for non-attendance.



Small Claims Checklist



Application

- I have checked what my entitlements are under my award or enterprise agreement and the Fair Work Act
- The amount I'm owed is less than \$20,000
- I have evidence to support my claim and can show how I have calculated my entitlements
- I have tried to resolve my dispute with my employer
- I have the legal name of my employer
- I have the address for service for my employer



After application

- I have received the court date
- I have served the court papers on the employer with the required amount of notice
- I have either:
 - arranged to attend court on the required date OR
 - settled the matter with the employer and filed the required forms with the court



Hearing

- I have prepared my case and evidence

Find out more

The Fair Work Ombudsman has a comprehensive Small Claims Guide with more details about the small claims process and templates you can use to set out your claim. You can find this, as well as some helpful videos at www.fairwork.gov.au/smallclaims.

For information on court locations and procedures, you should contact the Federal Circuit Court at www.federalcircuitcourt.gov.au or the magistrates court in your state or territory

Australian Capital Territory - www.courts.act.gov.au/magistrates

New South Wales - http://www.localcourt.justice.nsw.gov.au/Pages/about_us/cim_court.aspx

Northern Territory – www.nt.gov.au/justice/ntmc

Queensland – www.courts.qld.gov.au/courts/magistrates-court

South Australia – www.industrialcourt.sa.gov.au

Tasmania – www.magistratescourt.tas.gov.au

Victoria – www.magistratescourt.vic.gov.au

Western Australia – www.imc.wa.gov.au