

# Tax Bulletin

November 2009

## FAIR WORK ACT 2009

As of 1 July 2009, the Fair Work Act commenced its initial operation to replace the seven existing workplace relations agencies as well as oversee the new national workplace relations system. This Act has significant impacts for Small and Medium Enterprises (SME) employers.

### Minimum employment conditions

From 1 January 2010 (but subject to changes), Modern Awards and National Employment Standards (NES) commences. This stage covers changes to minimum employment conditions, introduction of a new set of awards and simplification of thousands of industry and occupation based awards.

Ten National Employment Standards will also be established, covering the following essential employment conditions:

1. Maximum weekly hours of work
2. The right to request flexible working arrangements
3. Parental leave and related entitlements
4. Annual leave
5. Personal/carer's leave and compassionate leave
6. Community service leave
7. Long service leave
8. Public holidays
9. Notice of termination and redundancy pay
10. Provision of a Fair Work Information Statement, which will detail the rights and entitlements of employees under the new system and how to seek advice and assistance.

### What does the Fair Work Act mean for you as a business owner?

If you are an employer, it is important for you to be aware of and comply with the Fair Work Act 2009 as the changes have significant legal and financial implications for all Australian businesses.

#### Implication #1: Fair Work Australia (FWA):

FWA is the new national industrial relations regulator which replaced the Australian Industrial Relations Commission (AIRC) on 1 July 2009. FWA's powers are broader than those which were granted to AIRC and include the ability to convene single, compulsory conferences or hearings to resolve disputes.

#### Implication #2: Parental leave:

All workers within the national industrial relations system (except casuals) will be entitled to apply for up to 12 months unpaid parental or adoption leave once they have performed 12 months of continuous service to their employer.

The employee may request an additional 12 months of unpaid leave and the employer may not unreasonably refuse this request.

#### Implication #3: Cashing out of Annual Leave and Paid Carer's Leave

All employees are granted with a minimum of 4 paid weeks of leave per year of service (5 weeks for shift workers). There may be an inclusion of provisions allowing for the "cashing out" of unused leave provided the employee retains a balance of at least 4 weeks but this can only be done by an Enterprise Agreement.

Employees are also granted with a minimum of 10 paid carer's and personal leave days per year. These may also be cashed out where an award or agreement allows provided the employee retains a balance of at least 15 days



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#### Implication #4: Unfair dismissal laws

There is an increase in protection from unfair dismissal for employees and a reduction in protection for employers.

For small businesses, you are only exempt from unfair dismissal laws if:

1. your employee has not been in your employment for 12 months; and
2. your business employs less than 15 full time equivalent employees during the period from 1 July 2009 until 31 December 2010. From 1 January 2011, the method of calculation will change to less than 15 employees based on a head count of total employees, not just full time equivalent.

For larger businesses, you are only exempt from unfair dismissal laws if your employee has not been in your employment for 6 months.

If a dismissal is found to be unfair, you may be forced to either rehire the employee and pay them their lost wages and entitlements or pay the employee compensation. Compensation is capped at the lesser of 26 weeks' pay or \$54,150 (being half of the high income threshold). Accordingly, it is important to ensure that you document every important interaction with employees and ideally obtain legal advice to ensure you are able to produce records in support of your decision to dismiss an employee.

**Attached is a Small Business Fair Dismissal Code Checklist for your utilisation every time you dismiss an employee. It is important to remember that this checklist is only a guide and its completion does not ensure compliance. The Fair Dismissal Code must still be followed, there must still be a valid reason and procedural fairness for a dismissal to be "fair".**

The following employees are excluded from making unfair dismissal claim:

- Employees who have not met the minimum employment period (12 months employment in a small business and 6 months employment in a larger business).
- Employees whose remuneration is more than the high income threshold (unless a modern award or enterprise agreement covers or applies to their employment). The high income threshold from 1 July 2009 is \$108,300 and is indexed annually.
- Casual employees employed on an irregular basis.
- Seasonal employees.
- Specified-task employees.

#### Implication #5: Payment on dismissal

Under the new Act, employees must be advised of their dismissal in writing and provided with a minimum period of notice – or payment in lieu of that notice – based on continuous service in accordance with the following table:

Year of service	Payment equivalent to
Less than 1 year	1 week
1 year to less than 3 years	2 weeks
3 years to less than 5 years	3 weeks
More than 5 years	4 weeks

#### Implication #6: Redundancy Pay

The minimum redundancy pay entitlements based on years of continuous service will be as follows:

Year of service	Payment equivalent to
1 to less than 2	4 weeks
2 to less than 3	6 weeks
3 to less than 4	7 weeks
4 to less than 5	8 weeks
5 to less than 6	10 weeks

6 to less than 7	11 weeks
7 to less than 8	13 weeks
8 to less than 9	14 weeks
9 to less than 10	16 weeks
At least 10	12 weeks

Note: Small businesses with fewer than 15 full-time equivalents employees are exempt from this provision. As an employer, you still need to ensure that you pay the greater of what is included in the contract of employment or the minimum national employment standard. This does not change the need to have a contract of employment.

### **Implication #7: Sham Contracting**

If you, as an employer, disguise a traditional employer/employee relationship as a contracting arrangement in order to avoid payment of work cover, superannuation and other employee entitlements, you will be prosecuted and heavily penalised by Fair Work Australia. Remember, just because your employees obtain an ABN, it does not mean they may be treated as a contractor. All of the circumstances surrounding the relationship between you and the contractor/employee must be considered to determine whether it is really one of client/contractor or employer/employee. Please do not hesitate to contact our office should you require assistance on this matter.

### **Implication #8: Modern Awards**

Modern Awards will replace existing awards and reduced from 4000 to just 130 from 1 January 2010. It is important to be aware that Modern Awards are not just concerned with basic pay rates, they also set out other employee entitlements, such as casual and part-time loadings, penalty rates and shift allowances. All of these have the potential to seriously impact a business's bottom line so it is recommended that you find out which award is applicable to your business as soon as possible, consider and prepare for its impact on your business prior to 1 January 2010. If you are paying annualised salaries or "all up" rates of pay you must now enter individual flexibility agreements under the applicable awards to maintain this arrangement.

### **Implication #9: Collective bargaining in good faith**

Under the new system, employers must commence bargaining by providing the required information form to employees to commence the 21 days period. In most cases the parties can simply agree to negotiations in order to create an enterprise agreement. However, it is a new requirement under the Act that enterprise bargaining must be done in good faith; ie. the agreement must include:

- a flexibility term
- a consultation term
- a dispute resolution term

To ensure you meet this requirement, you should review your current practices and either obtain appropriate training or engage a professional bargaining representative from Guild Lawyers by calling 02 9019 9999

### **Implication #10: Transfer of business rules**

A new owner of a business may decide not to recognise the period of service performed by employees for their previous employers when calculating their length of service to determine dismissal entitlements. However, the new employer must inform the employees of this in writing before the new period of service commences otherwise their previous service must still be included in any calculation.

We will keep you informed of further details as the Fair Work Act rolls out over the next 12 months. In the meantime, should you have any questions, please contact our office on 02 8220 1700.

*Guild Accountants would like to acknowledge Workforce Guardian for contributing to the content of this bulletin. The content of this article was extracted from "The 10 Most Important Financial Implications of the Fair Work Act" by Adrienne Unkovich, Managing Director of Workforce Guardian. [www.workforceguardian.com.au](http://www.workforceguardian.com.au)*

*DISCLAIMER: This bulletin is intended to provide a general summary only and should not be relied on as a substitute for professional advice specific to the taxpayers' circumstances. All material included in this bulletin is based on the information available at the time it was prepared and is subjected to changes..*

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# Small Business Fair Dismissal Code Checklist

**It is in the interests of the employer to complete this checklist at the time of dismissal and to keep it in case of a future unfair dismissal claim. However, it is not a requirement of the Fair Dismissal Code that the checklist be completed.**

1. How many full-time equivalent employees are employed in the business? (Include the dismissed employee and any other employee dismissed at the same time).
- Under 15 full-time equivalent employees
  - 15 full-time equivalent employees or more
- [If under 15 full-time equivalent employees, the Fair Dismissal Code applies.]

2. Has the employee been employed in this business as a full-time, part-time or regular casual employee for 12 months or more?
- Yes
  - No
- [If No, the employee cannot make an unfair dismissal claim.]

3. Did you dismiss the employee because of a genuine redundancy?
- Yes
  - No
- If Yes, explain the reason for the redundancy (for example, economic downturn, introduction of new technology therefore requiring less staff, or another such reason) and whether redeployment was considered.
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4. Do any of the following statements apply?
- | I dismissed the employee because I believed on reasonable grounds that:   | YES                      | NO                       |
|---|--------------------------|--------------------------|
| a. The employee was stealing money or goods from the business.  | <input type="checkbox"/> | <input type="checkbox"/> |
| b. The employee defrauded the business.   | <input type="checkbox"/> | <input type="checkbox"/> |
| c. The employee threatened me or other employees, or clients, with violence, or actually carried out violence in the workplace. | <input type="checkbox"/> | <input type="checkbox"/> |
| d. The employee committed a serious breach of occupational health and safety procedures.  | <input type="checkbox"/> | <input type="checkbox"/> |

5. Did you dismiss the employee for some other form of serious misconduct?

Yes

No

If Yes, what was the reason?

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If you answered Yes to any question in parts 3, 4 or 5, you are not required to answer the following questions.

6. Did you dismiss the employee because of the employee's unsatisfactory conduct, performance or capacity to do the job?

Yes

No

If Yes

	YES	NO
a. Did you clearly warn the employee (either verbally or in writing) that the employee was not doing the job properly and would have to improve his or her conduct or performance, or otherwise be dismissed?	<input type="checkbox"/>	<input type="checkbox"/>
b. Did you provide the employee with a reasonable amount of time to improve his or her performance or conduct? If yes, how much time was given? <hr/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Did you offer to provide the employee with any training or opportunity to develop his or her skills?	<input type="checkbox"/>	<input type="checkbox"/>
d. Did the employee subsequently improve his or her performance or conduct?	<input type="checkbox"/>	<input type="checkbox"/>
e. Before you dismissed the employee, did you tell the employee the reason for the dismissal and give him or her an opportunity to respond?	<input type="checkbox"/>	<input type="checkbox"/>
f. Did you keep any records of warning(s) made to the employee or of discussions on how his or her conduct or performance could be improved? Please attach any supporting documentation.	<input type="checkbox"/>	<input type="checkbox"/>

7. Did you dismiss the employee for some other reason?

Yes

No

If Yes, what was the reason?

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8. Did the employee voluntarily resign or abandon his or her employment?

Yes

No

If Yes, please provide details

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**DECLARATION**

I declare that I believe every statement or response in this checklist to be true.

Signature \_\_\_\_\_ Date \_\_\_\_\_