Information Sheet

National Employment Standards

September 2021

The National Employment Standards (NES) are the statutory minimum entitlements set out in the *Fair Work Act 2009* (FW Act) that apply to all national system employees.

The NES are:

1. maximum weekly hours;
2. requests for flexible working arrangements;

   2(ba). offers and requests for casual conversion. Requirement to issue all employees with the '*casual employment information statement*';
3. parental leave and related entitlements;
4. annual leave;
5. personal/carers' leave, compassionate leave and unpaid family and domestic violence leave;
6. community service leave;
7. long service leave;
8. public holidays;
9. notice of termination and redundancy pay; and
10. Fair Work Information Statement.

Additional industry and/or occupational entitlements are contained in modern awards. The NES cannot be contracted out of. It also applies to award free and high-income earners.

Like to know more?

Our **Introduction to Employment Law Fundamental** training is designed for you to understand your obligations in relation to employment law in Australia, including the NES.

For more information, click here.

Interaction with modern awards and enterprise agreements - the No Detriment Rule

A modern award or enterprise agreement (an agreement made after 1 July 2009) must not exclude or contradict the NES.

A modern award or enterprise agreement may include terms that are ancillary or incidental to the operation of the NES or terms that supplement the NES. However, such terms can only be included to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the NES. The FW Act provides examples of such provisions, including a term relating to the taking of annual leave at a half rate of pay for a longer period, or a term which allows for more than four weeks annual leave.

As well as agreements made after 1 July 2009, agreements made before 1 July 2009, which are still in operation as at 1 January 2010, must comply with the NES. Such agreements are referred to in the legislation as 'transitional instruments'. The no-detriment rule contained in the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* (the Transitional Bill) introduces the requirement that no term of a transitional instrument has effect if it is detrimental to an employee in any respect when compared to an entitlement of that employee under the NES.

Maximum weekly hours of work

An employee's ordinary hours of work must not exceed 38 hours for a full-time employee. For part-time employees, hours must not exceed the lesser of 38 hours and the employee's ordinary hours of work in a week. Ordinary hours are determined by the applicable award, agreement or contract of employment. For example, the maximum hours for a part-time employee who has a contract of employment which states that their ordinary hours are 25 hours per week, will be 25 hours.

An employer may request that employees work reasonable additional hours. However, an employee may refuse to work additional hours if the request is unreasonable. In determining whether additional hours are reasonable the following must be considered:

- any risk to employee health and safety from working the additional hours;
- the employee's personal circumstances, including family responsibilities;
- the needs of the workplace or enterprise in which the employee is employed;
- 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 of any request or requirement 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, or the part of an industry, in which the employee works;
- the nature of the employee's role, and the employee's level of responsibility;
- whether the additional hours are in accordance with averaging terms under the FW Act.

Averaging hours

The NES allows for a modern award or enterprise agreement to include terms providing for the averaging of hours of work over a specified period.

For employees who are award and agreement free, they and their employer may, in writing, agree to an averaging arrangement under which hours of work over a specified period of not more than 26 weeks are averaged.

Request for flexible working arrangements

The FW Act provides certain categories of employees with a right to request flexible working arrangements. These categories include:

- a parent, or person who has responsibility for the care, of a child who is of school age (i.e. the age at which a child is required by law to attend school) or younger;
- a carer (as defined by the *Carer Recognition Act 2010*) which includes those who provide care, support and assistance to a person who requires support due to a disability, medical condition, mental illness or fragility due to age;
- an employee with a disability;
- an employee who is 55 or older;
- an employee experiencing violence from a member of their family; and
- an employee who provides care or support to a member of their immediate family, or a member of their household, who requires care or support because the member is experiencing violence from the member's family.

Additionally, the FW Act provides that a parent, or person who has responsibility for the care of a child and is returning to work after taking leave in relation to the birth or adoption of a child, may request to work part-time to assist with the care of the child.

Flexible working arrangements could include condensed hours, part-time work, job-sharing, working from home or other arrangements.

To access the entitlement an employee must have completed at least 12 months of continuous service with the employer before making a request. A casual employee who has been engaged by the employer on a regular and systematic basis during a period of at least 12 months and has a reasonable expectation of continuing employment is also entitled to make a request.

The request must be in writing and must set out details of the change sought and reasons for the change. The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request. The employer 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.

The FW Act sets out what might constitute "reasonable business grounds" for refusing flexible working arrangements. These include:

- that the new working arrangements would be too costly for the employer.
- that there is no capacity to change the working arrangements of other employees to accommodate the requested work arrangements.
- that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the requested working arrangements.
- that the requested working arrangements would be likely to result in a significant loss in efficiency or productivity; and
- that the requested working arrangements would be likely to have a significant negative impact on customer service.

This list is not intended to be exhaustive and such grounds will be determined having regard to the particular circumstances of each workplace and the nature of the request made.

It is not explicitly possible under the NES for an employer to be prosecuted for refusing to grant a request. However, there may be indirect ways where employers will be held to account. Firstly, depending on the circumstances, such a refusal may be considered discrimination. Secondly, if an enterprise agreement includes dispute settlement procedures which relate to a term which is the same or substantially the same as the NES right to request provisions then the Fair Work Commission are able to deal with such a dispute.

In addition, if the employer does not adhere to the process outlined above, e.g. does not respond in writing within 21 days or does not outline the reasons for refusal, then the employer is breaching the Act and can be prosecuted.

Interaction with state laws

Unlike other provisions contained in the FW Act, the right to request provisions are not intended to apply to the exclusion of other state laws that might otherwise apply to the extent that such laws would be more generous. In WA, the *Minimum Conditions of Employment Act 1993* (the MCE Act) is such a law and interacts with the right to request provisions of the NES.

Section 38B of the MCE Act provides an employee with a right to request work on a 'modified basis' after finishing a period of parental leave. Modified basis is defined as working on different days; at different times; on fewer days; or for fewer hours.

The MCE Act provides for more generous entitlements for employees in relation to refusing a request. Section 38B(1) of the MCE Act states that an employer must agree to a request unless agreeing to the request would have an adverse effect on the business. The grounds for refusal must be sufficient to satisfy a reasonable person. Furthermore, a request may be enforced as a minimum condition of employment and the onus lies on the employer to demonstrate that the refusal of such a request was justified.

These provisions are not new. Under state and federal discrimination laws it is possible for an employee to bring a claim of direct or indirect discrimination on the basis of family responsibilities. However, the accessibility for employees has been significantly broadened under the NES.

Offers and requests for casual conversion

From 27 March 2021, casual employees have the right to become permanent employees (part-time or full-time) in some circumstances. This is known as 'casual conversion.

An employer (**other than a small business employer**) must make an offer for casual conversion if a casual employee has been employed for a period of 12 months and the employee has worked a regular and systematic pattern of hours on an ongoing basis for at least the last 6 months, which they could continue to work as a permanent employee (part-time or full-time) without significant change.

The offer for casual conversion must be given to the employee in writing within 21 days after the end of the 12-month period. The employee must accept or decline the offer in writing within 21 days of the offer being given. If the employee does not give a written response, it is taken that the employee has declined the offer.

An employer is not required to make an offer if there are reasonable business grounds not to do so. Reasonable business grounds include:

- the casual position will cease to exist in the next 12 months;

- the casual's hours of work will be significantly reduced in the next 12 months;
- there will be a significant change to the days and/or hours the employee is required to work in the next 12 months which cannot be accommodated by the employee; or
- making an offer would not comply with a recruitment or selection process required by or under Commonwealth, State or Territory law.

If an employer decides not to make an offer of casual conversion (based on reasonable business grounds or the fact that the employee has not met the requirements for casual conversion), they must notify the employee in writing within 21 days of the 12-month period. The notice must detail the reasons why an offer has not been made.

Employee request to become a permanent employee

Casual employees have the right to request casual conversion (even in a small business) if they have been employed by the employer for at least 12 months and, in the period of 6 months before the request has been given, have worked a regular pattern of hours on an ongoing basis, which they could continue to work as a permanent employee (part-time or full-time) without significant change.

An employee cannot make a request for casual conversion if:

- the employee has refused an offer of casual conversion in the last 6 months;
- the employer has given them notice advising the employee they won't be offered casual conversion based on reasonable business grounds; and
- the employer has refused a request for casual conversion in the last 6 months.

The employer must respond to the employee's request for casual conversion in writing within 21 days of the request. An employer must not refuse the request unless there are reasonable business grounds to do so. These reasonable business grounds are the same as those listed above but also include whether it would require a significant adjustment to the employee's hours of work for the employee to be employed as a permanent employee.

The casual employment information statement

The casual employment information statement (CEIS) must be given by employers to all casual employees. The statement can be accessed via the Fair Work Ombudsman's website here. The CEIS must be given to casual employees before, or as soon as possible after they commence employment and only needs to be issued once in a 12-month period.

Parental leave and related entitlements

Employees who have completed 12 months continuous service (other than casual employees) are eligible for 12 months unpaid parental leave if the leave is associated with the birth or adoption of a child. Casual employees are eligible once they have been engaged on a regular and systematic basis for at least 12 months and have a reasonable expectation of ongoing employment.

In addition, employees have the right to request a further 12 months of unpaid leave, up to a total period of 24 months.

An employee must provide written notice of the intention to take unpaid parental leave at least 10 weeks before starting the leave, or as soon as reasonably practicable. The notice must specify the start and end dates of the leave.

The primary care giver of the child is entitled to access 12 months unpaid parental leave. In an employee couple, both employees have access to 12 months each up to a combined total of 24 months. They may not take the leave concurrently, with the exception of the provision of 8 weeks concurrent leave. Concurrent leave may be taken in blocks of at least two weeks, or a shorter period with the employer's consent.

Medical certificate may be requested six weeks before the birth

If a pregnant employee who is entitled to parental leave continues to work during the period of six weeks before the expected date of birth of the child, the employer may ask the employee to provide a medical certificate containing a statement of whether the employee is fit to work and if the employee is fit to work—a statement of whether it is inadvisable for the employee to continue in her present position.

If the employee does not give the employer the requested certificate within seven days of the request or if the medical certificate states that the employee is not fit for work the employer may require the employee to commence their unpaid parental leave.

Varying a period of unpaid parental leave

If an employee does not elect to take the full 12 months available at first instance, that employee may extend the period of unpaid parental leave by giving the employer written notice at least four weeks before the end date of the original leave period. The employer is obliged to agree to an extension of unpaid parental leave on one occasion only and subject to the required notice being provided. The notice must specify the new end date for the leave. Any subsequent extensions are only granted if the employer agrees.

Similarly, if the employer agrees, an employee may reduce the period of unpaid parental leave he or she takes.

Right to request further 12 months

An employee who takes unpaid parental leave can request an extension of unpaid parental leave for a further period of up to 12 months.

The request must be in writing and must be given to the employer at least four weeks before the end of the original parental leave period. The employer must agree to the requested extension, unless the employer has reasonable business grounds for refusing.

The same issues that arise in refusing a request for flexible working arrangements also arise under this provision.

New flexible unpaid parental leave entitlement

On 26 November 2020, the Act was amended to enable all eligible employees to access up to 30 days of their unpaid parental leave flexibly, matching similar changes that were made to the Paid Parental Leave scheme in July 2020.

Employees entitled to unpaid parental leave can now take up to 30 days (6 weeks) of their 12 month unpaid parental leave period on a flexible basis, known as 'flexible unpaid parental leave'.

'Flexible unpaid parental leave' may be taken as:

- a single continuous period of 1 or more days, or;
- separate periods of 1 or more days each.

The leave must be taken within the first 24 months of the birth or adoption of a child.

Premature birth & birth-related complications

From 27 November 2020, employees who have a premature birth or other birth-related complications that result in the child having to stay in hospital or being hospitalised immediately after birth, can agree with their employer to pause their unpaid parental leave.

Employees may subsequently return to work. This period won't reduce their unpaid parental leave.

Stillbirth or death of child

From 27 November 2020, employees may be eligible to take unpaid parental leave for a maximum of 12 months if they experience:

- a stillbirth;
- the death of a child during the first 24 months of life.

Employers cannot direct employees to return to work after a stillbirth or death of a child, however the employee may choose to return to work after a stillbirth or death of a child.

If the unpaid parental leave has commenced, the employee must give their employer four (4) weeks' notice of their return date.

Employees who experience a stillbirth or death of a child may be entitled to take compassionate leave while on unpaid parental leave.

Unpaid special maternity leave

A female employee is entitled to a period of unpaid special maternity leave if she is unfit for work because she has a pregnancy-related illness, or she has been pregnant, and the pregnancy ends within 28 weeks of the expected date of birth of the child otherwise than by the birth of a living child.

Unpaid special maternity leave does not reduce an employee's entitlement to 12 months of unpaid parental leave.

An employee who needs to access unpaid special maternity leave can access any existing entitlement to paid personal leave prior to taking unpaid special maternity leave.

Transfer to a safe job

A female employee who gives evidence that would satisfy a reasonable person (which may be a medical certificate) that she is fit to work but that it is inadvisable for her to continue in her present position during a stated risk period because of illness, or risks, arising out of her pregnancy or hazards connected with that position, must be transferred to an appropriate safe job for the risk period.

While carrying out the safe job, the employee must be paid their full rate of pay (for the position she occupied before the transfer) for the hours that she works in the risk period. The full rate of pay of an employee includes any incentive-based payments and bonuses, loadings, monetary allowances, overtime and penalty rates.

If there is no appropriate safe job available, the employee is entitled to take paid no safe job leave for the risk period. If this occurs, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work during the risk period.

These transfer to safe job provisions extend to pregnant employees who do not have, or will not have, an entitlement to unpaid parental leave (e.g. have been employed for less than 12 months). However, where an employee is not entitled to unpaid parental leave, then no safe job leave will be unpaid.

Consultation with employee on unpaid parental leave

If, while an employee is on unpaid parental leave, the employer makes a decision that will have a significant impact on the status, pay or location of the employee's pre-parental leave position, the employer must take all reasonable steps to inform and discuss with the employee the effect of the decision.

Return to work guarantee

An employee is entitled to return to their pre-parental leave position on finishing unpaid parental leave. If that position no longer exists, the employee is entitled to return to an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.

Unpaid pre-adoption leave

In the circumstance of adoption, an employee is entitled to up to two days of unpaid pre-adoption leave to attend any interviews or examinations required in order to obtain approval for the employee's adoption of a child.

An employee is not entitled to take unpaid pre-adoption leave if the employee could instead take some other form of leave and the employer directs the employee to take that other form of leave.

Annual leave

An employee, other than a casual employee, is entitled to four weeks of paid annual leave for each year of service with his or her employer.

Shift workers (as defined by the modern award, enterprise agreement or the NES if award/agreement free) are entitled to five weeks of paid annual leave. Under the NES a shift worker is defined as an employee who is employed in an enterprise in which shifts are continuously rostered 24 hours a day for seven days a week; is regularly rostered to work those shifts; and regularly works on Sundays and public holidays.

Under the NES, annual leave accrues progressively during a year of service according to the employee's ordinary hours of work. Payment for a period of annual leave is made at the employee's base rate of pay for the employee's ordinary hours of work in the period. While the NES does not provide for leave loading on annual leave, most modern awards provide for 17.5% leave loading.

On termination, an employer must pay the employee any periods of accrued and untaken annual leave.

The NES also provides that an employee is taken not to be on annual leave at certain times. If a public holiday falls during a period of annual leave, an employee is taken not to be on annual leave for that day. Similarly, if a period of annual leave includes a period of personal/carers' leave or community services leave, an employee is taken not to be on annual leave during that period. In this circumstance, an employee would need to comply with the relevant evidence requirements.

Cashing out annual leave

It is possible for award/agreement free employees to cash out annual leave under the NES. However, it is not possible to cash out annual leave if the cashing out would result in the employee's

remaining accrued entitlement being less than four weeks. Further, each cashing out of a particular amount of paid annual leave must be by a separate agreement in writing between the employer and the employee and the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

Cashing out of annual leave is also possible for employees covered by an award or where an Enterprise Agreement applies to them, subject to the provisions of that award/agreement.

Other annual leave provisions

It is possible to agree to other annual leave provisions that haven't been prescribed by the NES.

A modern award or enterprise agreement can contain terms which require an employee to take accrued annual leave in particular circumstances. This may include requiring an employee to take a period of annual leave to reduce excessive accrual or if the employer decides to shut down the workplace over the Christmas/New Year period.

The NES also allows for a modern award or enterprise agreement to include other terms about the taking of paid annual leave such as the taking of paid annual leave in advance of accrual.

Transitional instruments which contain certain other provisions relating to annual leave continue to have effect. For example, if a collective agreement made before 1 July 2009 states that an employee can be directed to take annual leave after an 'excessive' amount has accrued, this clause still applies after 1 January 2010.

Similarly, an employer and award/agreement free employees may agree on when and how paid annual leave may be taken by the employee. For example, this would include such matters as taking paid annual leave in advance of accrual; that paid annual leave must be taken within a fixed period of time after it is accrued; the form of application for paid annual leave and that a specified period of notice must be given before taking paid annual leave.

Personal/carers' leave, compassionate leave and unpaid family and domestic violence leave

Employees, other than casuals, are entitled to 10 days of paid personal/carers' leave for each year of service with his or her employer. Personal/carers' leave continues to accumulate from year to year.

Paid personal/carers' leave accrues progressively during a year of service according to the employee's ordinary hours of work and is paid at the employee's base rate of pay for the employee's ordinary hours of work in the period.

An employee may take paid personal/carers' leave because:

- the employee is unfit for work because of a personal illness or injury; or
- to provide care or support to a member of the employee's immediate family or household, who requires care or support because of a personal illness or injury or because of an unexpected emergency affecting the member.

Cashing out personal/carer's leave

It is only possible to cash out personal/carers' leave if a modern award or enterprise agreement contains such provisions. It is not possible to enter into such an arrangement if employees are award or agreement-free.

If a provision to cash out personal/carers' leave is included in a modern award or enterprise agreement it must state that:

- leave cannot be cashed out if it would result in the remaining accrual being less than 15 days;
- each period of cashing out must be by a separate agreement in writing between the employer and the employee; and
- the employee must be paid at least the full amount that would have been payable had the employee taken the leave.

Unpaid carers' leave

All employees (including casual employees) are entitled to two days of unpaid carers' leave for each occasion that a member of the employee's immediate family or household requires care or support because of a personal illness or injury or because of an unexpected emergency.

Compassionate leave

Permanent employees are entitled to two days of paid compassionate leave and casuals unpaid for each occasion that a member of the employee's immediate family or household contracts or develops a personal illness that poses a serious threat to his or her life; sustains a personal injury that poses a serious threat to his or her life; or dies.

From September 2021, employees are entitled to access two days of paid compassionate leave (unpaid for casuals) if the employee, or employee's spouse or de facto partner, experiences a miscarriage.

The FW Act defines a miscarriage as:

- a spontaneous loss of an embryo or fetus before a period of gestation of 20 weeks.

Evidence and notice

An employee who is taking personal/carers' leave must give notice to the employer as soon as is reasonably 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.

If required by the employer, an employee must provide evidence that would satisfy 'a reasonable person'. What evidence would satisfy a reasonable person will differ depending on the circumstances and may or may not include a medical certificate.

However, the NES provides that a modern award or enterprise agreement may include more onerous provisions in relation to the kind of evidence that an employee must give in order to be entitled to paid personal/carers' leave, unpaid carers' leave or compassionate leave. Likewise, transitional instruments which contain more onerous evidence provisions continue to have effect. For example, if a collective agreement made before 1 July 2009 states that a medical certificate must be provided for each period of personal leave, this clause still applies after 1 January 2010.

Unpaid family and domestic violence leave

These provisions entitle all employees, including casuals, five days of unpaid family and domestic violence leave in a 12-month period. The leave is available in full at the start of each 12-month period of the employee's employment, however it does not accumulate from year to year.

The leave can be taken as a single continuous period, as separate periods of at least one day at a time, or any other arrangement as agreed between the employee and the employer.

Employees may take unpaid family and domestic violence leave if:

- the employee is experiencing family and domestic violence, and;
- the employee needs to do something to deal with the impact of the family and domestic violence, and;
- it is impractical for the employee to do that thing outside of the employee's ordinary hours of work.

Employers must take steps to ensure information concerning any unpaid family and domestic leave an employee is taking is treated confidentially, as far as is reasonably practicable.

Employees must comply with the same notice and evidence requirements provided for in the Personal/Carer's leave provisions. However, there may be additional evidence that may be reasonable – such as a police report, an appointment confirmation with a social worker etc.

Community service leave

Voluntary emergency management activities (such as being a volunteer fire fighter or part of the SES) and jury service are defined by the NES as 'eligible community service activities'.

The NES provides that employees undertaking such activities are entitled to be absent from their employment.

Unlike other provisions contained in the FW Act, the community services leave provisions are not intended to apply to the exclusion of state or territory laws that might otherwise apply to the extent that such laws would be more generous. In WA, there are two relevant pieces of legislation which must be considered in light of the NES provisions, the *Juries Act 1957 (WA)* and the *Emergency Management Act 2005 (WA)*.

Jury service

The NES provides that employees, other than casual employees, who receive a jury service summons, must be paid at their base rate of pay for up to a maximum of 10 days. However, under

Juries Act 1957 (WA), an employer is obligated to continue to pay employee wages for the **entire period** of jury service, and casuals may be entitled to paid leave for jury service. Employers can seek reimbursement from the Sheriff's Office.

Voluntary emergency management activities

While the NES provides that all activities other than jury service are to be taken as unpaid leave, under the *Emergency Management Act 2005 (WA)* an employee who is absent from employment because of an emergency management response is entitled to be paid by the employer for the period of absence.

Long service leave

An employee entitlement to long service leave can be derived from a number of instruments. Long service leave that is derived from a Federal award (prior to 1 January 2010) is an 'award-derived long service leave term'. Such terms are retained under the FW Act after 1 January 2010, even after the award itself is terminated because of the award modernisation process.

However, if a workplace agreement or AWA operates then the 'award-derived long service leave term' does not apply until that agreement ceases. Likewise, if an enterprise agreement; a preserved State agreement; a workplace determination; a pre-reform certified agreement; a pre-reform AWA; a section 170MX award or an old IR agreement applies AND expressly deals with long service leave then the 'award-derived long service leave term' does also not apply until that agreement ceases. Once those agreements cease an employee's entitlement to long service leave falls back to the 'award-derived long service leave term'.

In limited circumstances, an employee may also have an entitlement to long service leave from an 'applicable agreement-derived long service leave term'. An 'applicable agreement-derived long service leave term' only exists if there are no 'applicable award-derived long service leave terms' and the FWC makes an order which determines that a collective agreement which contains a long service leave scheme that applies in more than one state or territory, when considered on an overall basis, is no less beneficial to the employees than the long service leave entitlements that would otherwise apply under state and territory laws.

The FW Act does not exclude the application of the state Long Service Leave Act 1958 (WA), except in relation to employees who are entitled to long service leave under their agreement, their 'award-derived long service leave term' or their 'applicable agreement-derived long service leave term'. From 1 January 2010, an employee's entitlement to long service leave that is derived from the *Long Service Leave Act 1958 (WA)* continues.

Public holidays

The NES provides for an employee to receive payment at their base rate of pay for being absent on a day that is a public holiday.

If the employee does not have ordinary hours of work on the public holiday, the employee is not entitled to payment. For example, an employee is not entitled to payment if they are a part-time employee whose part-time hours do not include the day of the week on which the public holiday occurs.

Casual employees are not expressly excluded from payment for being absent on a public holiday. However, payment would not be required so long as casual employees are not rostered on for the public holiday. Employers must ensure that casual employees are clearly not rostered on the public holiday to reduce the liability of payment.

If a public holiday falls while an employee is on a period of paid annual leave or personal/carers' leave, the employee is considered not to be on annual leave or personal/carers' leave for that public holiday. As such, where applicable, it is paid to the employee as a public holiday.

An employer may request an employee to work on a public holiday if the request is reasonable. In determining whether a request, or a refusal of a request, is reasonable, the following must be considered:

- the nature of the employer's workplace or enterprise (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 or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday;
- the type of employment of the employee (for example, whether 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;
- in relation to the refusal of a request - the amount of notice in advance of the public holiday given by the employee when refusing the request; and
- any other relevant matter.

The NES also provides for substitution under a relevant state or territory law and further provides that a modern award or agreement may substitute (or provide for the substitution of) a day or part-day for a day or part-day that would otherwise be a public holiday.

Notice of termination and redundancy pay

Notice of termination

When terminating an employee, an employer must give written notice of the day of the termination (which cannot be before the day the notice is given).

The employer must provide the correct notice period or pay the employee in lieu of notice at the full rate of pay for the hours he or she would have worked had the employment continued until the end of the minimum period of notice. This includes payment of superannuation during the notice period. Please refer to Table 1 below for the period of notice.

The NES also provides that a modern award or enterprise agreement may include provisions specifying the period of notice an employee must give in order to terminate his or her employment.

The notice of termination provisions does not apply in respect of the following employees:

- a daily hire employee working in the building and construction industry;
- a daily hire employee working in the meat industry; or
- a weekly hire employee working in connection with the meat industry and whose termination of employment is determined solely by seasonal factors.

Redundancy pay

Under the NES, an employee is entitled to redundancy pay if they are terminated at the employer's initiative because the employer no longer requires the job done by the employee or to be done by anyone else (except where this is due to the ordinary and customary turnover of labour); or because of the insolvency or bankruptcy of the employer.

The following redundancy payments are made at the employee's base rate of pay for his or her ordinary hours of work. Please refer to Table 2 below.

Table 1

Employee's period of continuous service with the employer at the end of the day the notice is given	Period of notice
Not more than one year	One week
More than one year but not more than three years	Two weeks
More than three years but not more than five years	Three weeks
More than five years	Four weeks
This period is increased by one week if the employee is over 45 years old and has completed at least two years of continuous service with the employer at the end of the day the notice is given.	

Table 2

Period of continuous service with the employer on termination	Redundancy pay period
At least one year and less than two years	Four weeks' pay
At least two years and less than three years	Six weeks' pay
At least three years and less than four years	Seven weeks' pay
At least four years and less than five years	Eight weeks' pay

At least five years and less than six years	10 weeks' pay
At least six years and less than seven years	11 weeks' pay
At least seven years and less than eight years	13 weeks' pay
At least eight years and less than nine years	14 weeks' pay
At least nine years and less than 10 years	16 weeks' pay
At least 10 years	12 weeks' pay

On application by the employer, the Fair Work Commission may determine that the amount of redundancy pay is reduced because the employer obtains other acceptable alternative employment or because of an incapacity to pay the amount.

The NES provides that the following exclusions from redundancy pay apply:

- number of employees – if the employer employed fewer than 15 employees at the time the employee is given notice of the termination or immediately before the termination;
- service – If the period of continuous service with the employer on termination is less than 12 months;
- an employee who is an apprentice;
- an employee covered by a modern award that includes an industry-specific redundancy scheme; and
- an employee covered by an enterprise agreement which incorporates by reference an industry-specific redundancy scheme contained in a modern award which applies to that employee.

For the purpose of calculating the number of employees, all employees employed by the employer at that time are to be counted, including the employee whose employment is being terminated and any other employee whose employment is also being terminated. A casual employee is not counted unless the casual employee has, immediately before that time, been engaged by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.

A modern award may include a term specifying other situations in which redundancy pay would not apply to the termination of an employee's employment. If a modern award does include such a term, an enterprise agreement may incorporate the term by reference into the enterprise agreement. Such a term would only apply to those employees who are covered by the modern award.

Exemptions to notice of termination and redundancy

Further to the above-mentioned exemptions, the following employees are also exempt from both the notice of termination provisions and the redundancy provisions:

- an employee employed for a specified period of time or for a specified task;
- an employee whose employment is terminated because of serious misconduct;
- a casual employee;
- a trainee (other than an apprentice) to whom a training arrangement applies, and is employed on a fixed term basis (they may however be entitled to notice if terminated before the specified contract end date).

Fair Work Information Statement

Employers are required to give employees a copy of the *Fair Work Information Statement* before, or as soon as practicable after an employee starts.

The *Fair Work Information Statement* can be obtained from the Fair Work Commission.

The Statement contains information about the following:

a) the National Employment Standards;

b) modern awards;

c) agreement-making under the FW Act;

d) the right to freedom of association;

e) the role of the FWC and the Fair Work Ombudsman;

f) termination of employment;

g) individual flexibility arrangements; and

h) right of entry (including the protection of personal information by privacy laws).

☎ For more information on who is a National System Employee, please contact CCIWA's Employee Relations Advice Centre on (08) 9365 7660 or advice@cciwa.com

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