



# Small Business Assistance & Advisory Service

## Fair Work Act - The National Employment Standards (NES)

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The NES comprises of ten (10) minimum standards which apply to most employers within the Australian workplace relations system.

### 1. MAXIMUM WEEKLY HOURS OF WORK

The NES provides an entitlement for full-time employees to refuse to work additional hours in excess of 38 a week, if those additional hours are not reasonable. Factors that must be taken into account when deciding whether additional hours are reasonable include:

- any risk to the employee's health and safety;
- the employee's personal circumstances, including family responsibilities;
- the needs of the workplace or enterprise;
- 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 the additional hours;
- notice by the employer of a request or requirement to work additional hours;
- usual patterns of work in the industry;
- notice by the employee of an intention to refuse the additional hours; and
- nature of the employee's role and level of responsibility.

Averaging of hours is used when an employee's actual hours vary from week to week. The employee's hours are then averaged to determine compliance with restrictions on the maximum ordinary hours. This will also be a relevant factor in deciding whether additional hours above the 38-hour standard are reasonable.

Modern awards or enterprise agreements may include terms that allow for the averaging of hours over a specified period. Employees not covered by an award or an agreement may agree in writing with their employers to average their weekly hours over a period of 6 months or less.

#### **CASE STUDY: Dismissing an employee for refusing to work overtime**

If you dismiss an employee for refusing to work additional hours, the employee could challenge the dismissal as a contravention of the general protections' provisions in the FW Act.

In [Brown v Premier Pet \(\(2012\) FMCA 1089\)](#) an employee refused an employer's request to work 3 additional hours of overtime on a non-trading day every 7 to 10 days. The employee was dismissed and made a general protections claim, arguing that the reason for the dismissal was because he had exercised a workplace right, namely his entitlement to refuse to work unreasonable hours in addition to 38 a week.

The Court had to determine whether the employer had demonstrated that the requirement of the employee to work the additional hours was reasonable. The Court said that the following factors were relevant in concluding that the employer had not established reasonableness:

- the employee's personal circumstances, namely that he was required to assist his mother who lived at his home, he was involved in conducting his own businesses as an internet retailer and needed time to devote to that business, and the fact that he did not wish to work more than 38 hours a week because of the impact this would have on his bankruptcy situation;
- the employer's refusal to negotiate the issue with employee; and
- the employer's failure to provide evidence of the total amount of overtime that the employee was required to work.

The lesson from this case is that before an employer disciplines or dismisses an employee for refusing to work overtime, it needs to prove that it was not unreasonable to require the employee to work those hours. The employer also needs to be prepared to consult the employee and listen to his or her objections about the requirement to work the overtime before seeking to discipline the employee for not meeting it.

## **2. REQUEST FOR FLEXIBLE WORKING ARRANGEMENTS**

An employee has the right to request flexible working hours from his/her employer in the following circumstances:

- The employee is a parent or has a responsibility for the care of a child of school age or younger;
- The employee is a carer;
- The employee has a disability;
- The employee is aged 55 or older; and/or
- The employee is experiencing family violence or provides care or support to a family member experiencing family violence.

The employer can only decline the request on 'reasonable business grounds'. If a business ground is relied upon for refusing the request, the question of whether it is reasonable involves a balancing of the cost of accommodating the request (if any), the employer's ability to reorganise work arrangements to accommodate the request, and any detrimental effect on the operation of the business.

An employee is not entitled to request a flexible working arrangement unless he/she has completed at least 12 months of continuous service with the employer.

## **3. PARENTAL LEAVE**

Full-time and part-time employees who have completed 12 months of continuous service, as well as casual employees who work on a regular and systematic basis over a 12-month period, can take unpaid parental leave.

An employee is able to take up to 12 months' parental leave to enable him/her to undertake the primary care of their child. A couple of employees may each take up to 12 months consecutively. Alternatively, one parent can request up to 12 months' additional leave, taking their total entitlement to two years, which his/her employer will only be able to refuse on reasonable business grounds.

An employee returning from parental leave is entitled to return to the position he/she held before going on leave or, where that position no longer exists, to a position comparable in pay and status.

#### **4. ANNUAL LEAVE**

Permanent employees are entitled to 4 weeks' paid annual leave for each year of service. This is pro-rated for part-time employees.

Shift workers are entitled to 5 weeks paid annual leave. A shift worker is one defined as such under a modern award or enterprise agreement, or if award/agreement free, falls within the definition of shift worker in the FW Act (s 87(3)).

Annual leave accrues progressively during periods of "service" in accordance with "ordinary hours of work".

"Service" includes all periods of employment other than periods of unpaid leave, unpaid absence (other than community service leave) and unauthorised leave.

"Ordinary hours of work", for an employee to whom an award or enterprise agreement applies, are the ordinary hours set out in the award or agreement. Ordinary hours of work for an award/agreement free employee are the hours agreed as such between the employer and employee. If not agreed they will be 38 hours per week for full-time employees or in the case of other employees, the lesser of 38 hours or the employee's usual weekly hours of work.

Employees on annual leave are entitled to pay at their "base rate of pay". This is the rate of pay payable to the employee for his or her ordinary hours of work, but not including incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or any other separately identifiable amounts.

#### **5. PERSONAL/CARER'S LEAVE**

Employees are entitled to 10-days' paid personal/carer's leave for each year of service. Leave accrues progressively according to an employee's 'ordinary hours of work' and accumulates from year to year.

Employees are also entitled to two days of paid compassionate leave (such as for the death or serious illness of a family or household member) and two days of unpaid carer's leave if paid carer's leave has been exhausted. This entitlement extends to casual employees.

## **6. COMMUNITY SERVICE LEAVE**

Employees are entitled to unpaid leave to undertake eligible community service activities such as jury service and emergency service duties. Employers must provide make-up payments for full time and part time employees undertaking jury service for a period of up to 10 days. Make-up pay is the difference between what an employee was paid for jury service and the employee's base rate of pay for their ordinary hours of work for the period of jury service.

There are notice and evidence requirements that must be met by an employee for them to take this leave.

## **7. LONG SERVICE LEAVE**

Under the FW Act, the long service leave obligations contained in a pre-modernised award (such as the Metal Industry Award) still apply for employers that employ workers who were covered by the pre-modernised award on 31 December 2009, or joined the employer on or after 1 January 2010 but would have been covered by the pre-modernised award if they had been employed before that date.

## **8. PUBLIC HOLIDAYS**

Employees are entitled to be absent from work on prescribed public holidays. The NES provide for the following public holidays:

- Christmas Day, Boxing Day, New Year's Day, Australia Day, Anzac Day, Queens Birthday, Good Friday and Easter Monday.

An employee who is absent from work on a public holiday is entitled to payment at their base rate of pay for the ordinary hours that would have been worked.

An employer may make a reasonable request for an employee to work on a public holiday. However, an employee may refuse to work if they have reasonable grounds.

Factors that will be relevant in deciding whether a request or refusal to work is reasonable include:

- the nature of the workplace, including operational requirements, and the nature of the employee's work;
- the employee's personal circumstances, including family responsibilities;
- whether the employee could reasonably expect a request to work on a public holiday;
- whether the employee is entitled to overtime, penalty rates or other compensation for working on the holiday;
- the amount of advance notice by the employer making the request; and
- the amount of advance notice by the employee refusing the request.

If an employee works on a public holiday they may be entitled to penalty rates or other compensation set out in a modern award, enterprise agreement or contract of employment.

## **9. NOTICE OF TERMINATION AND REDUNDANCY PAY**

An employer must only terminate an employee's employment in writing. An employer must not terminate an employee's employment unless they have given the employee the necessary period of notice, or unless they have paid the employee an amount of salary in lieu of that notice. Notice payments will be at an employee's full rate of pay, including loadings, monetary allowances, penalty rates and other relevant amounts. The prescribed minimum period of notice is:

- one week for employees with up to one year's service;
- two weeks for one to three years' service;
- three weeks for three to five years' service, and
- four weeks for more than five years' service.

Employees over the age of 45 with at least two years' continuous service at the time of termination will be entitled to an additional one week's notice.

If termination is a consequence of redundancy, the employer must make redundancy payments to an employee calculated according to the following scale. Pay is calculated according to the employee's base rate of pay for ordinary hours of work excluding loadings, monetary allowances, penalty rates and other identifiable amounts. The period of time the employee is entitled to will be based on the length of an employee's continuous service immediately prior to termination.

- at least 1 year, but less than 2 years – 4 weeks' pay;
- at least 2 years, but less than 3 years – 6 weeks' pay;
- at least 3 years, but less than 4 years – 7 weeks' pay;
- at least 4 years, but less than 5 years – 8 weeks' pay;
- at least 5 years, but less than 6 years – 10 weeks' pay;
- at least 6 years, but less than 7 years – 11 weeks' pay;
- at least 7 years, but less than 8 years – 13 weeks' pay;
- at least 8 years, but less than 9 years – 14 weeks' pay;
- at least 9 years, but less than 10 years – 16 weeks' pay; or
- at least 10 years – 12 weeks' pay.

Service prior to 1 January 2010 will not be counted in calculating NES redundancy pay, unless the employee concerned had a pre-existing legal entitlement to redundancy pay as of 31 December 2009.

Redundancy payments may not be required in certain circumstances such as an incapacity to pay or where the employee has been provided with acceptable alternative employment.

Small businesses employing fewer than 15 employees will be exempt from making redundancy payments.

## **10. FAIR WORK INFORMATION STATEMENT**

Employers are required to give new employees a [Fair Work Information Statement](#) as soon as practicable after they start work.