National Employment Standards

eBook

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Contents

Overview

This eBook contains an in-depth overview of the National Employment Standards in the Fair Work Act (2009).

Should you have any questions in relation to the information below, please reach out to one of our Employment Relations experts on:

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National Employment Standards

There are 11 minimum conditions of employment applicable to all employees under the Fair Work Act 2009. The 11 minimum conditions are referred to as the National Employment Standards (NES).

The NES are legislated minimum employment conditions and cannot be excluded or modified in a contract of employment or other industrial agreement. They are as follows.

1. Maximum weekly hours

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

When determining whether the additional hours are reasonable, an employer must look at risks to health and safety, an employee's personal circumstances, the needs of the workplace, whether the employee is eligible to receive compensation for the additional hours worked, the notice given by the employer, the usual patterns of work in the industry, the nature of the employees role and the employees level of responsibility. An employee may refuse to work unreasonable additional hours.

The NES state that a modern award or enterprise agreement may allow for the averaging of hours, however the average weekly hours over the period must not exceed 38 hours.

2. Requests for flexible working arrangements

An employee who:

- is a parent, or has a responsibility for the care of a child school age or younger
- is a carer (under the Carer Recognition Act 2010)
- has a disability

- is 55 years or older
- is pregnant
- is experiencing family or domestic violence
- is providing support to a member of their household of immediate family who requires care and support due to family or domestic violence

may request the employer for a change in working arrangements to assist the employee to care for the child. A change in working arrangements may include a change in hours, patterns of work or location.

Full time and part time employees need to have been with the organisation for at least 12 months of continuous service before being eligible to request flexible work arrangements. Casual employees need to have at least 12 months service and have a reasonable expectation of continuing employment on a regular and systematic basis with the employer.

An employee should submit the request in writing outlining the details of the change sought and the reasons for the change. The employer must give the employee a written response within 21 days and this must include whether the request is approved or refused. The employer is only able to refuse on reasonable business grounds and the reason for the refusal must be provided to the employee in writing. It is important to note that if the employee iscovered by a modern award, then additional requirements apply. Ensure you refer to the modern award in relation to the additional steps required.

Employers and employees can agree to working arrangements that are different from what was originally requested by the employee. The employer needs to confirm within 21 days in writing what the agreed changes are.

3. Offer and request to convert from casual to permanent employment

An employer (other than a small business employer) must make an offer to a casual employee to transfer to permanent part time or full-time employment if:

- the employee has been employed for a period of 12 months; and
- during the last 6 months the employee worked a regular pattern of hours on an ongoing basis which, without significant adjustment the employee could continue to work as a full time or part time employee.

Note: a small business employer is an employer that employs fewer than 15 employees.

The offer must be in writing and must be given to the employee within 21 days after the end of their 12-month anniversary. An employee must respond to the offer in writing accepting or declining the offer to transfer to permanent part time or full-time employment. If the employee does not respond, the employer can conclude the employee has declined the offer.

If the employee accepts, the employer has 21 days to write to the employee confirming:

- whether the employee is converting to full time or part time employment

- the employee's hours of work after the conversion takes effect
- the day the employee's conversion to full time or part time employment takes effect.

An employer is not required to make an offer if there are reasonable grounds not to make the offer. Reasonable grounds may include:

  - the employees position ceasing to exist in the period of 12 months after the time of deciding not to make the offer;
  - the hours of work which the employee is required to work will be significantly reducing
  - significant change in the days and times at which the employee's hours of work are performed which cannot be accommodated with the days or times the employee is available to work

If the employer can demonstrate reasonable grounds for not making the offer to convert to full time or part time employment, the employer must write to the employee within 21 days of their 12-month anniversary stating:

- they are not making an offer to convert to part time or full-time employment
- the reasons for not making the offer

Small business employers (an employer with 15 or fewer employees)

Small business employers don't have to offer to convert their casual employees to permanent employees.

Employees of small business employers can request to convert to permanent part time or full time employment at any time on or after their 12 month anniversary. To respond to an employee's request to convert from casual to permanent, employers need to respond to them within 21 days to advise the employee whether they have accepted or declined their request. If the request is declined, the employer must tell the employee the reasons why in their response. Employer's can't refuse the request unless they have consulted the employee and have reasonable grounds to refuse the request.

4. Parental leave and related entitlements

A full time and part time employee must have completed at least 12 months of continuous service prior to being entitled to parental leave. A casual employee must have at least 12 months service and have a reasonable expectation of continuing employment with the employer on a regular and systematic basis.

An employee is entitled to 12 months of unpaid parental leave if the leave is associated with the birth of a child, adoption or if the employee has or will have responsibility for the care of the child. The leave can be taken as a single continuous period, or as a single continuous period and a flexible period of up to 30 days (6 weeks). An employee choosing to take continuous unpaid parental leave, must use this leave first before taking flexible unpaid parental leave.

If the leave is for the birth of a child, the leave may start 6 weeks before the expected due date. If

an employee continues to work during the 6-week period before the expected due date, an employer may request the employee to supply a medical certificate which outlines whether the employee is fit for work. If the employee doesn't supply the medical certificate within 7 days or the medical certificate advises the employee is not fit for work, the employer may request the employee to take parental leave.

Notice requirements

An employee must provide the employer with written notice of the intention to take parental leave at least 10 weeks before starting the leave or as soon as is practicable. The notice must specify the intended start and end dates. These dates need to be confirmed or any changes made no later than 4 weeks before the intended start date. An employer can also request evidence of the pregnancy or adoption.

An employee may request to extend their parental leave by 12 months, by providing the employer with written notice of the extension at least 4 weeks before the end date of the original leave period. The employer must give the employee a written response within 21 days and may only be refused on reasonable business grounds. No extension beyond 24 months is allowed.

If the employer agrees an employee may reduce the period of unpaid parental leave he or she takes. A pregnant employee can also request to be moved to a safe job if she meets all the notice requirements and provides a medical certificate from a doctor stating that the job she is performing is not safe. If there isn't a safe job available, the employee can go on "paid no safe job leave".

On ending unpaid parental leave an employee is entitled to return to their pre-parental position or if that position is no longer available an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental position.

Having another child

Employees who have taken parental leave are not required to work for another 12 months before they can take another period of parental leave if they are with the same employer.

5. Annual leave

For each year of service an employee (other than a casual employee) is entitled to 4 weeks of paid annual leave or 5 weeks paid annual leave for a shift worker. Paid annual leave may be taken for a period agreed between an employee and his or her employer. If a public holiday falls in an employee's period of annual leave, the employee is not required to take annual leave for that day.

6. Personal/carers leave, compassionate leave and paid family and domestic violence leave

Personal / carers leave

For each year of service an employee (other than a casual employee) shall be entitled to 10 days of paid personal/carers leave, pro rata for part time employees. This leave accumulates from year to year.

An employee is entitled to 2 days of unpaid carers leave when a member of the employee's immediate family or household requires care or support. This leave must only be taken if all other personal/carers leave has been exhausted.

Compassionate leave

An employee is entitled to two days compassionate leave if

- a member of the employee's immediate family or household contracts or develops a personal illness or injury posing a serious threat to his or her life or dies. This is paid for full time and part time employees and unpaid for casual employees.
- a baby in their immediate family or household is stillborn
- they have a miscarriage
- they have a miscarriage

Family and domestic violence leave

All employees (full time, part time and casual) are entitled to 10 days paid family and domestic violence leave per year, if they are experiencing family and domestic violence. This entitlement is available in full from their commencement date, however does not accumulate from year to year.

7. Community service leave

An employee is entitled to be absent from work to engage in eligible community service activity. Eligible community service activity includes jury service or a voluntary emergency management activity. There is no limit on the amount of community service an employee can take. An employer can request to see evidence that the employee will be engaging in eligible community service activity.

For jury service an employee (other than a casual employee) is entitled to be paid the difference between what he or she received for jury service and their usual base rate of pay. The employer can request evidence of the amount of jury service pay the employee has already been paid. The employer only needs to pay the 'make up pay' for the first 10 days of jury service.

8. Long service leave

Currently there is not a uniform long service leave national employment standard. Long Service

leave varies from state to state. Contact Liquid HR for further information on the Long Service leave requirements for your state.

9. Public holidays

An employee is entitled to be absent from work on a public holiday. An employer may request an employee to work on a public holiday if the request is 'reasonable'. In determining what is reasonable an employer must consider, the nature of the workplace and work performed by the employee, the employees personal circumstances, whether the employee could reasonably expect the employer may request them to work a public holiday, whether the employee is entitled to receive additional compensation for the public holiday, the type of employment of the employee (full time, part time, casual), the amount of notice provided and any other relevant matter.

The following public holidays are recognised under the NES:

- 1 January (New Year's Day)
- 26 January (Australia Day)
- Good Friday
- Easter Monday
- 25 April (ANZAC Day)
- King's birthday holiday
- 25 December (Christmas Day)
- 26 December (Boxing Day)

The NES recognises any other day or part day declared or prescribed by or under a State or Territory law.

10. Notice of termination and redundancy pay

Termination
An employer must provide the employee with written notice of termination. The notice may be provided to the employee by delivering it personally, leaving it at the employees last known address or sending it by pre-paid post to the employees last known address.

Employees should check their award, enterprise agreement, contract of employment or workplace policy to find out how much notice they are required to give if they resign. Note: if the employee is over the age of 45 and has completed at least 2 years continuous serviceyou must increase the notice period by one week.

Notice of termination does not apply to 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 who is terminated for 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

An employer can:

- let the employee stay employed through their notice period
- pay it out to them (pay in lieu of notice), or
- a combination of both.

Employment can't end on a date earlier than the day the notice is given. If an employer pays out a notice period, the amount paid must equal the full amount the employee would have been paid had they worked out their notice period. If an employer pays an employee in lieu of notice, the employee's employment ends on the date the payment in lieu of notice is made.

Serious Misconduct

When an employee is terminated on the grounds of serious misconduct, the employer is not required to provide any notice of termination. The employer is required to pay the employee all outstanding entitlements such as payment for time worked, annual leave, long service leave (where eligible) in their final pay.

Redundancy

An employee is entitled to redundancy pay if the employee is terminated at the employer's initiative because the employer no longer requires the job to be done by anyone or due insolvency or bankruptcy of the employer (there are some exclusions as set out below).
The entitlement to redundancy pay is based on the employee's service and will be calculated on the employee's base rate of pay for his or her ordinary hours of work.

Employee period of continuous service	Redundancy
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

Employee period of continuous service	Redundancy
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

If the employer cannot pay the amount (e.g. due to bankruptcy) or is able to obtain other acceptable employment for the employee, the employer can apply to the Fair Work Commission to reduce the amount of redundancy pay they are required to pay.

Redundancy provisions do not apply to:

- An employee with less than 12 months continuous service
- An employee who is employed by a small business employer (less than 15 full time employees)
- An employee employed for a specified period of time, for a specified task or for the duration of a specified season.
- An employee who is terminated for 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

11. Fair Work information statement and casual information statement

An employer must give each employee the Fair Work information statement before, or as soon as is practicable after the employee starts employment. The statement contains information about the NES, modern awards, agreement making, the right to freedom of association and the role of Fair Work Australia and the Fair Work Ombudsman.

A copy of the Fair Work Information Statement can be accessed at the link below.

https://www.fairwork.gov.au/employment-conditions/national-employment-standards/fair-work-information-statement

For casual employees, they must also be provided with a copy of the Casual Employment Information Statement. A copy of the Casual Employment Information Statement can be accessed at the link below.

https://www.fairwork.gov.au/employment-conditions/national-employment-standards/casual-employment-information-statement

Interaction between industrial arrangements and the NES

The no detriment rule – If an agreement of award provides conditions less favourable than the NES, then the NES will apply. If the conditions in the agreement or award are more favourable than the NES, then those conditions will continue to apply.

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