

LEGALVISION®

EMPLOYMENT ESSENTIALS FACTSHEET



UNDERSTAND THE EMPLOYMENT TYPE

There are two key types of employment: permanent employees and casual employees.

PERMANENT EMPLOYEE

A permanent employee works regular and systematic work hours and has a minimum number of guaranteed weekly hours of work. For example, a full-time employee is guaranteed 38 hours of work per week, and a part-time employee works anything less than 38 hours per week.

A permanent employee is entitled to paid leave (primarily annual leave and sick leave), redundancy payments and notice of termination.

A permanent employee can also be employed for a maximum term, that is, they are employed until a defined end date. Upon the specified end date, the employment automatically terminates without either party providing notice to the other.

CASUAL EMPLOYEE

Casual employees are engaged on an ad-hoc and irregular basis with no ongoing expectation of work. They are paid a 25% casual loading on their rate of pay to compensate them for not receiving permanent employment entitlements, like paid sick leave or annual leave.

From 26 August 2024, you will need to consider several changes to casual employment. When determining if someone is a casual employee, you should look at the real substance, practical reality and true nature of the relationship, not just what the employment contract says.

You are also no longer obligated to offer your casual employees permanent employment. Instead, casual employees can request permanent employment once they have worked for you for 6 months or 12 months (for a business with less than 15 employees) and believe that they no longer fit the new definition of a casual employee.

You can refuse this request for several reasons, such as if it would significantly impact how your business runs. Still, you must respond to the request in writing.

In addition to providing a casual employee with a casual employment information statement (CEIS) before or as soon as possible after they begin work, you will also need to provide them with a CEIS again after 12 months of employment. If you have more than 14 employees, you must also provide a CEIS after 6 months and after every 12 months of employment.



Characterising an employee as casual when they are, in fact, permanent carries an underpayment risk. Therefore, it is important to consider the employment type carefully.

Wage underpayment is when you have paid an employee an insufficient amount, usually on an ongoing basis. It most commonly occurs due to:

- payroll errors;
- changes in award classification;
- missed increases to modern award minimum wages; and
- penalty rates not being applied.

Wage underpayment is a serious issue that can result in huge reputational damage for your business, along with significant penalties incurred by the Fair Work Ombudsman.



CONSIDER AWARD COVERAGE

On top of the minimum terms and conditions outlined in the *Fair Work Act 2009* (Cth) (the **Act**), modern awards provide additional entitlements regarding employee pay and conditions. Therefore, understanding which of the [121 awards](#) (if any) covers your employees is a critical step in ensuring legislative compliance.

If an award covers your employee, you cannot undercut the award even by agreement. Awards include (without limitation) terms relating to:

- minimum rates of pay;
- hours of work, breaks and rostering;
- allowances;
- penalty and overtime rates;
- taking leave; and
- major workplace change.

If no award (or enterprise agreement) covers your employee, the minimum terms and conditions in the Act apply. They are the **National Employment Standards (NES)**.

KNOW THE EMPLOYEE'S LEAVE ENTITLEMENTS

A permanent full-time employee is entitled to the following leave entitlements.

| Type of leave | Entitlements |
|------------------------|--|
| Annual leave | 4 weeks of paid annual leave |
| Personal/carer's leave | 10 days of paid personal/carer's leave for personal injury, illness, or to provide care to an immediate family member. An employee's entitlement to personal/carer's leave accumulates progressively during a year of service. |
| Compassionate leave | 2 days of paid compassionate leave on each occasion when an illness, injury or unexpected emergency affects an immediate family member or the family member dies. |
| Parental leave | 12 months of unpaid parental leave (subject to conditions including whether the employee has completed 12 months of continuous service). |

A part-time employee is entitled to these leave entitlements on a pro-rata basis.

A permanent employee and a casual employee is entitled to:

- 2 days unpaid carer's leave;
- 2 days unpaid compassionate leave per occasion;
- 10 days paid family and domestic violence leave each year; and
- unpaid community service leave.

RIGHT TO DISCONNECT

From 26 August 2024, employees have the right to refuse to monitor, read, or respond to any communication from you or another party, such as clients or customers, outside of their working hours as long as the refusal is not unreasonable.

Whether the refusal is unreasonable will depend on, among other factors:

- the reason for contact;
- how disruptive the contact is to the employee;
- whether the employee is paid to work outside their working hours;
- the employee's role and responsibilities; and
- the employee's personal circumstances.

ISSUE AN EMPLOYMENT CONTRACT

Employment contracts provide certainty for both parties. Key employment contract terms are outlined in the table below.

| Key term | Explanation |
|--|---|
| Employment type | Consider whether the employment is casual or permanent, full-time or part-time, or maximum term. |
| Ordinary hours of work per week (for a permanent employee) | An applicable award may also require you to specify the weekly pattern of work or whether you will average the hours over a long period of time. |
| Hourly rate of pay or annual salary (and casual loading for a casual employee) | <p>If your employee is covered by an award but paid more than the minimum rate of pay, it is important to have an offset clause. This clause should confirm the rate of pay or salary that compensates them for all hours worked and any award entitlements (such as allowances, overtime and penalty rates).</p> <p>You must ensure you adequately compensate the employee following the NES or award.</p> |
| Confidentiality and intellectual property | The contract should define confidential information and prohibit its disclosure. It should also confirm that all intellectual property created in connection with the employment is assigned to the business. |
| Notice and probation period (for a permanent employee) | If the parties do not agree to a notice period, this can create uncertainty and give rise to disputes. On that basis, the contract should specify a notice period that is at least equal to the minimum periods under the NES or an applicable award. You may wish to have a shorter notice period during the probationary period. |
| Restraints | Without restraints in the contract, you cannot prohibit the employee from working for a competitor or soliciting your clients, suppliers or workers after their employment is terminated. Even if the contract includes restraints, they must be enforceable at the time of the conduct. |

DEVELOP AND IMPLEMENT CORE POLICIES

Employers are liable for the acts and omissions of their employees. To assist with discharging your obligations and reduce your liability, you should develop and implement:

- a work health and safety policy which confirms your obligations (to eliminate or reduce the risk to your employees' health and safety, so far as is reasonably practicable) and those of your employees;
- an anti-bullying, discrimination and harassment policy which defines and prohibits such conduct; and
- an IT policy that directs how employees use your IT systems.



Work Health and Safety (WHS)

Every business should have a policy that clearly outlines how it meets its obligations under the *Work Health and Safety Act 2011* (Cth). WHS policies serve as a valuable tool to effectively and consistently communicate operational matters to employees. All Australian states and territories have implemented the model WHS laws except for Victoria.

Under these laws, the company's primary duty is to ensure the health and safety of workers in the workplace, as far as is 'reasonably practicable'. This duty does not only relate to your employees.

If an employee is injured and claims the employer is liable for failing to comply with their WHS obligations, an employer can be assisted in defending such a claim where it has a consistently administered WHS policy in place. It will be important that an employer can demonstrate they took all reasonable steps to prevent the injury from occurring. This includes providing and communicating directions in a WHS policy.

Common WHS policies will incorporate clauses relating to:

- a company's, managers' and workers' obligations;
- working from home safely;
- consultation commitments; and
- drugs and alcohol.

Steps you can implement to ensure your business is taking reasonable steps in meeting WHS obligations include:

- making yourself aware of the hazards and risks in your business;
- ensuring suitable resources and procedures are in place to manage these risks in your business; and
- actively engaging and consulting with your staff about any concerns they may have about risks within the business.



Anti-Discrimination, Harassment and Bullying

Implementing an ADHB policy can help a business comply with its WHS and anti-discrimination obligations. A good ADHB policy should set out:

- who it covers;
- that a breach may result in disciplinary action, including termination;
- your obligations as the employer;
- the meaning of discrimination, harassment and bullying;
- a direction against discrimination, harassment and bullying; and
- a complaints procedure.



IT Policies

An IT policy typically sets out:

- who it covers;
- that a breach may result in disciplinary action, including termination;
- when workers can use emails and social media (this excludes emailing or use of social media without any connection to the employment);
- prohibited uses (like using IT to bully, harass and discriminate);
- ownership of intellectual property (IP), including email and social media content; and
- workplace surveillance.

REVIEW THE EMPLOYEE'S PERFORMANCE

Reviewing and addressing employees' performance early on can reduce the likelihood of certain claims, such as an unfair dismissal claim. It can also put you in a better position to defend a claim if it arises.

If the employee is **covered** by the unfair dismissal jurisdiction (including if they have completed 6 months of continuous service or 12 months for a small business employer as well as some other criteria), you should:

- review the employee's performance;
- alert them if their performance is poor;
- set targets for improvement; and
- notify them that failure to meet the targets may result in termination.

If the employee is **not covered** by the unfair dismissal jurisdiction, it is nonetheless useful to document and alert the employee to poor performance from a commercial perspective and also to assist with defending a general protections claim.

MANAGING STAFF FATIGUE

Managing staff fatigue in small businesses is crucial for maintaining productivity and well-being. Some key steps that you can take to ensure that you manage your staff effectively may include:

- establishing clear work schedules that balance workload and rest periods;
- encouraging open communication to address concerns about workload or stress;

- implementing regular breaks;
- offering flexibility where possible, such as remote work options or flexible hours, to accommodate individual needs and promote work-life balance; and
- providing access to resources for stress management and encouraging healthy lifestyle choices.

By proactively addressing fatigue, you can foster a healthier and more productive work environment.

EMPLOYEE PRIVACY

Your business must keep private any personal information provided by your employees. The best ways to ensure this include:

- obtaining informed consent from employees before collecting personal information, ensuring transparency about how it will be used;
- implementing robust security measures to safeguard data from breaches;
- limiting access to sensitive information to authorised personnel only;
- regularly reviewing and updating privacy policies to align with legal requirements and technological advancements;
- educating employees about privacy practices; and
- encouraging a culture of respect for personal information.

PREVENT DISCRIMINATION AND VICTIMISATION

If an employee believes that they have been discriminated against or victimised, they may bring a general protections claim against your business. An employee can bring this claim if they can demonstrate that you, or someone in your business, took adverse action against them (such as dismissal) because they:

- exercised a workplace right;
- engaged (or not engaged) in industrial activity; or
- had a protected attribute (for example race, sex or carer's responsibilities).

Additionally, an employee may have another protected ground to make a claim against you. Importantly, they may also make a discrimination claim under state/territory or federal legislation.

CONSIDER ANY ADMINISTRATIVE STEPS

Before a new employee begins work, there are some administrative steps to follow:

- register for pay-as-you-go (PAYG) withholding;
- set up payroll processes;
- take out workers compensation insurance; and
- make superannuation contributions on behalf of the employee.

In relation to the employee, you should also:

- collect the employee's superannuation and tax forms;
- provide a Fair Work Information Statement; and
- provide a CEIS to casual employees.



EMPLOYMENT ESSENTIALS CHECKLIST

- ☐ Understand the employment type
- ☐ Consider award coverage
- ☐ Know the employee's leave entitlements
- ☐ Issue an employment contract
- ☐ Develop and implement core policies
- ☐ Review the employee's performance
- ☐ Take care not to discriminate or victimise
- ☐ Consider any administrative steps

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We encourage readers to draw on the insights in this guide wherever useful. If you would like any further information, contact our Employment lawyers today on 1300 544 755.