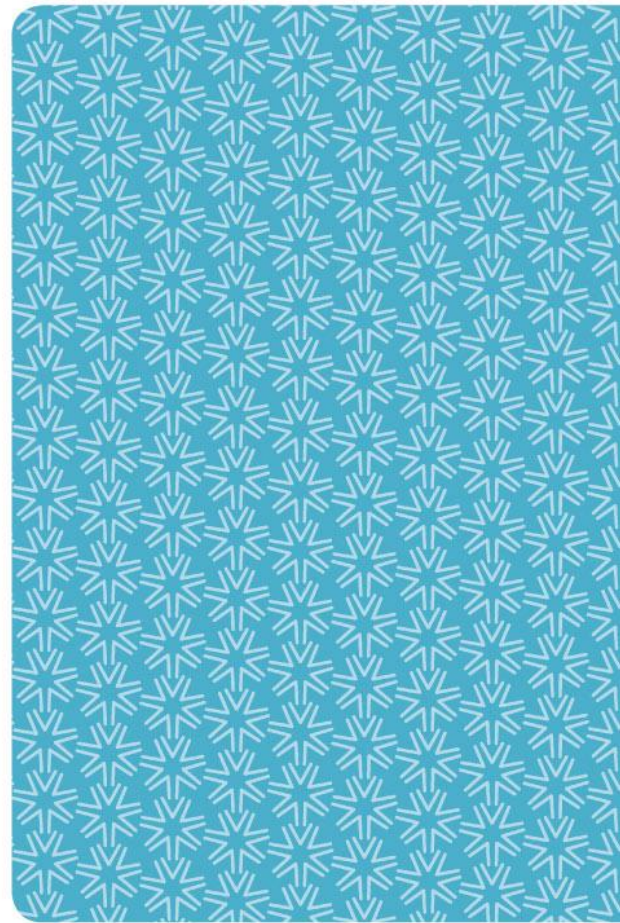
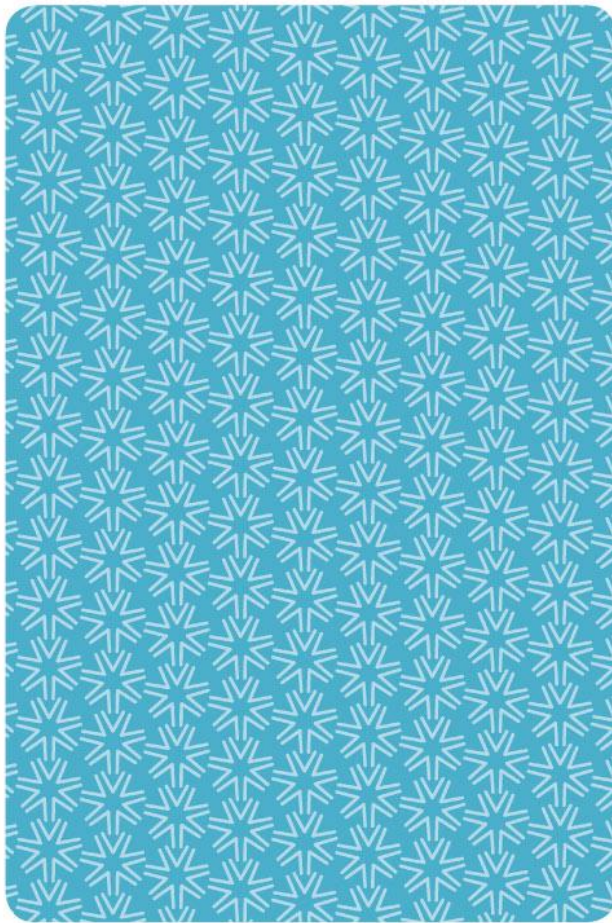


invigorating
business
compliance

White paper

National Employment Standards and Fair Work Legislation



Invigorating Business Compliance



Introduction

This white paper is brought to you by HR Advance, an easy to use online solution that helps ensure your business is compliant with the latest in IR laws while you save time and money. HR Advance keeps you up to date with regular email alerts and access to a comprehensive library of customisable documents including contracts, agreements, policies, forms and correspondence created in conjunction with Australian Business Lawyers.

This whitepaper (developed by [Australian Business Lawyers](#)) explores the legislative changes in the new IR landscape and highlights areas that businesses need to address in preparation for the workplace reform.

Based on the Corporations Power in the constitution, Fair Work Australia will cover trading, financial and foreign corporations as well as all employers in VIC, ACT and NT.

The new national system, Fair Work Australia (including the Office of the Fair Work Ombudsman), enterprise agreement and bargaining provisions, the new 'general protections' including new unfair dismissal provisions, union right of entry and transfer of business will apply from 1 July 2009. Provisions dealing with the NES and modern awards are scheduled to commence on 1 January 2010.

Legislated national employment standards (NES) and Fair Work Legislation

The National Employment Standards (NES) are key elements in the Labor Government's plans. These standards are made up of ten minimum employment conditions. The standards along with other elements of the Fair Work legislation make up the Government's package to change Australia's IR legislation.

On 25 November 2008, the Federal Government tabled in Parliament its proposed legislation to replace the current Workplace Relations Act. Since this date, the Act has passed through Parliament and is now known as the *Fair Work Act*.

Most aspects of the new laws commence 1 July 2009 with other aspects such as the National Employment Standards to commence 1 January 2010.



Minimum enforceable conditions

With few exceptions, the NES will be enforceable and courts will be able to impose penalties for non-compliance.

Awards and enterprise agreements in the new system may supplement these standards, but cannot diminish from them. For instance, if conditions within an award or enterprise agreement are less favourable, the standards will prevail.

The NES are concerned with the following conditions:

- > maximum hours of work
- > requests for flexible working arrangements
- > parental leave and related entitlements
- > annual leave
- > personal/carer's leave and compassionate leave
- > community service leave
- > long service leave
- > public holidays
- > notice of termination and redundancy pay
- > information statements to be given by employers to new employees.

Some aspects of the NES are comparable to the minimum standards under the existing legislation (eg annual leave). However, the NES go further and expand the range of employer obligations towards employees. Notable among these new standards are those concerned with redundancy pay, parental leave and the right of working parents to request flexible working arrangements.

Redundancy pay – wide application

The minimum condition for redundancy pay represents a very significant development as it will apply generally. In other words, it is not confined to employees under awards or agreements, but has wider application to all employees.

There are two circumstances in which the minimum standard to redundancy pay will apply:

- > where the employee's employment is terminated at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone (except where this is due to the ordinary and customary turnover of labour)
- > where the employee's employment is terminated at the employer's initiative because the employer is bankrupt or insolvent.



Scale

The Fair Work Act contains a payment scale. This scale is based on the length of an employee's continuous service on termination. For instance, an employee with at least one year of service but less than two years will be entitled to six weeks' redundancy pay; an employee with at least ten years of service is entitled to 12 weeks' redundancy pay.

The Standards provide for minimum periods of notice to be given by employers to employees whose employment is terminated by the employer. The actual period of notice is determined by the employee's length of continuous service. This aspect is consistent with existing legislation. However, unlike the existing legislation, the Standards will require employers to give notice in writing.

Requests for flexible working arrangements

An employee who is a parent, or has a responsibility for the care, of a child under school age will be entitled to request a change in working arrangements to assist the employee in caring for the child.

An employer may only refuse the request on reasonable business grounds. The Bill does not explain what facts and circumstances can support a refusal on business grounds. It is expected that further guidance on this issue will be provided in the future by Fair Work Australia.

An employee's request for flexible working arrangements, and the employer's response, must be in writing. The employee must set out the change sought and reasons for the change. The employer's response must state whether the request is granted or refused. If the request is refused, the written response must include details of the reasons for the refusal. A bare refusal (ie without reasons) is insufficient.

Not minimum condition

Unlike most aspects of the Standards, the right to request flexible working arrangements is not intended to be an enforceable minimum condition. For instance, an employer's decision to refuse a request cannot be reviewed or called into question by the new industrial tribunal, Fair Work Australia.

However, if an enterprise agreement provides a right to flexible work arrangements or a right to request an extension to unpaid parental leave that supplements the Standard, the dispute settlement procedure could be invoked if the employee disputes the employer's refusal of the request. If the dispute is unresolved, Fair Work Australia could then become involved by virtue of that dispute procedure. This opens up the potential for the employer's decision to be reviewed.



Parental leave and related entitlements

An employee with at least 12 months' continuous service will be entitled to 12 months' unpaid parental leave associated with the birth or adoption of a child for whom the employee has caring responsibilities.

An employee, or the employee's spouse or de facto partner, may request to extend the period of parental leave up to a further 12 months. An employer may only refuse the request on reasonable business grounds. As with flexible working arrangements, the Act does not explain the grounds on which it will be reasonable to refuse the request, but clarification is expected in the future.

Annual leave

The Fair Work Act provides a minimum entitlement to annual leave. An employee (other than a casual employee) will be entitled to four weeks of paid annual leave per year of service. Some shift workers will be entitled to additional leave under the proposed modern awards that are to take effect on 1 January 2010.

Although similar in some respects to existing legislation, the annual leave provisions in the Fair Work Act do not contain the complex accrual and crediting rules that feature in the current legislation.

Modern awards and enterprise agreements may allow employees to cash out annual leave, provided that the employee retains an accrued annual leave entitlement of at least four weeks.

Personal/carer's leave and compassionate leave

The obligations in relation to personal/carer's leave and compassionate leave are largely consistent with existing legislation. The provisions relating to the accrual and taking of leave have been simplified in the Fair Work Act.

Community service leave

Employees who engage in an eligible community service activity will be entitled to unpaid leave of absence for the period in which the employee engages in the activity. The entitlement extends to reasonable travelling time and rest time associated with the activity.

The entitlement applies to employees who are required to perform jury service or employees who perform a voluntary emergency management activity.

To claim leave for emergency management activities, the employee must be a member of, or be associated with, a recognised emergency management body. It is possible that future regulations will extend the scope of permissible activities.



Hours of work

An employee's ordinary hours of work must not exceed 38 hours in any week. Additionally, an employer may require an employee to work reasonable additional hours.

Modern awards and enterprise agreements may provide for averaging over a longer period. For employees who are not covered by an award or an enterprise agreement, the hours of work may be averaged over a maximum of 26 weeks by mutual agreement.

Public holidays

An employee is entitled to be absent from work on a public holiday unless the employer requests the employee to work on the public holiday. If so, the request must be reasonable. The nature of workplace, the employee's personal circumstances and the payment received by the employee for working on the public holiday are relevant considerations in assessing the reasonableness of the request.

Employees who are absent from work on a public holiday are entitled to receive payment for any ordinary hours that the employee would have worked at the employee's base rate of pay.

Long service leave

Employees will continue to be entitled to long service leave in accordance with their current entitlements.

Information statements

Employers will be required to provide all new employees with an information statement as soon as practicable after the employee commences employment. The form of the statement has not yet been determined by Fair Work Australia.

Relevant to agreements

The NES will introduce a significant expansion in employer obligations towards employees.

The Standards will need to be taken into account by employers negotiating enterprise agreements in the new system. See Fair Work Act, NES and agreements lodged from [1 July 2009](#).

Each employer should take the opportunity to assess the likely impact of the Standards upon employment conditions with the business.

Source: [Australian Business Lawyers](#).

