

Fair Work | Fact Sheet

National Employment Standards

The information in this sheet concerns the National Employment Standards (NES), which will not commence operation before 1 January 2010.

It applies to national system employers and Victorian employers, except in relation to the parental leave and related entitlements NES and the notice of termination NES, which apply to all Australian employers.

Key differences between the NES and the Australian Fair Pay and Conditions Standard in the Workplace Relations Act are:

- The NES provides for a right of working parents to request a flexible work arrangement and employees on parental leave to request an extension of unpaid parental leave.
- The NES provides for minimum redundancy pay for employer of 15 or more employees.

Interaction with modern awards and enterprise agreements

A modern award or enterprise agreement must not exclude the NES or any provision of the NES. A modern award or enterprise agreement can, however, include incidental or ancillary terms to deal with issues such as when payment for leave must be made. Modern awards and enterprise agreements may also provide for more beneficial payment arrangements for periods of leave, or provide redundancy entitlements to employees of small business employers.

Summary of key provisions

Maximum weekly hours of work

The NES provides for a 38-hour week. This is subject to the condition that an employer can require an employee to work reasonable additional hours. Factors that must be taken into account when deciding whether additional hours are reasonable include:

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- any risk to the employee's health and safety;
- the employee's personal circumstances, including family circumstances;
- the needs of the workplace or enterprise;
- whether the employee is entitled to receive overtime payments, penalty rates or other compensation from working the additional hours;
- notice by the employer of a request or requirement to work overtime;
- notice by the employee of an intention to refuse the additional hours; and
- any other relevant matter.

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.

Employees covered by a modern award or enterprise agreement will have terms included 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.

Request for flexible working arrangements

Employees who care for children under school age have the right to request flexible working hours. An employer can only decline the request on 'reasonable business grounds' e.g. the cost of accommodating a request, the employer's ability to reorganise work arrangements and the needs of the business.

Employees are not entitled to make the request unless they have completed at least 12 months of continuous service with the employer or, in the case of a long term casual employee, they have an expectation of ongoing employment on a regular and systematic basis.

Parental leave

Employees are able to request up to 12 months' parental leave for each parent with primary care of a child. Alternatively, one parent can request up to 12 months additional leave, taking their total entitlement to two years, which employer's will only be able to refuse on reasonable business grounds.

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

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Annual leave

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

Shift workers will be entitled to 5 weeks paid annual leave. A shiftworker is one defined as such under a modern award or enterprise agreement, or if award/agreement free, falls within the definition of shiftworker in the Fair Work Act 2009 (Cth) (s 87(3)).

Annual leave will accrue 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 of 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.

Employers can direct employees to take annual leave in certain circumstances, if the relevant criteria is met e.g. ensuring employees have enough leave in 'the bank'.

Personal/carer's leave

Employees will be 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.

Employee's will also be 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.

Personal/carer's leave may be cashed out in certain circumstances.

Community service leave

Employees will be entitled to unpaid leave to undertake eligible community service activities such as jury service and emergency service duties. Employers will be able to 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



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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.

Long service leave

Initially, the NES will apply current state and territory long service leave entitlements, with long service leave continuing to accrue in accordance with applicable state legislation. The federal government plans to implement a national long service leave system in the future to provide nationally consistent long service leave entitlements.

Public holidays

An employee will be 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 will be 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;
- the amount of advance notice by the employee refusing the request;
- any other relevant matter.

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



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Notice of termination and redundancy pay

Employees whose employment is terminated must be given written notice. 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 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.

Employers will also be entitled to redundancy pay where their employment is terminated because the employer no longer requires the job to be done by anyone or because the employer is bankrupt or insolvent.

Redundancy pay must be paid to an employee at their base rate of pay for ordinary hours of work excluding loadings, monetary allowances, penalty rates and other identifiable amounts. The scale is based on the length of an employee's continuous service immediately prior to termination, as per the following:

- 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; or
- at least 10 years – 12 weeks.

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

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

Fair Work Information Statement

Employers will be required to give new employees a Fair Work Information Statement as soon as practicable after they start work.

The statement will be published by Fair Work Australia (FWA) and will contain information about the NES, modern awards, agreement making, the right to freedom of association and the role of FWA and the Fair Work Ombudsman.

The statement will not have to be given to existing employees.

Tips for compliance

- Review employment contracts and human resources policies to ensure that provisions do not undercut the NES;
- Implement a register which records receipt and processing of applications for flexible working arrangements and parental leave;
- To assist employees in understanding what is permissible and required with regard to annual leave, it would be helpful for employers to draft a human resources policy, which deals with:
 - taking paid annual leave in advance of accrual;
 - a requirement that paid annual leave be taken within a fixed period of time after it is accrued; and
 - a requirement that an employee give certain notice before taking paid annual leave.



Find out more at:
www.fairworkaustralia.ahri.com.au