



The material contained in this document is provided by way of general information only and is designed to raise your awareness. It is not intended to be and is not a substitute for advice which evaluates the circumstances of your business. Its content is accurate as at the date which appears below. This work is copyright. Apart from any use permitted under the Copyright Act 1968, all other rights are reserved.

FAIR WORK ACT 2009 - FACT SHEET 1 National Employment Standards

JUNE 2010

On **1 January 2010** all private sector employees became entitled to the National Employment Standards (NES) provided for in the *Fair Work Act 2009* (FWA). These NES replicate many minimum entitlements which were provided for under the *Workplace Relations Act 1996*.



The 10 NES are:

MAXIMUM ORDINARY HOURS

Under the AFPCs the maximum hours which an employer can require an employee to work per week are 38 plus any "reasonable additional hours". Under the AFPCs the 38 hour maximum can be averaged out over the course of 12 months.

The NES concerning maximum ordinary hours contains an express requirement that "an employer must not request or require an employer to work more than (38 hours) in a week unless the additional hours are reasonable". An employee may refuse a request to work more than 38 hours if those hours are "unreasonable".

"Reasonable additional hours" is defined under the AFPCs by reference to a number of relevant factors. These include but are not limited to:

- any risk to employee health and safety from working additional hours;
- the employee's personal circumstances, including family responsibilities;
- the needs of the workplace or enterprise in which the employee is employed;
- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects the expectation of, working additional hours;
- the nature of the employee's role and the employee's level of responsibility;
- the usual patterns of work in the industry or the part of an industry in which the employee works.

DEVINE LAW AT WORK



T: 02-8985 7312

M: 0410 622 887

E: elizabeth@devinelaw.com.au

W: www.devinelaw.com.au

The averaging of ordinary hours worked is permitted if there is a relevant provision in an applicable modern award or enterprise agreement. It is also possible for employers of award/agreement free employees to enter into an averaging agreement under which hours worked are averaged for a specified period of not more than 26 weeks.

2. REQUEST FOR FLEXIBLE WORKING ARRANGEMENTS

This entitlement permits an employee who is a parent or a person with caring responsibility, for either a child who is under school age or a child under 18 years with a disability, to **request** a change in working arrangements to assist the employee in caring for the child. Such working arrangements may include: hours of work; patterns of work; and location.

Only permanent employees who have provided at least 12 months continuous service and casual employees who have been engaged on a regular and systematic basis for at least 12 months and who have a reasonable expectation of continuing employment are eligible to make such a request.

Any request for flexible working arrangements must be made in writing and must set out the details of the change sought and the reason for the proposed change. The employer must respond in writing within **21 days** of the request being made.

Where the request is refused, the employer must include the reason(s) for the refusal in the response. An employer may only refuse a request for a change to working arrangements on "**reasonable business grounds**". Fair Work Australia has indicated that this *may* include:

- the effect on the workplace and the employer's business (including financial impact and impact on efficiency, productivity and customer service);
- the inability to organise work among existing staff;
- the inability to recruit a replacement or the practicality or otherwise of the arrangements that would have to be put in place to accommodate the employee's request.

3. NOTICE OF TERMINATION AND REDUNDANCY PAY

The NES in relation to notice provides for a minimum amount of notice (or payment in lieu thereof) which an employer must give when terminating an employee's employment. This NES includes an express requirement that "*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)*".

The NES in relation to redundancy pay is an entirely new entitlement for award free employees. The amount of the entitlement to redundancy pay under the FWA is based on a scale determined by reference to length of service and which is consistent with the current standard provision in Federal awards. In the event that an employer is able to obtain 'other acceptable employment' or cannot pay the redundancy pay, the employer will be entitled to make an application to the Fair Work Authority to determine what amount of redundancy pay, if any, should be paid to the employee.

DEVINE LAW AT WORK



T: 02-8985 7312

M: 0410 622 887

E: elizabeth@devinelaw.com.au

W: www.devinelaw.com.au

The minimum prescribed period of **notice** under the FWA is:

Period of Continuous Service	Period of Notice	Additional notice if the employee is over 45 years old and has completed at least 2 years continuous service
Not more than 1 year	At least 1 week	1 week
More than 1 year but not more than 3 years	At least 2 weeks	1 week
More than 3 years but not more than 5 years	At least 3 weeks	1 week
More than 5 years	At least 4 weeks	1 week

The minimum prescribed amount of **severance pay** under the FWA (section 119(2)) is consistent with the current minimum severance provision in Federal awards:

Years of service	Federal award minimum
<1	0
1 < 2	4
2 < 3	6
3 < 4	7
4 < 5	8
5 < 6	10
6 < 7	11
7 < 8	13
8 < 9	14
9 < 10	16
10 years +	12

Severance pay is calculated by reference to the employee's **base rate of pay** for his or her ordinary hours of work. Base rate of pay does *not* include: incentive-based payments and bonuses; loadings; monetary allowances; overtime or penalty rates; any other separately identifiable amounts (section 16 FWA).

DEVINE LAW AT WORK



T: 02-8985 7312

M: 0410 622 887

E: elizabeth@devinelaw.com.au

W: www.devinelaw.com.au

In the event that an employer is able to obtain 'other acceptable employment' or cannot pay the redundancy pay, the employer is entitled to make an application to the Fair Work Authority to determine what amount of redundancy pay, if any, should be paid to the employee.

The following categories of employee are *not* entitled to redundancy pay under the FWA:

- employees of a small business employer (15 or fewer employees);
- employees who have provided continuous service of less than 12 months;
- employees employed for a specified period of time, for a specified task, or for the duration of a specified season;
- employees dismissed for serious misconduct;
- casual employees;
- employees (other than apprentices) who are the subject of a training arrangement.

In addition to these excluded categories of employee, the notice component of this NES will *not* apply to: apprentices; or, employees to whom an industry-specific redundancy scheme in a modern award applies; or, an employee to whom a redundancy scheme in an enterprise agreement applies if the scheme is an industry-specific one that is incorporated into the enterprise agreement from a modern award and the employee is covered by the scheme.

In the event of a **transfer of employment** from one employer to another employer (e.g. in the case of a merger or acquisition) an employee will *not* be entitled to redundancy pay if s/he rejects an offer of employment from the proposed new employer which is on terms **substantially similar** to and on an overall basis 'no less favourable' than the employee's terms and conditions of employment with the first employer; *and* recognises the employee's service with the first employer; *and*, but for the employee's rejection of the offer, would have amounted to a transfer of employment. Nevertheless, the Fair Work Authority will be able to order the first employer to pay an amount of redundancy pay if it determines that the provision in relation to transfer of employment operates unfairly.

4. PARENTAL LEAVE AND RELATED ENTITLEMENTS

This long standing entitlement of all permanent employees and long term casual employees who have provided at least 12 months continuous service enables an employee to take up to 12 months unpaid parental leave in the event of the birth/adoption of a child. The term 'parental leave' is inclusive of maternity leave, paternity leave and adoption leave.

Both members of an "employee couple" (defined as being two national system employees who are the spouse or de facto partner of the other) will be permitted to take a maximum of **three weeks concurrent unpaid leave**.

DEVINE LAW AT WORK



T: 02-8985 7312

M: 0410 622 887

E: elizabeth@devinelaw.com.au

W: www.devinelaw.com.au

An employee who wants to take parental leave is required to provide **10 weeks written notice to her/his employer** and any supporting documentation required by her/his employer (e.g. a medical certificate). An employee who does not satisfy the requirement for written notification and any requirement to produce supporting evidence is *not* entitled to unpaid parental leave.

An employee who takes parental leave is entitled to return to the position s/he held prior to taking leave.

An employee who has taken a 12 month period of parental leave is entitled to request an extension by a further 12 months. This can only be refused on "reasonable business grounds". What this may be is discussed on **page 2** of this Fact Sheet. Employers will need to do more than simply reject a request; they will be required to consider each request carefully and apply objective and fair criteria.

Under this NES employers have an express obligation to **take all reasonable steps** to give an employee who is on parental leave information about and an opportunity to discuss the effect of any decision made by the employer which will have a significant effect on the status, pay or location of the employee's pre-parental leave position. This requirement will be a useful prompt to employers, minimising the risk of other potential compliance breaches (e.g. discrimination on the ground of family/carer responsibilities).

5. ANNUAL LEAVE

Under this NES, the annual leave entitlement of an employee for each year of service is 20 days per annum for all permanent employees other than shift-workers (as defined) who are entitled to 5 weeks annual leave.

This form of leave **accrues progressively** throughout the year and accumulates from year to year.

This NES contains an express provision to the effect that when a public holiday falls within a period of annual leave, the day on which the public holiday falls should be treated as a public holiday and not as an annual leave day. The same position applies to when an employee takes another form of leave, other than parental leave, during a period of annual leave. For example, if the employee falls ill during annual leave and satisfies the notice and documentary evidence conditions for such leave.

Annual leave must be taken for a period agreed between the employee and employer. Any request made by an employee for annual leave must not be unreasonably refused by the employer.

Under this NES an employer and employee may agree to cash out a portion of the employee's annual leave entitlement *provided* that the annual leave is cashed out in accordance with either the terms of a modern award, an enterprise agreement or an agreement between an employer and an award/agreement free employee. The amount of the entitlement which must remain after the proposed cashing out must be *not* less than 4 weeks leave.

Employers are entitled to require an employee to take a period of annual leave, provided that the request is reasonable. An example of where it would be reasonable would be when the employer has an annual shutdown.

DEVINE LAW AT WORK



T: 02-8985 7312

M: 0410 622 887

E: elizabeth@devinelaw.com.au

W: www.devinelaw.com.au

6. PERSONAL/CARER'S LEAVE AND COMPASSIONATE LEAVE

Under this NES, the paid personal/carer's leave entitlement of an employee is 10 days per year of service. This form of leave **accrues progressively** throughout a year of service and accumulates from year to year.

If a public holiday falls during a period of personal/carer's leave, that day is to be treated as a public holiday and not as a day of personal/carer's leave.

Employers are not entitled to enter into an agreement with an award free employee to cash out a portion of the employee's personal leave entitlement. Employers are only entitled to enter into an agreement with an award employee to cash out a portion of his/her personal leave entitlement *if* the award allows that and the parties comply with the requirements of the relevant provision in the award. The amount of the entitlement which must remain after any cashing out agreement must be not less than 15 days leave.

Permanent employees will continue to be entitled to two days unpaid carer's leave and two days compassionate leave, provided the relevant eligibility requirements are satisfied.

In order to be entitled to personal/carers and compassionate leave, an employee is required to satisfy notification and documentation requirements. Notification must be provided "as soon as reasonably practicable" and the evidence an employee may be required by an employer to provide must be "evidence that would satisfy a reasonable person that" the leave was taken for the required reason. If an employee does not comply with the notification and documentation requirements, s/he is *not* be entitled to the leave.

7. COMMUNITY SERVICES LEAVE

This entitlement permits absence from work when an employee engages in an eligible community service activity (jury service, a voluntary emergency management activity, or an activity prescribed under the regulations) for a period consisting of: time engaged in the activity; reasonable travelling time; and reasonable resting time immediately after the activity.

Except in the case of jury service, engagement in the activity must be reasonable in all the circumstances.

Notice of engagement in the activity must be given by the employee to the employer as soon as reasonably practicable and must include information regarding the expected period of the absence. If required to do so by the employer, the employee must produce evidence that would satisfy a reasonable person that the absence is because of the employee's participation in the community service activity.

An employer is required to pay the employee at his/her **base rate of pay** during the period in which s/he engages in jury service, less any amount of jury pay received by the employee. The requirement to continue paying the employee during jury services applies only to the first 10 days of the absence. An employer may require an affected employee to produce evidence that s/he has taken all necessary steps to obtain any amount of jury service pay to which s/he may be entitled.

DEVINE LAW AT WORK



T: 02-8985 7312

M: 0410 622 887

E: elizabeth@devinelaw.com.au

W: www.devinelaw.com.au

8. LONG SERVICE LEAVE

The entitlement to long service leave is a long standing one and has always been primarily sourced from State and Territory legislation. Under this NES the entitlement to long service leave is acknowledged as deriving from either an award or State legislation.

9. PUBLIC HOLIDAYS

An employer is entitled to request an employee to work on a prescribed public holiday and the employee is entitled to refuse that request if either the request is unreasonable or the refusal is reasonable. What is reasonable is determined by reference to a number of contextual factors; including: the nature of the workplace/enterprise; the employee's personal circumstances; whether the employee could reasonably expect the employer to request him/her to work on the public holiday; compensation; and, the amount of notice. Employees who are not required to work on a public holiday will continue to be entitled to receive a payment calculated at their base rate of pay for the day.

10. FAIR WORK STATEMENT

Employers are required to provide new employees with a Fair Work Information Statement (Statement) as soon as reasonably practicable after the employment commences. The Statement is available online at www.fairwork.gov.au

DO YOU HAVE ANY QUESTIONS OR WOULD LIKE TO KNOW MORE?

Getting the answers you need is as easy as giving us a call or sending us an email. We look forward to hearing from you.

Tel: 02 8985 7312

Fax: 02 8985 7373

Email: elizabeth@devinelaw.com.au

www.devinelaw.com.au