



November 2009

## National Employment Standards – A Summary

A set of 10 minimum employment standards will apply to all employees within the federal system from 1 January 2010. The minimum standards cannot be displaced.

An employer must not contravene a provision of the NES and, if it does, will be subject to a maximum penalty of \$6,600 (for individuals) or \$33,000 (for corporations) and any other order the Court considers appropriate.

From 1 January 2010 the following rules will apply. There are 10 NES. A summary of each NES is set out below.

### 1. Maximum weekly hours

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

- (a) For a full-time employee – 38 hours; or
- (b) For an employee who is not a full-time employee – the lesser of:
  - (i) 38 hours; and
  - (ii) The employee's ordinary hours of work in a week.

The employee may refuse to work additional hours (beyond those referred to above) if they are unreasonable. In determining whether additional hours are reasonable or unreasonable, the following must be taken into account:

- (a) Any risk to employee health and safety from working the additional hours.
- (b) The employee's personal circumstances, including family responsibilities.
- (c) The needs of the workplace or enterprise in which the employee is employed.
- (d) Whether the employee is entitled to any overtime, penalty rates or other compensation for, or a level or remuneration that reflects an expectation of, working additional hours.
- (e) The notice (if any) given by the employer of any request or requirement to work the additional hours.
- (f) The notice (if any) given by the employee of his or her intention to refuse to work the additional hours.
- (g) The usual patterns of work in the industry, or the part of an industry in which the employee works.
- (h) The nature of the employee's role and level of responsibility.
- (i) Whether the additional hours accord with the averaging terms of a relevant modern award.
- (j) Any other relevant matter.

For non-award employees, an employer and an employee may agree to average the 38 hours over a period of not more than 26 weeks.

## 2. Requests for flexible working arrangements

An employee who is a parent, or has a responsibility for the care of a child under school age may request the employer for a change in working arrangements for the purpose of assisting the employee to care for the child.

A permanent employee may make the request if he or she has completed at least 12 months of continuous service with the employer. A casual employee may make a request if he or she is a long term casual employee (having over 12 months continuous service) and has a reasonable expectation of continuing employment on a regular and systematic basis.

The request must be in writing and contain details of the change sought and of the reasons for the change. The employer must give the employee a written response to the request within 21 days, stating whether the request is granted or refused. The employer may refuse the request only on reasonable business grounds and, if the request is refused, the employer must include the reasons for the refusal.

**Note:** Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

## 3. Parental leave and related entitlements

To be eligible for parental leave, permanent employees must have completed at least 12 months continuous service immediately before the date of birth, or the expected date of the birth of a child. Long term casual employees are also entitled to parental leave providing they would have a reasonable expectation of continuing employment on a regular and systematic basis.

If a pregnant employee who is entitled to parental leave continues to work during the period of 6 weeks before the expected date of birth of the child, the employer may ask the employee to give the employer a medical certificate containing the following statements (if applicable):

- (a) A statement of whether the employee is fit to work;
- (b) If the employee is fit to work – a statement of whether it is inadvisable for the employee to continue in her present position during a stated period because of:
  - (i) Illness, or risks, arising out of the employee's pregnancy; or
  - (ii) Hazards connected with the position.

**Note:** Personal information given to the employer under this subsection may be regulated under the *Privacy Act 1988*.

An employee must give his or her employer written notice of the taking of unpaid parental leave. The notice must be given to the employer:

- (a) At least 10 weeks before starting the leave; or
- (b) If that is not reasonably practicable – as soon as is reasonably practicable (which may be a time after the leave has started).

The notice must specify the intended start and end dates of the leave.

An employee also has the right to request an extension to their period of leave for a further 12 months. The employee will be required to provide their employer with 4 weeks written notice before the end of the available parental leave period. The notice must specify the new end date for the leave. The employer must give the employee a written response to the request within 21 days. The employer may only reject the request if there are reasonable business grounds. If the employer refuses the request, the written response must include details of the reasons for the refusal.

There is also a new obligation on an employer to consult with an employee on unpaid parental leave if the employer makes a decision that will have a significant effect on the status, pay or location of the employee's 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 the decision on the pre-parental leave position.

On ending unpaid parental leave, an employee is entitled to return to:

- (a) The employee's pre-parental leave position; or
- (b) If that position no longer exists – an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.

#### **4. Annual leave**

The NES provides for permanent employees to have 4 weeks of paid annual leave and, in the case of a shift worker under a modern award, 5 weeks paid annual leave.

An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work and will accumulate from year to year.

Paid annual leave may be taken for a period agreed between an employee and his or her employer. However, an employer must not unreasonably refuse to agree to a request by an employee to take paid annual leave. An award may provide for an employer to require an employee to take leave in particular circumstances, but only if the requirement is reasonable. An employer may require an award free employee to take leave also but only if the requirement is reasonable.

For award employees, paid leave cannot be cashed out except in accordance with a permitted cashing out term in an award or enterprise agreement. An award free employee and his or her employer may agree to cash out the leave providing the employee's remaining accrued entitlement is not less than 4 weeks. Such an agreement must be a separate agreement in writing. If the period during which an employee takes paid annual leave includes a period of any other leave (other than unpaid parental leave) or a period of absence from employment (community service leave), the employee is taken not to be on paid annual leave for the period of that other leave or absence.

#### **5. Personal/carer's leave and compassionate leave**

Permanent full time employees will be entitled to 10 days of paid personal/carer's leave for each year of service. The entitlement accrues progressively during the year according to the employee's ordinary hours of work and accumulates from year to year.

An employee may take paid personal/carer's leave if the leave is taken:

- (a) Because the employee is unfit for work because of a personal illness, or personal injury, affecting the employee, or
- (b) To provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:
  - (i) A personal illness, or personal injury affecting the member; or
  - (ii) An unexpected emergency affecting the member.

All employees, including casuals, are entitled to 2 days of unpaid carer's leave for each permissible occasion when a member of the employee's immediate family, or a member of the employee's household, requires care and support.

For award employees, paid leave cannot be cashed out except in accordance with a permitted cashing out term in an award or enterprise agreement.

All employees, excluding casuals, are entitled to 2 days paid compassionate leave for each permissible occasion when a member of the employee's immediate family, or a member of the employee's household:

- (a) Contracts or develops a personal illness that poses a serious threat to his or her life; or
- (b) Sustains a personal injury that poses a serious threat to his or her life; or
- (c) Dies.

An employee must give his or her employer notice of the taking of leave 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.

An employer may require an employee taking leave to provide evidence that would satisfy a reasonable person that the leave was necessary.

An employee is not entitled to take leave unless the employee complies with the notice and evidence requirements.

**Restriction on taking or accruing leave or absence while receiving workers compensation**

- (1) Subject to subsections (2) and (3), an employee is not entitled to take or accrue any leave or absence (whether paid or unpaid) under this Part during a period (a **compensation period**) when the employee is absent from work because of a personal illness, or a personal injury, for which the employee is receiving compensation payable under a law (a **compensation law**) of the Commonwealth, or of a State or Territory, relating to workers' compensation.
- (2) Subsection (1) does not prevent an employee from taking or accruing leave during a compensation period if the taking or accruing of the leave is permitted by a compensation law.
- (3) Subsection (1) does not prevent an employee from taking unpaid parental leave during a compensation period.

**6. Community service leave**

An employee who engages in an eligible community service activity is entitled to be absent from work for the time when the employee is engaged in the activity and for reasonable travelling and rest time. The absence must be reasonable in the circumstances.

The following are deemed eligible community service activities:

- (a) Jury service (including attendance for the purpose of jury selection) that is required by or under a law of the Commonwealth or of a State or Territory; or
- (b) A voluntary emergency management activity with a recognised organisation (such as a fire-fighting, civil defence or rescue body).

An employee who wants an absence from his or her employment to undertake an eligible community service must give notice to the employer as soon as practicable (which may be a time after the absence has started) and must advise the employer of the period, or expected period of the absence. The employee must provide evidence to his or her employer that would satisfy a reasonable person that the absence relates to the community service proposed to be taken.

Employees (other than casuals) are entitled to payment for the first 10 days of attending jury service.

**7. Long service leave**

The NES preserves the entitlement of employees to long service leave in accordance with prevailing State legislation or applicable awards.

**8. Public holidays**

An employee will be entitled to be absent from work and be paid on a day or part-day that is a public holiday in the place where the employee is based for work purposes. A public holiday are days declared as such around Australia including any other day declared by a State government to be a public holiday.

However, an employer may request an employee to work on a public holiday if the request is reasonable. The employee may refuse such request if the request is not reasonable or the refusal is reasonable. In determining whether a request, or a refusal of a request, to work on a public holiday is reasonable, the following must be taken into account:

- (a) The nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee.
- (b) The employee's personal circumstances, including family responsibilities.
- (c) Whether the employee could reasonably expect that the employer might request work on the public holiday.
- (d) 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.
- (e) The type of employment of the employee (for example, whether full time, part time, casual or shiftwork).
- (f) The amount of notice in advance of the public holiday given by the employer when making the request.
- (g) 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.
- (h) Any other relevant matter.

## **9. Notice of termination and redundancy pay**

### **Termination**

An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given), except for the following employees:

- (a) An employee engaged for a specified period of time, for a specified task, or for the duration of a specified season.
- (b) An employee whose employment is terminated because of serious misconduct.
- (c) A casual employee.
- (d) 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.

Notice may be given to an employee by:

- (a) Delivering it personally; or
- (b) Leaving it at the employee's last known address; or
- (c) Sending it by pre-paid post to the employee's last known address.

Where there is a valid reason for termination, the legislation requires the employer to conform to certain standards concerning minimum periods of notice for termination of employment based on the employee's age and years of service. The minimum periods of notice are as follows:

<b>Employee's period of continuous service with the employer at the end of the day the notice is given</b>	<b>Period of Notice</b>
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

Where an employee is over 45 years of age at the time of termination and has completed at least 2 years continuous service with the employer, the employee shall be entitled to one week's notice in addition to that prescribed above.

### **Redundancy**

The NES has introduced a statutory entitlement to redundancy pay for permanent employees whose employer employs 15 or more employees (including certain casual employees).

An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

- (a) At the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
- (b) Because of the insolvency or bankruptcy of the employer.

The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table:

<b>Employee's period of continuous service with the employer on termination</b>	<b>Redundancy pay period</b>
Less than 1 year	Nil
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

### **10. Fair Work Information Statement**

An employer must give every new employee the Fair Work Information Statement before, or as soon as practicable after, the employee starts employment.

The Statement contains information about the following:

- (a) The National Employment Standards;
- (b) Modern awards;
- (c) Agreement making;
- (d) The right to freedom of association; and
- (e) The role of Fair Work Australia and the Fair Work Ombudsman.

### **Minimum wages**

Minimum wages will be set by the Minimum Wage Panel of Fair Work Australia.

For award employees, the minimum wages will be contained in the modern awards. For award free employees, the minimum wages will be specified in the national minimum wage order.

Fair Work Australia will be required to establish and maintain a safety net of fair minimum wages taking into account certain social and economic factors. Wage reviews will be undertaken annually and will also set the casual loading for award free employees.