

New unfair dismissal laws effective 1 July 2009

From 1 July 2009, new unfair dismissal laws apply under the federal workplace relations system with the commencement of the Fair Work Act.

The new laws do not continue with several exemptions that have shielded many employers from unfair dismissal claims since 27 March 2006. Notably, employers with fewer than 100 employees will fall within the new unfair dismissal jurisdiction.

There are now some restrictions upon claims under the new laws — a dismissed employee will be unable to bring a claim if dismissed within the first six months of employment where the business employs 15 or more employees. If the business from which the employee is dismissed employs fewer than 15 employees, the employee will be unable to bring the claim if dismissed within the first 12 months of employment (but please check with BIA NSW as to what constitutes the 15 employees).

Transitional agreements

All existing collective and individual agreements become 'transitional instruments' from 1 July. ITEAs may be made until 31 December 2009. Conditional termination arrangements for individual agreements are available from 1 July.

Transfer of business

There is a new test for what constitutes a transfer of business. The law has been altered to concentrate on the transfer of instruments (that is, industrial awards and agreements) by looking at the work the employee is doing, and whether it is substantially the same. Awards and agreements will continue to apply to transferred staff. Fair Work Australia is given powers to make orders for whether instruments cover transferring and non transferring employees.

Fair Work Australia

Fair Work Australia commences operating from 1 July. The AIRC will cease to operate from 31 December 2009, with commission members to hold dual appointments in the interim period. The Fair Work divisions of Federal Magistrates Court and Federal Court and the Workplace Ombudsman will be abolished and functions taken over by the Fair Work Ombudsman.

The Workplace Authority will operate until 31 January 2010 to finish assessing agreements made before 1 July 2009.

The Australian Fair Pay Commission ceases to operate on 31 July 2009 — after handing down its final minimum wage decision — to be effective from 1 October 2009.

Modern awards and National Employment Standards - Not until 1 January 2010

The safety net provisions, modern awards and NES apply from 1 January 2010. As does the new building inspectorate — noting that amendments to the Building and Construction Industry Improvement Act operate from 1 February 2010.

Modern awards are being drafted at the moment by the AIRC, to commence on 1 January 2010. These significantly change terms and conditions of employment, including increasing Sunday to double time for shop staff. Bakers will be covered by the new General Retail Industry Award 2010, and non-shop bakeries covered by the Food Beverage and Tobacco Industry Award 2010. See the links below to review these drafts.

National Employment Standards (NES)

1. Maximum weekly hours

Under the NES the standard weekly hours of work for an employee will be 38 hours per week (or for an employee who is not a full-time employee, the lesser number of hours which are their ordinary hours of work per week), and an employer may request or require an employee to work reasonable additional hours.

2. Requests for flexible working arrangements

The NES will provide that a permanent employee who:

- (a) has completed at least 12 months of continuous employment with the employer; and
- (b) who is a parent or has responsibility for the care of a child under school age

3. Parental leave and related entitlements

The entitlement to parental leave under the NES will be generally the same as is currently provided for under the AFPCS, except that it has been extended to same sex couples. Eligible employees will be entitled to a period of 12 months starting from the birth/placement of the child. Generally only one parent may be on leave (other than a concurrent period of three weeks), and the leave is unpaid.

4. Annual leave

The NES will provide that employees are entitled to:

- (a) 4 weeks of annual leave; and
- (b) for an employee employed under a modern award who falls within the definition of a shift worker in the modern award, an additional 1 week annual leave for each year of service with their employer. The leave entitlement will accrue throughout the year.

5. **Personal/carer's leave and compassionate leave**

The NES will provide an entitlement to personal/carer's leave which is generally in line with the AFPCS. Employees, other than casual employees, will be entitled to take personal/carer's leave:

- (a) because the employee is unfit for work because of a personal illness or injury affecting the employee (**personal leave**); or
- (b) to provide care or support to a member of the employee's immediate family or household because of:
 - (i) a personal illness or injury affecting the member; or
 - (ii) an unexpected emergency affecting the member (**carer's leave**).

Employees, other than casual employees, will be entitled to up to 10 days of personal/carer's leave in each year, which accrues throughout the year and will accumulate with no limitation. Unlike under the AFPCS, there is no cap on the amount of carer's leave an employee may take in any year.

6. **Community service leave**

An employee who engages in an eligible community service activity, being jury service or carrying out a voluntary emergency management activity (or other activities which may be prescribed in the future), will be entitled under the NES to be absent from work for the time when the employee is engaged in the activity and any reasonable travelling and rest time, so long as the absence is reasonable in the circumstances. In the case of jury service, the absence need not be reasonable.

7. **Long service leave**

The NES refers to other instruments to determine the long service leave entitlement of an employee. Whilst there is a desire for a uniform long service leave entitlement for employees throughout Australia, the NES appears to retain the current entitlements for employees.

8. **Public holidays**

Employees will be entitled to be absent from work on a day or a part-day that is a public holiday under the NES. An employer will be able to request an employee work on a public holiday, but the employee may refuse the request if the request is not reasonable or the refusal is reasonable.

9. Notice of termination of employment and redundancy pay

The NES provides for the same minimum notice periods to be afforded to employees as the WR Act on the termination of their employment. The NES confirms the requirement for the notice of termination of employment to be in writing. In addition, the NES clarifies the notice that is to be provided to an employee where they work for a business which has been transmitted.

10. Fair Work Information Statement

Fair Work Australia (**FWA**), the body to replace the Commission and the Australian Fair Pay Commission, is required under the NES to publish a statement called the Fair Work Information Statement (**Statement**). The Statement will detail various matters including:

- (a) the NES;
- (b) modern awards;
- (c) agreement making;
- (d) the right to freedom of association;
- (e) the role of FWA; and
- (f) any other matters which may be prescribed in the future.