

HR HOT TOPIC

The National Employment Standards

Are you aware of the impacts of the new requirements?

November 2009

With the new National Employment Standards (NES) coming into effect on 1st January 2010, it is essential all employers know to what extent the changes will impact them. Many employers may find that much of the NES are comparable to the current minimum standards and as such have incorporated them into their employment related documentation. However, the NES does introduce some new standards such as a minimum standard of severance pay for redundancy, extended parental leave and the right of working parents to request flexible working arrangements go further and expand the range of employer obligations towards employees. Practically, this will mean most employers will need to review and change their existing employment contracts, policies and some practices in order to comply with the National Employment Standard.

In this HRBS Hot Topic we have provided an overview of each of the national employment standards.

Overview

- The NES will apply to all Federal system employees from 1 January 2010.
- They increase the number of minimum conditions in the employment relationship from 5 to 10
- The ten NES do not include minimum wages. Pay and classifications will be returned to Awards.
- With few exceptions, the National Employment Standards will be enforceable and courts will be able to impose penalties for non-compliance. Awards and enterprise agreements in the new system may supplement these standards, but cannot fall below or contract out of them.
- The NES will not substantially change the employment relationship although it remains to be seen how terms such as 'reasonable business grounds' will be interpreted by the courts.
- The system will be administered by Fair Work Australia (FWA)

The Ten National Employment Standards

1. A 38 hour week plus reasonable additional hours

- An employee's ordinary hours of work must not exceed 38 hours in any week (or for an employee who is not a full-time employee, the lesser number of hours which are their ordinary hours of work per week)
- Additionally, an employer may require an employee to work reasonable additional hours.
- In determining whether any additional hours are reasonable, consideration must be directed toward a number of specified factors including: the employee's health and safety, personal/family circumstances, the needs of the workplace, compensation or overtime entitlements, industry averages and the employee's position/level of responsibility. If the hours are unreasonable, the employee is entitled to refuse to work them.
- Unlike the current Australian Fair Pay & Conditions Standard, the maximum weekly hours of work for an employee under the NES may not be averaged over a 12 month period, however a Modern Award may provide for a specific averaging period.
- For employees who are not covered by an Award or an Enterprise Agreement, the hours of work may be averaged over a maximum of 26 weeks by mutual agreement.

2. Up to 12 months' unpaid parental leave – (with a right to request an additional 12 months unpaid parental leave)

- Currently, permanent employees are able to take 12 months unpaid parental leave, provided that they have completed 12 months of continuous service with the employer.
- This NES will extend this entitlement, allowing employees to request, in writing, an additional 12 months unpaid parental leave.
- The employer must have a reasonable business ground for refusal and the employee is entitled to return to the same position, or if that position no longer exists, the one that is closest in terms of status and pay level to their pre-parental leave position.
- Clarification is expected in regards to the grounds on which it will be reasonable to refuse the request.
- If a pregnant employee continues working during the 6 weeks prior to giving birth, the employer may require the employee to provide a medical certificate stating whether the employee is fit to work and, if the employee is fit to work, whether it is inadvisable for the employee to continue working in her present position.
- The employer may require the employee to take unpaid parental leave if the employee does not provide a medical certificate as required, is not fit for work, or is not fit to work in her present position and no safe job is available.
- The employer may now require a pregnant employee to provide a medical certificate as evidence of pregnancy or associated illness, miscarriage, or as evidence that the employee is not fit to continue working in her present position.

- Employees may extend their parental leave on four weeks written notice if they have taken less than their available period (ie: 12 months) of unpaid parental leave and may reduce their parental leave if the employer agrees.
- The provisions in relation to parental leave have been amended to reflect that employees taking parental leave may be members of same sex couples.

3. A right to request flexible work for parents

- An employee who is a parent, or has a responsibility for the care of a child under school age will be entitled request a change in working arrangements to assist the employee in caring for the child.
- The employee must have already completed 12 months of continuous service with the employer
- It also applies to casuals if they have been systematically engaged on a regular basis for at least 12 months.
- An employer may only refuse the request on reasonable business grounds. The Act does not explain what facts and circumstances can support a refusal on business grounds.
- An employee's request for flexible working arrangements, and the employer's response, must be in writing. The employee must set out the change sought and reasons for the change.
- The employer's response must be given to the employee within 21 working days and must state whether the request is granted or refused. If the request is refused, the written response must include details of the reasons for the refusal. A bare refusal (i.e., without reasons) is insufficient.
- Unlike most aspects of the Standards, the right to request flexible working arrangements is not intended to be an enforceable minimum condition.
- This provision is likely to cause an increase in requests for flexible working arrangements, even though it does not significantly change the legal position. Under equal opportunity legislation refusing a request for flexible working arrangements would be unlawful indirect discrimination if the requirement to maintain the current arrangements was unreasonable.

4. Annual leave of 4 weeks for full time employees and 5 weeks for shift workers

- Full time employees shall continue to be entitled to 4 weeks of paid annual leave (or 5 weeks in the case of a prescribed shift-worker).
- An employee is not considered to be on annual leave where the leave taken coincides with a public holiday.
- Modern Awards and Enterprise Agreements may allow employees to cash out annual leave, provided that the employee retains an accrued annual leave entitlement of at least 4 weeks.

Personal, Carer's and Compassionate Leave

- The obligations in relation to personal/carer's leave and compassionate leave are similar to existing legislation.
- The provisions relating to the accrual and taking of leave have been simplified.

6. Community Service Leave

- Employees who engage in an eligible community service activity (either jury service or a voluntary emergency service activity) will be entitled to unpaid leave of absence for the period in which the employee engages in the activity.
- The entitlement extends to reasonable travelling time and rest time associated with the activity.
- To claim leave for emergency management activities, the employee must be a member of, or be associated with, a recognised emergency management body.

7. Guaranteed Public Holidays

- An employee is entitled to be absent from work on a public holiday unless the employer requests the employee to work on the public holiday. If so, the request must be reasonable.
- When assessing whether it is reasonable for an employer to request an employee to work on a public holiday, the type of employment of the employee (eg full-time, part-time, casual, or shiftwork) is now one of the relevant factors to be taken into account.
- Where an employee is absent on a public holiday, the employer must pay the employee at the employee's base rate of pay for the ordinary hours of work on that day.
- The NES makes it clear that casual and part-time employees who are not rostered to work and do not work on a public holiday are not entitled to payment.

8. Fair Work Information Statement to all new employees

- Employers will be required to provide all new employees with an information statement as soon as practicable after the employee commences employment.
- The statement will be drafted by Fair Work Australia

9. Termination of Employment & Redundancy

- The minimum condition for redundancy pay represents a very significant development as it will apply generally and not confined to employees under Awards or Agreements
- There are two circumstances in which the minimum standard to redundancy pay will apply:
 - Where 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)
 - Where the employee's employment is terminated at the employer's initiative because the employer is bankrupt or insolvent.
- The Fair Work Act contains a payment scale and a notice period as follows:

Length of service	Period of notice (weeks)	Severance payment (weeks)
Less than 1 year	1	-
1 – 2 years	2	4
2 – 3 years	2	6
3 – 4 years	3	7
4 – 5 years	3	8
5 – 6 years	4	10
6 – 7 years	4	11
7 – 8 years	4	13
8 – 9 years	4	14
9 – 10 years	4	16
Over 10 years	4	12

Note: An additional week of notice must be given to an employee aged over 45 with at least 2 years of service (the employee does not have to provide extra notice to the employer.)

- An employer is **not** required to make redundancy payments if any of the following conditions exist:
 - The employer is classified as a small business (i.e. less than 15 employees), or
 - The employee has been employed for less than one year
 - The employee is serving a period of probation or a qualifying period of employment
 - The employee is employed on a casual, fixed term or seasonal basis.
 - The employee is a trainee or apprentice
 - The employee's employment is terminated at the initiative of the employer but is due to the ordinary and customary turnover of labour.
 - The employee is terminated for serious misconduct;
 - In a transfer of business situation where transferring employee's service is recognised or where employee rejects offer of employment with new employer which is no less favourable and recognises prior service
 - The employee is covered by a Modern Award with an industry specific redundancy scheme;
- The Standards will require employers to give notice in writing.
- A Modern Award may include provisions specifying how much notice of termination an employee is required to give.
- Must apply to FWA to be relieved of obligation if employer obtains other acceptable employment for the employee

10. Long Service Leave

- Employees will continue to be entitled to long service leave in accordance with their current entitlements
- There are plans for a minimum national long service leave standard

Where to from here?

The first step is to familiarise yourself with any Modern Awards that apply to your workplace and read the National Employment Standards . You will then need to review and update your employment contracts, employee handbooks and some HR policies. To be truly compliant you will need to look at training and up-skilling your managers on the impact of the new legislation on their decision-making with respect to HR Matters. If you require further advice or are interested in having an HR Audit done to determine how the changes affect your business, please email or call Tina Radford on tina@hrbs.com.au or 07 3254 1177