

## PENDLEBURY WORKPLACE LAW UPDATE

Developments in HR & IR Law in Australia  
January 2010

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The Fair Work Act  
What You Need to Know



Hello to all friends & colleagues of Pendlebury Workplace Law. Happy New Year! I hope you are feeling refreshed and re-energised for the year ahead. This Update will consider what matters are relevant that you need to know about the *Fair Work Act 2009* now we are into 2010, in particular, the NES, modern awards, and workplace flexibility provisions.

### Fair Work Act now in 2010

From 1 January 2010 several important changes in Australia's workplace laws took effect, and these changes affected all employers and employees in the national workplace relations system.

The changes included the introduction of the new National Employment Standards ("NES"), many employers moving into the national system, the commencement of modern awards and workplace flexibility provisions.

Employers need to be aware of these changes and commence implementation without delay.

### 10 National Employment Standards (the NES)

The *Fair Work Act 2009* provides a safety net of enforceable minimum employment terms and conditions through the NES.

The NES set out 10 minimum workplace entitlements which apply to all employers and employees in the national workplace relations system from 1 January 2010 (however only certain entitlements apply to casual employees).

The NES replace the non-pay rate provisions of the Australian Fair Pay and Conditions Standard, which applied up to and including 31 December 2009.

Under the NES, employees have certain minimum conditions. Together with pay rates in modern awards (which also generally took

effect 1 January 2010) and minimum wage orders, the NES makes up the safety net that cannot be altered to the disadvantage of the employee.

In addition to the NES, generally an employee's terms and conditions of employment derive from a modern award, agreement, transitional award and agreement, minimum wage order, transitional minimum wage instrument, and state or federal laws.



## What are the 10 NES entitlements?

The NES are set out in the *Fair Work Act 2009* and comprise 10 minimum standards of employment.

In summary, the NES are as follows:

### 1. **Maximum weekly hours of work** -

38 hours per week, plus reasonable additional hours. Criteria is provided to assess what is 'reasonable' additional hours. Please contact me for more information.

### 2. **Requests for flexible working arrangements** -

allows parents or carers of a child under school age or of a child under 18 with a disability, to request a change in working arrangements to assist with the child's care.

### 3. **Parental leave and related entitlements** -

up to 12 months unpaid leave for every employee, plus a right to request an additional 12 months unpaid leave, plus other forms of maternity, paternity and adoption related leave.

### 4. **Annual leave** - 4 weeks paid leave per year, plus an additional week for certain shift workers.

### 5. **Personal / carer's leave and compassionate leave** - 10 days paid personal / carer's leave, 2 days unpaid carer's leave as required, and 2 days compassionate leave (unpaid for casuals) as required.

### 6. **Community service leave** - unpaid leave for voluntary emergency activities and leave for jury service, with an entitlement to be paid for up to 10 days for jury service.

### 7. **Long service leave** - a transitional entitlement for certain employees who had certain LSL entitlements before 1/1/10 pending the development of a uniform national long service leave standard.

### 8. **Public holidays** - a paid day off on a public holiday, except where reasonably requested to work.

### 9. **Notice of termination and redundancy pay** - up to 4 weeks notice of termination (5 weeks if the employee is over 45 and has at least 2 years of continuous service) and up to 16 weeks redundancy pay, both based on length of service. Rules apply as to when service for the purposes of calculating redundancy, is counted, & other exemptions. Please contact me for more details.

### 10. **Provision Fair Work Information Statement** - employers must provide this statement to all new employees. It contains information about the NES, modern awards, and other workplace rights. A copy of this Statement is available, please contact me.



## Casual employees and the NES

Only certain NES entitlements apply to casual employees.

These are:

- 2 days unpaid carer's leave and 2 days unpaid compassionate leave per occasion;
- maximum weekly hours;
- community service leave (except paid jury service);
- a day off on a public holiday, unless reasonably requested to work by the employer; and
- provision of the Fair Work Information Statement.

In addition, casual employees who have been employed for at *least 12 months* by an employer on a *regular and systematic* basis and with an *expectation of ongoing* employment are entitled to:

- make requests for flexible working arrangements; and
- parental leave.

## How the NES is applied

The NES applies to all employees covered by the national workplace relations system regardless of the award, agreement or contract of employment that applies.

### Employees covered by awards and agreements

Awards, agreements and transitional awards and agreements may supplement the NES by providing entitlements that do not disadvantage employees in comparison with the NES.

A certain amount of flexibility is also allowed in the operation of the NES. For example, awards and agreements may specify terms that are flexible in relation to:

- averaging an employee's ordinary hours of work
- the cashing out of and taking paid annual leave
- the cashing out of paid personal / carer's leave
- the substitution of public holidays
- situations in which redundancy pay entitlements do not apply.

Terms in awards, agreements, transitional awards and agreements, and employment contracts cannot exclude, or provide for an entitlement less than the NES.

## Penalties for Breach NES

Employers who contravene provisions of the NES may face penalties of up to \$6,600 for an individual and \$33,000 for a corporation.



## Modern awards

Modern awards now replace existing awards in most industries.

Modern awards are industry or occupation-based enforceable minimum employment standards which apply in addition to the NES.

Modern awards cover all employers and employees who perform work in those industries or occupations covered by a particular modern award.

However, modern awards may not apply to some managers or higher income employees (who have a guarantee of annual earnings of more than \$108,300 annually (indexed annually)) even if a modern award covers the industry in which they work.

Modern awards contain terms and conditions about:

- minimum wages
- overtime and penalty rates
- types of employment
- work arrangements (eg. rosters, variation to working hours)
- hours of work
- rest breaks
- classifications
- allowances
- leave and leave loadings

- superannuation
- procedures for consultation,
- representation and dispute settlement.

Some standard clauses in the modern awards include:

- a 25% casual loading;
- exemption rates which is a clause excluding employees who earn above a certain annual salary from various provisions of the award;
- overtime and penalty provisions; and
- 17.5% annual leave loading.



To lessen the financial impact of the new arrangements, some modern awards may contain transitional provisions which allow changes in minimum conditions to be progressively phased in.

*If you would prefer not to receive further Updates I will remove you from the mailing list. This publication is intended only as a general overview of legal issues. It is not intended as legal advice and should only be used for information purposes only. Please seek advice from Pendlebury Workplace Law before taking any action based on material published in this Update.*

## Award Flexibility

The modern awards allow for an employer and individual employee to agree to vary the application of certain terms of the modern award to meet the genuine individual needs of the employer and the individual employee, termed *award flexibility*.

Award flexibility imposes strict procedural requirements on the employer, including that an award flexibility agreement must:

- a. be in writing and signed by both parties;
- b. detail the variation to the terms of the modern award;
- c. detail how the variation does not disadvantage the individual employee; and
- d. include the date on which the variation comes into operation.

An employer's failure to meet the requirements in regard to award flexibility may result in a breach of a workplace right, which is a civil penalty provision under the Act.

If you would like further assistance with respect to award flexibility and preparation of an award flexibility agreement, please contact me.



## Tips for Employers

- Most industries and occupations will be covered by a modern award. Determine which modern awards apply to your employees.
- There are many and varied workplace rights available to employees, prospective employees and in some cases, independent contractors, under the *Fair Work Act*. A breach of a workplace right can attract attention from the tribunal, Fair Work Australia, the Fair Work Ombudsman and the Courts, and can result in civil penalties and compliance orders against an employer. Be aware of the workplace rights.
- The Fair Work Ombudsman is proactively enforcing compliance of the Act now.
- Employers can use award flexibility and enterprise agreements as a means of allowing greater flexibility in the workplace so as to meet the employer's commercial and operational needs.





## New Workplace Flexibility Options

Employees of national system employers now have a right to request flexible work arrangements. This is a new right which did not previously exist under the predecessor to the *Fair Work Act*. There is no phasing-in period for this 'right to request' scheme.

### **The scheme**

The 'right to request' is a minimum entitlement. It forms a part of the NES.

The 'right to request' entitles an eligible employee to request a change in their working arrangements to "*assist the employee to care for [a] child*". The term *working arrangements* is not defined but it envisages capturing matters like hours of work, patterns of work and location of work.

An eligible employee is a parent or a person who has responsibility for the care of a child who is under school age or is under 18 years and has a disability. However, a casual employee, (excepting a casual with a *reasonable expectation of continuing employment* by the employer on a *regular and systematic* basis) is not eligible.

A qualifying period of at least 12 months continuous service applies before an employee is eligible to make a request. A right to request must be in writing and set out the details of the change sought and the reasons for the change.

An employer must provide the employee with a written response to a request within 21 days.

An employer's response must state whether the employer grants or refuses the request. Importantly, where an employer refuses a request it can only do so on *reasonable business grounds*. An employer must also provide details, in writing, of the reasons for the refusal. There is no obligation to provide written reasons where an employer agrees to grant a request.

### **Remedies**

The *Fair Work Act* provides for certain avenues of redress where a right to request by an employee may not have been adequately dealt with.

While an aggrieved employee cannot seek a substantive review of any decision made to decline a request for flexible work arrangements, a remedy can be sought via the Federal Magistrates Court or Federal Court where there has been a failure by an employer to consider a request at all, or to consider a request in time, or to provide a written response to a request. Where such failures occur, an aggrieved employee may seek from the Court orders that include any order the Court considers appropriate, compensation, and penalties.

The maximum penalty for an individual is \$6,600 and for a corporation \$33,000.

Alternatively, an aggrieved employee may in some circumstances be able to bring proceedings against the employer in the Federal Magistrates Court or Federal Court claiming adverse action because of their sex or family or carer's responsibilities.

In limited circumstances, a dispute arising from an employer's refusal to allow for flexible arrangements can also be dealt with by the new Fair Work Australia body if the parties have agreed in a contract of employment, enterprise agreement or other written agreement to allow Fair Work Australia to deal with the matter. A similar situation applies where a third party (such as an external mediator) is to be engaged to mediate/facilitate the resolution of a dispute.



### Checklist for Employers

Employers preparing for the 'right to request' scheme should:

- check if existing policies & procedures are compliant with the 'right to request' scheme and, if not, consider what changes should be made;
- identify those parts of the business which might expect to receive requests from their employees and have in place strategies to manage workforce expectations (e.g. identify positions or types of positions which might lend themselves to a reasonable business case for flexibility and those which do not);
- determine what communications need to be made to the workforce about the scheme in terms of awareness;
- educate those whom might have to respond to a request for flexibility so as not to expose the organisation to risk; and
- consider how disputes arising from a flexibility request are to be resolved.

## Final tips

While the 'right to request' scheme does not impose a mandatory obligation on an employer to provide flexible work arrangements, it does impose a duty to consider such requests when they arise.

Therefore, an employer cannot decide to not consider a request at all, or reject a request, without having applied some analysis to it to determine whether the arrangements can be in fact accommodated so that they reasonably suit the needs of the employee and the business needs of the employer.

## Pay rates under modern awards

While modern awards start from 1 January 2010, pay rates in most modern awards commence from the first pay period on or after 1 July 2010.

A number of modern awards contain a model phasing-in schedule which allows the following wages and conditions to be phased in over 5 annual instalments:

- minimum wages, including juniors, trainees, employees with disability and piecework rates;
- casual and part time loadings;
- Saturday, Sunday and public holiday penalty rates;
- evening and other penalty rates;
- shift allowances.

Employers must make sure the modern awards applicable to their business provide such a phasing-in period.

If there are no transitional provisions in a modern award, then the wages specified in a modern award need to be paid from 1 January 2010.

## Sole traders, partnerships & others moving into the national system

From 1 January 2010, sole traders, partnerships, other unincorporated entities and non-trading corporations in New South Wales, Queensland, South Australia and Tasmania are covered by the national system rather than their own specific state system.

Employers that were already operating under the national system continue to be covered (eg. Pty Ltd businesses, employers in the ACT, NT and Victoria).

There are special transitional rules for employers in these states to help them. Please contact me for more information.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

**If you would like more information, please contact Brooke Ph: 9231 0250, M: 0403 818 912, E: [info@pendlebury.com.au](mailto:info@pendlebury.com.au). Please have a look at the website at [www.pendlebury.com.au](http://www.pendlebury.com.au).**