



NATIONAL EMPLOYMENT STANDARDS

Important note

This Fact Sheet contains information about annual leave and redundancy provisions of the *Building and Construction General On-site Award 2010*, which vary the minimum standards in the National Employment Standards. The redundancy pay provisions and the method of calculating annual leave in the modern award are matters that may be varied. If there is a variation to the modern award Master Builders will update the information in this Fact Sheet and the revised Fact Sheet will be available on Master Builders' web site.

This Fact Sheet provides information about the ten legislated minimum employment standards that are known as the National Employment Standards (NES).

The NES come into effect from 1 January 2010 and will replace the Australian Fair Pay and Conditions Standard. In the period before the NES commence (ie from 1 July 2009 to 1 January 2010) entitlements under the Australian Fair Pay and Conditions Standard continue to apply.

The ten minimum standards in the NES cover:

- (a) maximum weekly hours;
- (b) requests for flexible working arrangements;
- (c) parental leave and related entitlements;
- (d) annual leave;
- (e) personal/carer's leave and compassionate leave;
- (f) community service leave;
- (g) long service leave;
- (h) public holidays;
- (i) notice of termination and redundancy pay; and
- (j) Fair Work Information Statement.

The NES apply to all employees of national system employers (see Master Builders Fact Sheet 2), and prevail over employee entitlements specified in State and Territory laws, except where those laws provide more beneficial entitlements for employees.

The NES and modern awards, agreements and common law agreements

A modern award, agreement or common law agreement cannot be detrimental to an employee in any respect when compared to the NES, except where this is expressly allowed by the NES. Areas in which the NES expressly allow a modern award to include provisions which would otherwise be contrary to the NES include the cashing out of paid annual leave and paid personal/carer's leave, redundancy pay, the kind of evidence that must be provided to access paid personal/carer's leave, substitution of a public holiday and the period of notice for termination of employment.

The *Building and Construction General On-site Award 2010* (the Building Award), which comes into effect on 1 January 2010 varies the minimum standards in the NES in two areas – annual leave and redundancy pay. These variations are reflected in this Fact Sheet.

The NES and pre-Fair Work Act employment instruments

The NES and minimum rates of pay (for example, minimum rates in a relevant modern award) will apply to an employee where any existing entitlement is detrimental by comparison. This includes any entitlement derived from a transitional instrument such as an Individual Transitional Employment



Agreement. Employers will therefore need to review their agreements against the NES to determine which will apply. Where an agreement term is detrimental to the employee then the NES will need to be given effect from 1 January 2010. A person covered by a transitional instrument can apply to Fair Work Australia to resolve any difficulties and Fair Work Australia can vary the instrument to resolve any uncertainty or to make the instrument operate effectively with the NES.

Maximum weekly hours

A full-time employee cannot be required or requested to work more than 38 hours per week, plus reasonable additional hours. For part-time or casual employees weekly hours must not exceed the lesser of the employee's ordinary hours or 38 hours.

Averaging ordinary hours of work

A modern award or enterprise agreement can provide for hours of work to be averaged over a specified period. An employee not covered by an award or agreement may agree in writing to average hours over 26 weeks or less. Where there is an arrangement to average hours, the weekly hours guarantee (and the requirement that additional hours be reasonable) still applies in respect of each week – but the fact that there is an averaging arrangement will be taken into account when deciding whether the additional hours are reasonable. The relevant modern award should be checked, when finalised, to determine if averaging is available.

Reasonable additional hours

To determine whether the additional hours an employee is requested or required to work are reasonable, a range of factors must be taken into account, including:

- (a) any risk to employee health and safety from working the additional hours;
- (b) the employee's personal circumstances including family responsibilities;
- (c) the needs of the workplace or enterprise;
- (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of working additional hours;
- (e) any notice given by the employer of any request or requirement to work the additional hours;
- (f) any notice given by the employee of an intention to refuse to work the additional hours;
- (g) the usual patterns of work in the industry or part of an industry in which the employee works;
- (h) the nature of the employee's role and the employee's level of responsibility;
- (i) whether the additional hours are in accordance with averaging arrangements; and
- (j) any other relevant matter.

Requests for flexible working arrangements

An employee has the right to request a change in working arrangements if they have 12 months continuous service and the employee is the parent of, or has responsibility for the care of, a child under school age or a child who is under 18 and who has a disability. The request must be in writing, must set out the change sought and the reasons for the change.

Employers are required to respond in writing to the request within 21 days indicating whether the change is granted or refused. A request may only be refused on reasonable business grounds. If an employer does refuse a request, the written response must include details of the reasons for the refusal (a bare refusal without reasons is not sufficient). What is considered "reasonable business grounds" will depend on the circumstances of the case. It is likely that Fair Work Australia will issue guidance on this matter.



Parental leave

The NES provide access to 12 months unpaid parental leave in relation to the birth of a child or the adoption of a child under 16. Parental leave extends to same sex couples.

Documentation is required to evidence pregnancy or adoption and the request for parental leave.

To be eligible for unpaid parental leave, an employee must have completed 12 months continuous service with their current employer prior to the date of commencement of the leave. Parental leave must be taken in a single continuous period. Parental leave does not break an employee's continuity of service.

An employee may request an extension of the parental leave for up to an additional 12 months. The employee must make the request for an extension in writing at least 4 weeks before the end of the available parental leave period. An employer can only refuse a request for an extension on reasonable business grounds – the reasons must be detailed in a written response to the request.

There are special rules for extending parental leave where both parents are employed by employers covered by the Fair Work Act (known as an employee couple). The available extension period will take into account the parental leave or special maternity leave (which applies if a female employee is not fit for work due to a pregnancy related illness) taken by the employee's partner.

Generally parental leave for an employee couple must be taken sequentially, other than a period of up to three weeks at the time of birth or adoption.

A pregnant employee who is entitled to unpaid parental leave and who is fit for work but because of illness or risks arising out of her pregnancy or because of hazards connected with her position is entitled to be transferred to a safe job. If none is available she is entitled to paid no safe job leave for the period where the risk exists.

Return to work guarantee after parental leave

There is a guarantee that where an employee returns to work following parental leave the employee is entitled to return to their previous position or, if that position does not exist, to an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.

Annual leave

Employees, other than casual employees, are entitled to four weeks paid annual leave for each year of service. An employee's entitlement to paid annual leave accrues progressively during a year of service according to an employee's ordinary hours of work and accumulates from year to year.

A shift worker (as defined by a relevant modern award or enterprise agreement) is entitled to an additional week of annual leave. An award/agreement free employee will qualify for the additional weeks leave if:

- the employee is employed in a business in which shifts are continuously rostered 24 hours a day for seven days a week, is regularly rostered to work those shifts, and regularly works on Sundays and public holidays; or
- the employee is in a class of employees prescribed by the regulations as shift workers for the purpose of the NES.

The operational details regarding annual leave are largely left to awards and agreements. This is a different approach to the Australian Fair Pay and Conditions Standard, which specified such things as the rate of accrual for part-time employees and arrangements for increasing the duration of annual leave (for example, taking twice the amount of annual leave at half pay).



The period of paid annual leave must be agreed between an employee and his or her employer. However, an employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave. The Fair Work Act does not specify the circumstances in which refusal to agree to paid annual leave would be considered unreasonable.

Annual leave does not break an employee's continuity of service

Payment of annual leave

The Building Award requires an employer to pay the employee, in advance of the commencement of the annual leave, the amount which they would have received for working ordinary time hours if they had not been on leave.

For employees not covered by the award, the NES provides that where annual leave is taken, the employee must be paid at least at the **base rate of pay** for the employee's ordinary hours of work in the period of leave. Base rate of pay is the pay for the employee's ordinary hours of work and excludes incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and any other separately identifiable amounts.

Where accrued annual leave is paid out on termination of employment, the employer must pay the employee the amount that would have been payable if the employee had taken that period of leave.

Cashing out annual leave

The NES states that a modern award or enterprise agreement can include arrangements for cashing out of paid annual leave. The Building Award does not permit cashing out of paid annual leave.

Where allowed by an award or enterprise agreement, annual leave may only be cashed out where the remaining leave entitlement balance is at least 4 weeks. The employer and employee must agree to the amount of leave to be cashed out. The amount paid to the employee must be equal to the amount that would have been paid had the employee actually taken the annual leave.

The same conditions for cashing out annual leave apply to employees not covered by an award or agreement.

The general protections provided by the Fair Work Act apply to entering into a cashing out arrangement. This means that an employer cannot exert undue influence or undue pressure on an employee to agree to cash out leave.

Requirement to take leave

The NES provides that a modern award or enterprise agreement may allow or require an employee to take paid annual leave in particular circumstances. The Building Award allows an employer to direct an employee to take paid annual leave during all or part of a period in conjunction with the Christmas/New Year holidays, where the employer shuts down the business, part of the business or a site where the employee works. If an employee does not have sufficient accrued annual leave for the period of the shutdown, then the employee may be required to take leave without pay for the balance of the shutdown period for which leave is not accrued.



Personal/carer's/compassionate leave

Paid personal/carer's leave

Employees (other than casual employees) are entitled to 10 days' paid personal/carer's leave per year of service. The entitlement to leave accrues progressively throughout the year according to the employee's ordinary hours of work and accumulates from year to year. There is no cap on the number of days of paid personal/carer's leave that may be taken per year.

Paid personal/carer's leave may be taken:

- because the employee is not fit for work because of a personal illness, or personal injury; or
- to provide care or support to a member of the employee's immediate family or a member of the employee's household because of a personal illness, or injury, of the member or an unexpected emergency affecting the member.

An employee's immediate family are the spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee or of the employee's spouse/de facto partner. A de facto partner includes a same sex partner.

Unpaid carer's leave

Employees are entitled to an additional two days' unpaid carer's leave for each occasion where the employee requires carer's leave and they have exhausted all their paid personal/carer's leave entitlements. Casual employees are also entitled to this unpaid carer's leave. An employee may take the leave as one single period of up to two days or any separate periods to which the employee and employer agree.

Compassionate leave

Employees are entitled to two days' paid compassionate leave for each occasion that a member of the employee's immediate family or household:

- (a) has an illness or injury that poses a serious threat to his or her life; or
- (b) dies.

This leave may be taken at any time the illness or injury persists and may be taken for a single, unbroken period of two days, two separate periods of one day each or any separate period agreed to by the employee and the employer.

Payment of personal/carer's/compassionate leave

Where paid personal/carer's/compassionate leave is taken, the rate of payment must be at least equal the employee's basic rate of pay for the employee's ordinary hours of work in the period.

For casual employers, personal/carer's/compassionate leave is unpaid.

Cashing out paid personal/carer's leave

A modern award or enterprise agreement may include terms for cashing out paid personal/carer's leave. The amount of leave remaining must be at least 15 days. The same conditions for cashing out paid personal/carer's leave that apply to annual leave also apply to cashing out paid personal/carer's leave.



Personal/carer's/compassionate leave and continuity of service

Paid personal/carer's leave does not break an employee's continuity of service and counts as service.

Unpaid carer's leave does not break an employee's continuity of service but does not count as service.

Notice and documentary evidence required for personal/carer's/compassionate leave

An employee must give his or her employer notice of personal, carer's and compassionate leave as soon as practicable (which could be after the leave has started). An employee must also advise the employer of the period, or expected period, of leave.

If required by the employer, an employee must provide evidence that would satisfy a reasonable person that the leave was for a legitimate reason. The types of evidence commonly requested include a medical certificate or statutory declaration. It may not be reasonable on every occasion of personal illness for an employer to require an employee to provide a medical certificate. However, in cases of an absence extending beyond a short period or repeated absences on particular days (eg before or after a weekend or public holiday), it may be reasonable for an employer to request a medical certificate in support of the employee's request for leave.

Community service leave

Employees who undertake community service activity (such as jury duty or dealing with an emergency or natural disaster as a volunteer) are entitled to community service leave for the period of the activity, plus reasonable travel time and rest time following the activity. An employee must provide notice of the absence to his or her employer – if not, the absence will not be covered by community service leave.

Community service leave is generally unpaid, other than where the leave is taken for jury service.

State or Territory laws that provide employee entitlements in relation to eligible community service activities continue to apply to an employee if they are more beneficial to employees than the NES.

Payments for jury service

The NES provide for a paid entitlement for employees (other than casuals) required to attend jury service. An employer must pay an employee for a period of up to 10 days while the employee is absent from work during a period of jury service. If the jury service for a particular matter is for more than 10 days, the employer is only required to pay the employee for the first 10 days.

An employer may require an employee to take steps to obtain jury service payments from the relevant State or Territory body. If so, the amount payable by the employer is reduced by the amount of jury service payments.

Long service leave

The NES provide that an employee's existing entitlement to long service leave continues to apply to the employee. This is intended to be a transitional arrangement pending agreement between the Commonwealth and State and Territory governments on a uniform national long service leave standard. The current portable long service leave arrangements for the building and construction industry are unlikely to be affected.



Public holidays

The NES allow employees to be absent from work on specified public holidays and to be paid for the hours they would normally work. The NES specifies eight common public holidays. Other days or part-days declared by a State or Territory are also considered public holidays.

If a State or Territory substitutes another day or declares an additional day, the employee is entitled to be absent with pay on that day.

Public holidays may be substituted by agreement between an employer and an employee.

An employer may request an employee to work on a public holiday if the request is reasonable. The employee may refuse the request if it is unreasonable or if they have reasonable grounds for the refusal. In deciding whether or not a request to work on a public holiday is reasonable, the following factors must be taken into account:

- the nature of the workplace and the nature of the work performed by the employee;
- the employee’s personal circumstances, including family responsibilities;
- whether the employee could reasonably expect that the employer might request work on the public holiday;
- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for working or receives a level of remuneration that reflects an expectation of working on a public holiday;
- the type of employment of the employee (eg whether it is full-time, part-time, casual or shift work);
- the amount of notice given by the employer; and
- the amount of notice given by the employee in refusing the request.

Notice of termination and redundancy pay

The NES provide that an employer must not terminate an employee’s employment unless the employer has provided *written* notice to the employee or payment in lieu of notice. The minimum period of notice to be provided depends on the employee’s length of service and is as follows:

Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

If an employee is over 45 years old and has completed at least 2 years continuous service, an additional one weeks notice must be given.

Notice of termination of employment does not have to be given to daily hire employees in the building and construction industry. Notice also does not have to be provided to employees employed for a specified period of time, casual employees, an employee whose employment is terminated because of serious misconduct and employees to whom a training agreement applies (other than apprentices) and whose employment is for a specified period of time.



Redundancy Pay

Award-covered employees

Employees covered by the Building Award will be entitled to redundancy pay under the industry specific redundancy scheme specified in that award. For the purposes of the award, redundancy means a situation where an employee ceases to be employed by an employer to whom the award applies, other than because of misconduct or refusal of duty. This definition of redundancy is significantly wider than the definition used in the NES. The rate of redundancy pay specified in the award is as follows:

Period of continuous service	Redundancy/severance pay	Maximum
Less than 12 months	1.75 hours pay per week of service <u>only if the redundancy is not initiated by the employee</u>	
1 year or more but less than 2 years	2.4 weeks' pay, plus 1.75 hours pay for each completed week of service in excess of 1 year	4.8 weeks' pay
2 years or more but less than 3 years	4.8 weeks' pay, plus 1.6 hours pay for each completed week of service in excess of 2 years	7 weeks' pay
3 years or more but less than 4 years	7 weeks' pay, plus 0.73 hours pay for each completed week of service in excess of 3 years	8 weeks' pay
4 years or more	8 weeks' pay	

Other employees

Where an employee is not covered by the Building Award, the NES provide that redundancy pay must be paid to an employee if 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; or
- because of the insolvency or bankruptcy of the employer.

There are a number of exclusions from this requirement to pay redundancy pay including where:

- the employee had less than 12 months continuous service; or
- the employer is a small business employer (ie has fewer than 15 employees, including those employees whose employment is being terminated); or
- the employee is an apprentice.

Fair Work Information Statement

Employers are required to give each new employee a copy of the Fair Work Information Statement. The Statement must be provided prior to, or as soon as possible after, commencement of employment.

The Fair Work Information Statement will be prepared by the Fair Work Ombudsman and will contain information on key elements of the new workplace relations system including the role of Fair Work Australia and the Fair Work Ombudsman, the National Employment Standards, modern awards, agreement making and freedom of association. The Fair Work Information Statement will also contain



information on individual flexibility arrangements, employee records and privacy and termination of employment.

Default rules for employees not covered by awards or enterprise agreements

Default rules will set out how the NES will apply to employees not covered by awards or enterprise agreements by:

- defining which shift workers are entitled to an extra week of annual leave under the NES;
- providing a mechanism to set the employee's 'ordinary hours of work' to underpin the calculation of leave accrual and payment under the NES, if these are not agreed between the employer and the employee;
- allowing the averaging of working hours, by written agreement, over a maximum period of 26 weeks;
- allowing the cashing out of annual leave by agreement, subject to protections, including a requirement that the employee retains at least 4 weeks leave after the cashing out;
- allowing agreement about when and how paid annual leave may be taken between an employer and employee;
- allowing employers to give reasonable directions about the taking of paid annual leave by an employee; and
- allowing the substitution of public holidays by agreement.

Minimum wages

Before 1 January 2010

During the period 1 July 2009 to 31 December 2009 minimum wages will continue to be set by reference to the Australian Pay and Classification Scales for award covered employees.

An employee must be paid the appropriate classification rate of pay set out in the applicable Pay Scales. Full-time and part-time employees engaged to work a specified number of hours per week are guaranteed a basic weekly payment based on those hours. If the employee is not covered by the Pay Scales, then he or she must be paid a rate of pay that is at least equal to the Federal Minimum Wage.

On or after 1 January 2010

From 1 January 2010, minimum wages will be specified in modern awards for award covered employees. For employees covered by the Building Award the classifications and minimum wage rates are specified in Part 4 of the award.

Employees to whom an enterprise agreement applies will receive the rates of pay specified in the agreement. However, these rates of pay must at least be equal to the base rate of pay that they would receive under the relevant modern award (where the employee is covered by a modern award) or the national minimum wage order.

Award/agreement free employees will be covered by the national minimum wage order made by Fair Work Australia. The national minimum wage order will include a national minimum wage, as well as special national minimum wages for award/agreement free employees who are junior employees, employees to whom training arrangements apply or employees with a disability. The order will also include a casual loading for casual employees who are not covered by either an award or an agreement.

Fair Work Australia is required to conduct and complete its first wage review within the period 1 January 2010 to 30 June 2010.



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Disclaimer: This information is provided as general advice on the workplace relations system. It does not constitute legal advice and it is always advisable to seek further information regarding specific workplace relations issues.