

Workplace Relations

February 2010

The new Industrial Relations regime – What's new in 2010?



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NES

The National Employment Standards ("NES") commenced on 1 January 2010. The NES are 10 minimum terms and conditions that apply to all federal system employers, which now also includes non constitutional corporations such as partnerships and sole proprietors.

The NES are:

1. A 38 hour week plus reasonable additional hours
2. Up to 12 months unpaid parental leave – with a right to request an additional 12 months unpaid parental leave, which an employer cannot unreasonably refuse
3. A right to request flexible work
4. Annual leave for four weeks for full-time employees and five weeks for shift workers
5. Personal, carers and compassionate leave
6. Community service leave
7. Guaranteed public holidays
8. The provision to all new employees with a "fair work information statement" with information about workplace rights
9. Notice of termination of employment and redundancy
10. Long service leave – initially, existing long service leave entitlements and awards and State legislation will be preserved. However the Government will work with the States to develop nationally consistent long service leave entitlements.

Modern Awards

Modern Awards commenced on 1 January 2010 and replaced preserved State Awards (NAPSAs) and preserved Federal Awards.

However, certain terms and conditions of the Modern Awards will not commence until 1 July 2010 and will be phased in by continuing annual increments until 1 July 2014. The following monetary obligations will be phased in:

- Minimum wage rates and peace work rates (including junior rates)
- Casual loadings
- Part-time loadings
- Saturday, Sunday; Public Holiday, evening or other penalties
- Shift allowances/penalties.

All other Modern Award provisions will apply from 1 January 2010 including expense related allowances.

What the phasing in arrangements mean is if the existing rate of pay is lower, the applicable rate for both the existing and new employees will remain at the old rate until 1 July 2010 and then will increase by 20% of the transitional amount each year.

If the existing rate is higher, the applicable rate for existing employees will remain at the old rate until the new rate catches up through award increases.

Monetary obligations contained in the Modern Award can be absorbed into existing over award payments. Award modernization is not intended to result in a reduction in the take home pay of employees covered by a Modern Award.

Implications for employers

- It is important that employers understand the Modern Award that applies to their business and ensure that the contracts of employment comply with both the terms of the Modern Award and the NES.

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A key feature of the NES, which is new, is the redundancy pay provision



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When are employees entitled to redundancy pay?

Prior to the NES, there was no national legislative right to redundancy pay. Under the NES, national workplace system employers (listed below) will be required to provide retrenched employees with redundancy pay calculated by reference to their period of service, as set out in the following table:

| Employee's period of continuous service with employer at the time of termination | Redundancy pay period |
|--|-----------------------|
| Less than 1 year | Nil |
| At least 1 year but less than 2 years | 4 weeks pay |
| At least 2 years but less than 3 years | 6 weeks pay |
| At least 3 years but less than 4 years | 7 weeks pay |
| At least 4 years but less than 5 years | 8 weeks pay |
| At least 5 years but less than 6 years | 10 weeks pay |
| At least 6 years but less than 7 years | 11 weeks pay |
| At least 7 years but less than 8 years | 13 weeks pay |
| At least 8 years but less than 9 years | 14 weeks pay |
| At least 9 years but less than 10 years | 16 weeks pay |
| 10 years and over | 12 weeks pay |

The calculation is to be made according to the employee's base rate of pay for his/her ordinary hours of work. Base pay is defined to exclude all incentive based payments and bonuses, loadings, monetary allowances, overtime rates, penalty rates and other separately identifiable amounts.

Who is in the national workplace system?

The national workplace relations system at present covers those who are:

- employed by a constitutional corporation (these are corporations that are trading or financial, usually Pty Ltd or Ltd companies)
- employed in all states and territories except WA in relation to private sector employees
- employed by the Commonwealth or a Commonwealth authority

Pre-2010 service

A key issue for employers is whether the service of the employee prior to the commencement of the NES is to be counted. The *Fair Work (Transitional Provisions & Consequential Amendments) Act 2009* addresses this issue and provides that any service prior to 1 January 2010 does **not** count as service for the purpose of

calculating an employee's NES redundancy entitlement, **unless** the employee had an entitlement to redundancy pay before 2010.

If the employee's terms and conditions of employment immediately before 1 January 2010 provided for an entitlement to redundancy pay, then that employee's service will count.

Therefore it will be important to determine whether the employee's terms and conditions of employment did include an entitlement to redundancy pay. The sources of such terms and conditions may include an employee's contract of employment, a pre-reform award or workplace agreement.

What is the position as regards a redundancy policy?

Where a redundancy entitlement exists only as a result of a redundancy policy, it will be critical to determine whether the policy forms part of the employment contract. If it does not, then it will not be a term or condition of employment. However, policies may have contractual force.

Determining whether a policy has been given contractual force can be complex and will generally be determined by the language used in the policy and in the contract of employment.

What if a pre-2010 redundancy entitlement was more or less generous?

Where an employee did have a pre-2010 redundancy entitlement but the entitlement was different from the NES entitlement, being either less or more generous, the employer will be obliged to provide the NES entitlement as a base minimum and all pre-2010 service of its employees must be counted in the calculation of this entitlement.

In the situation where the pre-2010 entitlement was more generous than the NES, the NES is the minimum entitlement – however the employer may still be contractually obliged to provide the greater entitlement as a matter of contract law.

Exceptions to application of the NES

The obligation to pay redundancy does not apply to small business employers with fewer than 15 employees. The NES entitlement also does not apply to the following categories of employees:

- Employees employed for a specific term, task or season, unless a substantial reason for choosing the employment category was to avoid the redundancy pay obligation
- Employees dismissed for serious misconduct
- Casual employees
- Apprentices
- Trainees whose employment was for a specified period or limited to the duration of the training arrangement
- Employees to whom an industry specific redundancy scheme in a modern award applies

Employers can also apply to Fair Work Australia for a variation to their obligation to provide redundancy pay under the NES in the following circumstances:

- Where the employer has obtained "other acceptable employment" for the employee
- Where the employer is unable to pay the redundancy pay amount.

Other acceptable employment

In order to be able to vary an obligation to make a redundancy payment where the employer has obtained "other acceptable employment" for the employee, the employer will need to demonstrate that the other employment has been obtained because of its efforts rather than as a result of the employee's own initiatives. The alternative employment must also, on an objective assessment, be "acceptable". Factors such as pay, award conditions, working hours, job security, location and career prospects have been identified as particularly relevant.

Implications for employers

- Employers will need to carefully consider whether for those employees with a pre-2010 commencement date, their period of continuous service begins on the date their employment commenced or on 1 January 2010 with the commencement of the NES. At times this can be a challenging issue and employers should seek advice if there is any doubt.

Right to request flexible working arrangements

The NES provides that employees who are parents of (or care for) children under school age, or a child under 18 that has a disability, may request a “change in working arrangements”.

This condition applies to permanent employees who have completed at least 12 months continuous service and to casual employees with a reasonable expectation of continuous employment on a regular and systematic basis.

The request must be in writing and must indicate the reason for the change and the nature of the change. The employer must respond in writing within 21 days of receipt of the request. If the request is refused the response must address in detail the reason for the refusal. The refusal can only be made on “reasonable business grounds”. It is likely that relevant issues to consider whether a refusal was made on reasonable business grounds will include:

- The impact of the request on the business.
- The associated costs as well as benefits to the individual and the business.
- The nature of the role and the key performance indicators.

A proper consideration is likely to include a consultation process with the employee rather than just saying no to a request because it has not been done before. The condition imposes a duty to consider each request when it is made.

Implications for employers

- Employers should ensure that their managers are educated about the conditions generally provided for in the NES. A review of existing policies should be made to ensure that they are compliant with the NES and if not, consider what changes are necessary.
- In relation to the flexibility condition, employers should identify those parts of the business which might likely receive requests for flexibility and ensure that appropriate strategies are in place to deal with the requests.

Contact Details

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This newsletter is published for general guidance only and is not a substitute for legal advice which should be sought before taking any steps in relation to information that may be included in this newsletter.

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Senior Appointments



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Rebecca is a property lawyer specialising in retirement villages and aged care. She advises on sales and acquisitions of facilities, conducts regulatory due diligence on facilities and advises on regulatory compliance and other issues relating to the Aged Care Act and the Retirement Villages Act.



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David Martin has been appointed to our family law practice following the retirement of Jill Cooper. David is a senior practitioner in family law with 25 years experience. David advises clients in all areas of family law and has acted as counsel in the Family Court, Federal Court, Supreme Court, District Court and Industrial Court.



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Jody has been practising since 1998. She spent several years as Legal Counsel with the Real Estate Institute of South Australia and has a strong background in property, and planning and environmental law. Jody specialises in advising developers on planning, development, environment, Local Government, Native Vegetation and Water Licensing issues.