

## National Employment Standards

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### 1 What are the National Employment Standards?

The National Employment Standards (“NES”) are a set of 10 minimum entitlements that commenced on 1 January 2010.

The NES cover a number of the most basic of employment entitlements. They operate as a safety net or minimum standard. It is not lawful to provide employees with entitlements less favourable than the NES, but you may provide more favourable entitlements. The NES are often supplemented by modern awards or enterprise agreements.

### 2 Who is covered by the National Employment Standards?

The minimum entitlements in the NES apply to *all* employees, regardless of whether their entitlements are otherwise contained in an award, enterprise agreement or contract. The only exception is that not all of the NES entitlements apply to casual employees. This is discussed at item 3.2 below.

### 3 What do the National Employment Standards cover?

The 10 NES relate to:

1. Hours of work;
2. Annual leave;
3. Personal, carers and compassionate leave;
4. Parental leave;
5. Flexible working arrangements for parents;
6. Community service leave;
7. Public holidays;
8. Information in the workplace;
9. Notice of termination and redundancy; and
10. Long service leave.

A general summary of the NES can be viewed [here](#).

Many of the NES relate to entitlements that were already covered by legislation (for example, four weeks of annual leave per year) in the Australian Fair Pay Conditions Standard (“AFPCS”). Further information about the AFPCS can be viewed [here](#).

### **3.1 Significant features**

#### **3.1.1 Hours of work**

As was the case prior to the NES, the maximum ordinary hours for a full-time employee are 38 hours plus reasonable additional hours. However, unlike under the AFPCS, which allowed hours worked to be averaged over a period of up to 12 months, the NES do not allow for the averaging of hours over a period of time except in the following circumstances:

- (a) If the employee is covered by an award or enterprise agreement that contains a term permitting the averaging of hours, the hours may be averaged in accordance with that clause; or
- (b) If the employee is not covered by any award or enterprise agreement, the employee may agree in writing to have their working hours averaged over a period of up to 26 weeks.

#### **3.1.2 Annual leave**

The entitlement to annual leave is basically the same as the previous entitlement under the AFPCS – employees are entitled to accrue four weeks of annual leave a year (pro-rata for part time employees). In addition to the base four weeks, the NES provide for an additional week of annual leave per year for some shiftworkers.

The definition for a shiftworker varies depending on the award. Non-award employees gain the shiftworker entitlement if they work in an organisation for which there are continuous 7 day shifts, the employee is regularly required to work these shifts, and regularly works on Sundays and public holidays.

The NES do not provide an automatic right to cash out annual leave. Some modern awards or enterprise agreements contain terms that allow the cashing out of annual leave, but none of the four awards likely to apply to the aged and community care sector (listed below) contain terms of this nature.

However, the modern awards which affect the aged and community care sector contain provisions which modify the amount of leave an employee is entitled to, and other details relating to the taking of leave:

##### **(a) Aged Care Award 2010**

- (1) Provides for a 17.5% leave loading entitlement.

**(b) Nurses Award 2010**

- (1) Provides an additional week of annual leave per year for all employees (in addition to the extra week for shiftworkers);
- (2) Provides for a 17.5% leave loading entitlement for up to four weeks of leave (five for shiftworkers);
- (3) Requires employees to take annual leave within six months of accruing five weeks' leave.

**(c) Social, Community, Home Care and Disability Services Industry Award 2010**

- (1) Provides for a 17.5% leave loading entitlement.

**(d) Clerks – Private Sector Award 2010**

- (1) Provides for a 17.5% leave loading entitlement;
- (2) Allows an employer to direct an employee to take leave during a period of shutdown or where the employee has accrued more than eight weeks' leave.

**3.1.3 Personal/carers leave and compassionate leave**

The entitlements to personal/carers leave are very similar to what they were under the AFPCS:

- an employee accrues 10 days of paid personal/carers leave per year (pro-rata for part time employees);
- an employee may take two days of unpaid carers leave for each occasion where a member of the employee's immediate family or household requires care because of illness, injury or an unexpected emergency;
- unused personal/carers leave is not paid out to the employee on termination.
- an employee is entitled to two days of compassionate leave where a member of the employee's immediate family or household dies or develops a life threatening illness or injury.

For both personal/carers leave and compassionate leave, the employee must give their employer notice of taking leave as soon as practicable and advise the employer of the expected period of the leave. In addition, the employer may request evidence that would satisfy a reasonable person that the leave is being taken for a permissible reason.

### **3.1.4 Parental leave**

Both parents now have an entitlement to up to 12 months of unpaid parental leave for the birth or adoption of a child. That is, one parent may take up to 12 months off, then that parent may return to work and the other parent may take up to 12 months off, as long as the total does not exceed 24 months. This entitlement is qualified by the requirement that the employee has completed at least 12 months of continuous service at the time the leave commences.

Both members of a couple may take their parental leave concurrently to a limited extent – the concurrent leave may be for a maximum of three weeks, and unless the employer agrees otherwise, must be taken in the three weeks immediately following the birth or placement of the child.

In addition to the entitlement to 12 months' leave, an employee may request that the period of leave be extended by up to further 12 months. Where the employee is one of an employee couple, and each has taken parental leave, this entitlement is reduced by the amount of leave that the other member of the couple has taken so that the total leave for both parents will not exceed 24 months.

A request to extend the period of parental leave must be in writing. The employer must respond in writing within 21 days giving reasons if the request is refused, and the refusal may only be on reasonable business grounds (as with flexible working arrangements, discussed above).

### **3.1.5 Flexible working arrangements**

Under the NES, an employee now has the right to request flexible working arrangements if they are a parent or have the responsibility for the care of a child under school age, or a child under 18 with a disability. The types of arrangements that may be requested are not limited, but some examples may be:

- limiting employment to certain days or working part time;
- modified working hours;
- job sharing; or
- arrangements for the employee to work at a different location, including from home.

A request for flexible working arrangements must be in writing, and set out the details of the request.

Once a request is received, an employer is obliged to provide a written response within 21 days stating whether the request is granted or refused. A request can only be refused on reasonable business grounds, and if refused, the written response must include reasons for the refusal.

'Reasonable business grounds' are not defined, but are likely to include considerations such as:

- the employee's circumstances and the nature of the parental or carer responsibilities;
- the nature and the occupational requirements of the role that is on offer;
- the financial circumstances of the business;
- the nature of the arrangements required to accommodate the modified work arrangements, including;
  - whether additional employees are required to be engaged, or whether work can be distributed amongst existing employees;
  - the availability of suitable candidates;
  - the workload of other employees;
- the effect on the workplace of making those arrangements, including:
  - the financial impact, including costs arising from penalty rates or additional overtime hours, and additional equipment;
  - the extent to which the arrangements would affect other workers, whether beneficially or adversely;
  - the impact on quality, productivity and customer service;
  - any safety considerations which may arise out of the arrangements;
- when the arrangements would start and how long they would be needed;
- the employee's performance and supervision requirements;
- the availability of work during the periods the employee proposes to work;
- any planned structural changes;
- whether the arrangement has been trialled before with other employees:
  - whether such a trial was successful;
  - if not, whether it could be modified;

- any other consequences for the employer of having the flexible work arrangements; and
- any other consequences for the employee of not having the flexible work arrangements.

### **3.1.6 Community Service Leave**

The NES allows an employee to be absent from work for the purposes of carrying out 'eligible community service activities', such as jury service (including attendance for jury selection), and taking part in a 'voluntary emergency management activity'. A voluntary emergency management activity is an activity undertaken on a voluntary basis as a member of a recognised emergency management body (such as a fire-fighting, civil defence or rescue body). Leave to take part in a voluntary emergency management activity is unpaid.

The jury service provisions in the NES require employers to pay employees who are required to attend for jury selection or service (except casual employees) an amount which is equal to the difference between the employee's base rate of pay during the period that they were required to perform jury service, and any amount of jury service pay that is payable, for up to a total of 10 days of jury service. In effect, the employee is able to attend for jury service for up to 10 days without loss of pay.

The NES also specifies that where an employee's entitlement in relation to community service leave is more beneficial under State or Territory legislation, the employee is entitled to receive the entitlements under the State or Territory laws. For example, under the *Juries Act 2000* (Vic), an employee may be entitled to a longer period of paid leave from an employer while absent from work during a period of jury service.

For both forms of community service leave, the employee must give the employer notice of taking leave as soon as practicable and advise the employer of the expected period of the leave. In addition, the employer may request evidence that would satisfy a reasonable person that the employee is engaging in an eligible community service activity.

### **3.1.7 Public Holidays**

Under the NES, the following days are considered public holidays:

- (1) 1 January (New Year's Day);
- (2) 26 January (Australia Day);
- (3) Good Friday;
- (4) Easter Monday;

- (5) 25 April (Anzac Day);
- (6) the Queen's birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);
- (7) 25 December (Christmas Day);
- (8) 26 December (Boxing Day); and
- (9) Any other day prescribed as such by a law of a State or Territory.

An employee may be absent from their employment on a public holiday. An employer may request that 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. In determining what is reasonable, the following considerations must be taken into account:

- (a) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;
- (b) the employee's personal circumstances and family responsibilities;
- (c) whether the employee could reasonably expect that the employer might request work on the public holiday;
- (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, work on the public holiday;
- (e) the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork);
- (f) the amount of notice in advance of the public holiday given by the employer when making the request;
- (g) in relation to the refusal of a request – the amount of notice in advance of the public holiday given by the employee when refusing the request; and
- (h) any other relevant matter.

### **3.1.8 Information in the Workplace**

All new employees must now be given information about their workplace rights when they commence employment in the form of a 'Fair Work Information Statement.' The statement can be downloaded [here](#).

### **3.1.9 Notice of termination**

The NES provide for minimum periods of notice when an employee is terminated. The periods required by the NES are the same as were contained in the AFPCS:

<b>Period of service</b>	<b>Notice Period</b>
Less than 1 year	1 week
1-3 years	2 weeks
3-5 years	3 weeks
5 or more years	4 weeks

In addition, where an employee is over 45 years old and has provided more than two years of service, they are entitled an extra week of notice provided.

The NES allow for the applicable notice period to be paid out to the employee in lieu of working during the notice period.

The only significant change is that all employees must be notified in writing of their termination before the termination takes effect.

### **3.1.10 Redundancy**

The NES provide a statutory entitlement to severance pay after completing at least one year of service. The amount of severance pay an employee is entitled to is:

<b>Period of service</b>	<b>Severance Pay</b>
1-2 years	4 weeks
2-3 years	6 weeks
3-4 years	7 weeks
4-5 years	8 weeks
5-6 years	10 weeks
6-7 years	11 weeks
7-8 years	13 weeks
8-9 years	14 weeks
9-10 years	16 weeks
10 or more years	12 weeks

This entitlement affects different people in different ways:

- (a) Employees that were entitled to severance pay before 1 January 2010 by an award, agreement or contract may count their previous service with their employer when calculating their entitlement to severance pay.
- (b) Employees who prior to 1 January 2010 had a more favourable entitlement under a notional agreement preserving a state award ("**NAPSA**"), retain that entitlement through the operation of the relevant modern award until 31 December 2014. (Under Work Choices, the terms and conditions of State awards were preserved as NAPSA's.)

- (c) Employees who had no entitlement to severance pay though an award, enterprise agreement or contract before the commencement of the NES may only count service after 1 January 2010 for the purpose of calculating their severance pay.
- (d) Employers with fewer than 15 employees continue to be exempt from paying severance pay.

### **3.1.11 Long Service Leave**

Under the NES, an employee may receive an entitlement to long service leave from one of three sources:

- (a) If the employee was covered by an award that contained an entitlement to long service leave immediately before 31 December 2009, the old award long service leave entitlements are preserved by the NES, and the employee is entitled to long service leave in accordance with those terms;
- (b) Similarly, if the employee was covered by an enterprise agreement, collective agreement, pre-reform certified agreement, or old IR agreement that contained an entitlement to long service leave immediately before 31 December 2009, they agreement's long service leave entitlements are preserved by the NES, and the employee is entitled to long service leave in accordance with those terms;
- (c) If the employee was not entitled to long service leave under the previous award or agreement as set out above, the existing State long service leave legislation will continue to apply.

## **3.2 Casual employees and the National Employment Standards**

A number of the NES do not apply to employees engaged on a casual basis. Casual employees are expressly excluded from the following aspects of the NES:

- Annual leave;
- Paid personal/carers leave;
- Paid compassionate leave;
- Payment for jury service (however, state legislation may require payment to casual employees for jury service as discussed ); and
- Notice of termination and redundancy.

Some of the entitlements do not apply to casual employees unless they are 'long term casual employees.' Generally, these entitlements will only apply to a casual employee who has been employed on a regular and systematic basis

for at least 12 months and have a reasonable expectation of continuing employment. The entitlements in this category are:

- Requests for flexible working arrangements; and
- Parental leave.

## **4 How do the National Employment Standards interact with other entitlements?**

### **4.1 Australian Fair Pay and Conditions Standard**

The AFPCS was the previous set of minimum standards for employees. The NES have replaced the AFPCS as of 1 January 2010 and the AFPCS no longer applies.

### **4.2 Awards and agreements, old and new**

The NES are a minimum safety net of entitlements; they must not be diminished by another workplace instrument. They will always apply to all workers, although some awards or agreements may provide entitlements that are more favourable than the NES. If an award or agreement includes any term that is less favourable to an employee than the NES, that term has no effect. In other words, an award (including a modern award), agreement or contract may give an employee more than the minimum standards, but never less. In addition, if an enterprise agreement contains a term that is less favourable than the NES, that enterprise agreement will not be approved by Fair Work Australia.

## **5 Breaches of the National Employment Standards**

If an employer does not comply with the NES in relation to an employee, that employee can take legal action to recover compensation or obtain an order that the employer comply with the NES. The legal proceedings may be issued in the Federal Court system, but proceedings may also be issued in some state courts (such as the Industrial Division of the Victorian Magistrates' Court). If there is any shortfall in payments, the employee can recover that money, plus interest. The court may also make an order for a penalty of up to \$33,000 against a company, and up to \$6,600 against an individual who has been involved in a breach.

While the employee may pursue this breach in person, through their union, or through legal representatives, they may instead choose to notify the Fair Work Ombudsman, which may conduct an investigation. If the Fair Work Ombudsman considers that a breach of the NES has occurred, and the employer disputes that breach, the Fair Work Ombudsman may prosecute the employer in relation to that breach.

## **6 Further information**

Further information about each of the NES can be found at the following links:

[Annual leave](#)

[Community service leave](#)

[Fair work information statement](#)

[Flexible working arrangements](#)

[Long service leave](#)

[Maximum weekly hours](#)

[Notice of termination and redundancy](#)

[Parental leave](#)

[Personal leave and compassionate leave](#)

[Public holidays](#)