



Notice of termination and redundancy pay and the National Employment Standards

Australia's new workplace relations system

From 1 July 2009, most Australian workplaces are governed by a new system created by the *Fair Work Act 2009*.

The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. We provide education, information and advice, investigate workplace complaints, and enforce relevant Commonwealth workplace laws.

Notice of termination and redundancy pay forms part of the National Employment Standards (NES). As of 1 January 2010, the NES apply to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment.

Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES, and have no effect. An employer must not contravene a provision of the NES. A contravention of a provision of the NES may result in penalties of up to \$6,600 for an individual and \$33,000 for a corporation.

In addition to the NES, an employee's terms and conditions of employment generally come from an award or agreement. All references to an award or agreement in this fact sheet includes modern awards, enterprise agreements, and award or agreement-based transitional instruments.

Overview

The NES establish the minimum period of notice, or payment in lieu of notice, that an employer must give an employee to terminate their employment. The provisions about notice of termination apply to all employees (other than casuals), not just those covered by the national workplace relations system.

The NES also set out what redundancy pay may be applicable to an employee on the termination of their employment. The redundancy entitlement under the NES only applies to employees covered by the national workplace relations system.

Notice of termination

An employer must not terminate an employee's employment (subject to the exceptions set out below) unless they have given the employee **written notice** of the day of the termination.

An employer may give notice to the employee by:

- delivering it personally or
- leaving it at the employee's last known address or
- sending it by pre-paid post to the employee's last known address.

What amount of notice must be given?

An employer must not terminate an employee unless they have:

- given the minimum period of notice (see table below) or
- paid the employee in lieu of notice at the full rate of pay for at least the hours the employee would have worked had the employment continued until the end of the minimum period of notice (see table below).

An employee's full rate of pay (other than a pieceworker) is the rate of pay payable to an employee, including all the following:

- incentive-based payments and bonuses
- loadings
- monetary allowances
- overtime or penalty rates
- any other separately identifiable amounts.

| Employee's period of continuous service with the employer at the end of the day the notice is given | Period |
|---|---------|
| 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 |

If the employee is over 45 years old, and has completed at least two years of service at the end of the day notice is given, the employee receives an additional one week notice.

The minimum periods of notice apply to all employees employed in Australia (subject to the exceptions noted below).

An award or agreement may include terms specifying the period of notice an employee must give in order to terminate his or her employment.

Does notice of termination apply to all employees?

An employer does not need to provide notice of termination (or payment in lieu of notice) to any of the following employees:

- an employee employed for a specified period of time, for a specified task, or for the duration of a specified season
- an employee whose employment is terminated because of serious misconduct (for example, an employee who has, in the course of their employment, engaged in theft, fraud or assault)
- a casual employee
- 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
- a daily hire employee working in the building and construction industry (including working in connection with the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures)
- a daily hire employee working in the meat industry in connection with the slaughter of livestock
- a weekly hire employee working in connection with the meat industry and whose termination of employment is determined solely by seasonal factors.

Redundancy pay

An employee is entitled to redundancy pay (subject to the exceptions set out below) from the employer if the employee is terminated:

- at the employer's initiative because they no longer require the job to be done by the employee or anyone (except where this is due to the ordinary and customary turnover of labour) or
- because of the insolvency or bankruptcy of the employer.

Based on the table below, the amount of redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out at their 'base rate of pay' for ordinary hours worked.

An employee's base rate of pay (other than a pieceworker) is the rate of pay payable to an employee for his or her ordinary hours of work, but not including any of the following:

- incentive-based payments and bonuses
- loadings
- monetary allowances
- overtime or penalty rates
- any other separately identifiable amounts.

| Employee's period of continuous service with the employer on termination | Redundancy pay period |
|--|-----------------------|
| 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* |

* There is a reduction in redundancy pay from 16 weeks to 12 weeks for employees with at least 10 years continuous service. This is consistent with the 2004 Redundancy Case decision made by the Australian Industrial Relations Commission.

It is possible for an employer to apply to Fair Work Australia for a determination reducing the liability to pay redundancy pay to a specified amount (that may be nil) if Fair Work Australia considers it appropriate. The employer may apply for the determination if an employee is entitled to redundancy pay, and the employer finds other acceptable alternative employment or cannot pay the amount.

Does redundancy pay apply to all employees?

An employer who is a small business employer is not required to provide redundancy pay on the termination of an employee's employment. A small business employer for the purpose of determining redundancy pay is an employer who, at a particular time, employs fewer than 15 employees.

When calculating the number of employees employed at a particular time, the following factors are to be taken into account:

- all employees employed by the employer at that time are to be counted
- a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis
- associated entities are taken to be one entity
- the employee being terminated and any other employees being terminated at that time are counted.

In addition, redundancy pay will not be payable to any of the following:

- an employee whose period of continuous service with the employer is less than 12 months
- an employee employed for a specified period of time, for a specified task, or for the duration of a specified season
- an employee whose employment is terminated because of serious misconduct
- a casual employee
- 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
- an apprentice
- an employee to whom a industry-specific redundancy scheme in a modern award applies
- an employee to whom a redundancy scheme in an enterprise agreement applies if:
 - the scheme is an industry-specific redundancy scheme that is incorporated by reference (and as in force from time to time) into the enterprise agreement from a modern award that is in operation
 - the employee is covered by the industry-specific redundancy scheme in the modern award.

An award that is in operation may include a term specifying other situations in which redundancy pay does not apply to the termination of an employee's employment.

Is redundancy pay payable on a transfer of employment?

The 'transfer of employment' provisions under the *Fair Work Act 2009* apply when an employee moves from one employer (the old employer) to another employer (the new employer) within three months, and there is a transfer of business involved. This may occur through a number of connections between the two employers, including a transfer of assets, outsourcing and insourcing, or where the two employers are associated entities.

If these conditions are satisfied, the period of service with the old employer will generally count as service with the new employer for the purposes of entitlements under the *Fair Work Act 2009*. If this applies, an employee is not entitled to redundancy pay under the NES in relation to termination of their employment with the old employer.

However, there are exceptions to this general principle. A new employer that is not an associated entity of the old employer has the option to not recognise a transferring employee's previous service for the purposes of NES entitlements to redundancy pay. If the new employer does not recognise an employee's service in relation to redundancy pay, the old employer will be required to pay out the employee's redundancy pay.

Further, subject to an order from Fair Work Australia, an employee is not entitled to redundancy pay under the NES in relation to the termination of his or her employment with the old employer if:

- the employee rejects an offer of employment made by another employer that:
 - is on terms and conditions substantially similar to, and, on an overall basis, no less favourable than the employee's terms and conditions of employment with the old employer immediately before the termination
 - recognises the employee's service with the old employer for the purposes of redundancy pay
- had the employee accepted the offer, there would have been a transfer of employment.

For more information on the transfer of business provisions and the impact on employee entitlements, please see the *Fair Work Ombudsman Fact Sheet – Transfer of Business*.

Further information

The Fair Work Ombudsman has published a fact sheet on each NES entitlement. For further information on a specific NES entitlement, please see the relevant fact sheets at www.fwo.gov.au

For further information, visit www.fairwork.gov.au or contact Fair Work Online **13 13 94**.

Related publications

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Parental leave and related entitlements and the NES

Annual leave and the NES

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Long service leave and the NES

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Fair Work Information Statement and the NES

Contact us

Fair Work Online: www.fairwork.gov.au

Fair Work Infoline: **13 13 94**

Monday to Friday, between 8.00am–6.00pm

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