

K&L GATES

Australia

Employer Guide

2024

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INTRODUCTION

In the space of 12 months in 2022–2023, the federal Labor government (Labor Government), elected in May 2022, has introduced three significant tranches of employment law reform.

At the top of the Labor Government’s agenda item was the introduction of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022, amending a number of Australian industrial relations areas, including fixed-term contracts, enterprise bargaining and equal pay. This legislation has brought about the greatest changes to the Australian employment law space since the introduction of the Fair Work Act 2009.

The Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023 was the second noteworthy reform through its reinforcement of employees’ rights to superannuation contributions.

But perhaps the most contentious development is the Labor Government’s introduction of the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, which, if enacted in 2024, could see an overturning of the definition of “employment” and major changes with respect to casual employees, independent contractors, labour hire, regulation of gig workers and wage compliance.

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EMPLOYMENT RELATIONSHIP

I. PRE-EMPLOYMENT

Immigration/Visa Requirements

Employers are responsible for ensuring that their employees have the right to work in Australia.

Foreign workers wishing to work in Australia must apply for visas to live and work in Australia on either a temporary or permanent basis. There are a number of different types of visas administered by the Australian Department of Home Affairs.

The Temporary Skill Shortage visa (subclass 482) allows employers to sponsor skilled foreign workers to live and work in Australia for up to four years where there is a “genuine” skills shortage.

Some visas restrict the number of hours employees are allowed to work per week.

Reference/Background Checks

An employer is permitted to contact a prospective employee’s referees and previous employers to gather and verify information.

Police Checks

Permitted with the applicant’s consent if necessary to determine suitability for a particular job.

Working With Children Check

Mandatory for all child-related work.

Medical Examinations

Permitted with the applicant’s consent if necessary to determine fitness for a particular job.

Minimum Qualifications

Permitted.

Job Advertisements

An employer must not include pay rates in job advertisements which undercut the employee’s minimum entitlements under the Fair Work Act and legally binding “awards” (see below) and collective agreements.

II. TYPES OF RELATIONSHIPS

Employee

Individuals can be employed on either a full-time, part-time or casual basis. Employees attract different entitlements depending on what basis they are employed.

Individuals can be employed on a fixed-term or on a maximum-term contract for a limited duration (with certain exceptions, such as high-income employees).

Independent Contractor

Independent contractors are commonly used and can be engaged directly by the company or via a personal services company.

Labour Hire

Labour hire workers are often engaged for short periods and are frequently used. Labour hire workers are not engaged as employees of the company which engages them; they remain employees or contractors of the labour hire firm.

III. INSTRUMENTS OF EMPLOYMENT

Registered Agreements

A registered agreement (also commonly referred to as an “enterprise agreement” or, since 2023, a “multi-employer agreement”) sets out the minimum pay and conditions to which an employee is entitled. When a business has a registered agreement, the award does not apply. The pay and conditions provided in a registered agreement cannot be less than that of the applicable award or the National Employment Standards.

There are four different kinds of enterprise agreements. These are:

- Single enterprise agreements between an employer, or two or more related employers, and employees.
- Single interest agreements between employees and two or more employers who have common interests or want to jointly bargain for a single agreement.
- Supported bargaining agreements between employers with common interests and employees, focusing on whether low rates of pay prevail in the industry or sector.
- Cooperative workplace agreements for employers who have consented to collectively bargain.

Where negotiations for bargaining agreements between employers and employees become “intractable”, the Fair Work Commission may issue an intractable bargaining declaration and workplace determination.

In the event bargaining escalates into industrial action and employees seek for their industrial action to be protected, the Fair Work Commission may make a protected action ballot order and direct all bargaining representatives to the proposed agreement to attend a conciliation conference.

All pre-2010 agreements (referred to as “zombie agreements”) automatically terminated on 7 December 2023, unless a party to the agreement applied to the Fair Work Commission for an extension of time.

The Fair Work Commission must approve any agreement for it to go into effect, and it will consider whether employees are “better off overall” under the agreement compared to any relevant modern award, pursuant to a global as opposed to a line-by-line assessment. The Fair Work Commission has the power to amend or remove terms which do not meet the “better off overall” test.

Awards

Awards set out the minimum pay and conditions an employee is entitled to if an award covers the business and the work the employee does.

Awards do not apply when a business has a registered agreement and the employee is covered by it.

There are currently 121 modern awards of general application that cover most people working in Australia, which means many employees who are not covered by a registered agreement will most likely be covered by an award.

Common Law Contracts

A contract can be oral or in writing. Written contracts are strongly recommended.

Where no award or registered agreement applies, the minimum pay and conditions in the legislation will apply.

From 6 December 2023, employers cannot employ an employee on a fixed-term contract that would exceed a period of two years unless certain exceptions apply, such as engagement in a relief position (e.g., parental leave), for specialized skills or where the salary exceeds the 'high income threshold' (for 2023–2024 the amount is AU\$167,500).

Terms relating to pay secrecy in employment contracts, written agreements or fair work instruments have no effect and cannot be enforced (i.e., employees are free to discuss their pay). Employers who include pay secrecy terms could face penalties.

Policies

Policies are not mandatory, but they are strongly recommended. Policies which should exist include those relating to discrimination, harassment, bullying, and work health and safety.

IV. ENTITLEMENTS

Minimum (Statutory) Employment Rights

There are 11 National Employment Standards set out in the Fair Work Act, which cover the majority of employees.

1. Hours of Work

An employee can work a maximum of 38 ordinary hours in a week, although the employer may require an employee to work reasonable additional hours.

2. Annual Leave

Full-time and part-time employees are entitled to four weeks of paid annual leave, calculated on a pro rata basis based on their ordinary hours of work. Shift workers may be entitled to five weeks of paid annual leave per year. Casual employees are not entitled to annual leave and instead receive leave loading as part of their pay.

3. Parental Leave

Eligible employees are entitled to 12 months of unpaid parental leave (which can be extended by 12 months by agreement) when a child is born or adopted. Additional entitlements include adoption leave, unpaid special parental leave, no safe job leave, a right to be transferred to a safe job and a right to return to the old job. Specific legislation may also entitle eligible employees to parental leave pay from the Australian government, equivalent to the minimum wage, for a period of up to 20 weeks.

4.a. Personal/Carer's Leave

Full-time employees are entitled to 10 days of paid personal/carer's leave a year. This covers circumstances where an employee is sick or an employee has to care for a family or household member or attend a family emergency. Part-time employees are entitled to a pro rata of 10 days each year depending on their ordinary hours of work. All employees (including casual employees) are entitled to two days of unpaid carer's leave on each occasion.

4.b. Compassionate Leave

All employees are entitled to two days of paid compassionate leave each time a family or household member dies or suffers a life-threatening illness or injury, or when a child is stillborn, or where the employee or the employee's spouse or de facto partner has a miscarriage.

4.c. Family and Domestic Violence Leave

All employees (including part-time and casual employees) are entitled to 10 days of paid family and domestic violence leave each year. Employees are entitled to the full 10 days from the day they start work. The 10 days renews each 12 months but does not accumulate from year to year if it is not used.

5. Community Service Leave

All employees are entitled to community service leave for certain activities, such as volunteering during natural disasters or emergencies and for jury duty. Jury duty entitlements differ among states/territories.

6. Long Service Leave

Full-time, part-time and some casual employees are entitled to paid long service leave once they have worked for an employer for a long period of time. Most entitlements are stipulated by state/territory legislation.

7. Flexible Working Arrangements

Certain employees have the right to request flexible working arrangements. Options include working part time, job sharing, working from home and altering work hours.

An employee is not entitled to make a request unless:

- They are an employee, other than a casual employee, who has worked for the same employer for at least 12 months.
- They are a casual employee who is a long-term employee and has a reasonable expectation of continuing employment by the employer on a regular and systemic basis.

If eligible, an employee can request flexible working arrangements if they:

- Are the parent or have the responsibility for a child who is school aged or younger.
- Are a carer (under the Carer Recognition Act 2010).
- Have a disability.
- Are 55 years old or older.
- Are experiencing family or domestic violence.
- Provide care or support to a member of their household or immediate family who requires care and support because of family or domestic violence.

The right to request flexible working arrangements also applies to employees, or a member of their immediate family or household, experiencing family and domestic violence, or employees who are pregnant.

If a request is refused by the employer, an employee may apply to the Fair Work Commission to conciliate or arbitrate the dispute.

Before refusing a request, employers have an obligation to:

- Discuss the request with the employee.

- Make a genuine effort to find alternative arrangements to accommodate the employee's circumstances.
- Provide a written response that includes an explanation of the reasonable business grounds for refusing the request.

8. Offers and Requests to Convert From Casual to Permanent Employment

Casual employees who have worked for their employer for 12 months need to be offered the option to convert to full-time or part-time (ongoing) employment by their employer. Certain eligibility requirements need to be met for this to occur.

Casual employees may be able to request that their employer convert their employment to full time or part time (ongoing) in some circumstances.

Small business employers (those that globally employ less than 15 employees) are not required to offer casual conversion to their casual employees after 12 months, although an eligible casual employee working for a small business employer can request to convert to permanent employment at any time on or after his or her 12-month anniversary.

9. Public Holidays

Employees are entitled to a paid day off for each public holiday in the state or territory in which they work. Some employees are entitled to additional pay if they work on a public holiday.

10. Notice of Termination and Redundancy Pay

When an employer terminates a full-time or part-time employee's employment for reasons other than serious misconduct, they must provide the following notice:

- Not more than one year of service – one week.
- More than one year but not more than three years of service – two weeks.
- More than three years but not more than five years of service – three weeks.
- More than five years of service – four weeks.

Where an employee is over 45 years of age and has completed at least two years of continuous service, that employee is entitled to another week's notice.

Alternatively, an employer can make a payment in lieu of notice.

When an employee resigns, he or she has to provide the notice as specified in the relevant registered agreement/award or contract.

For circumstances where an employer no longer needs a full-time or part-time employee's job to be done by anyone and has consulted with the employee, an employee is entitled to the following redundancy payment (unless an employment contract or registered agreement specifies a higher payment):

- At least one year but less than two years – four weeks.
- At least two years but less than three years – six weeks.
- At least three years but less than four years – seven weeks.
- At least four years but less than five years – eight weeks.
- At least five years but less than six years – 10 weeks.
- At least six years but less than seven years – 11 weeks.
- At least seven years but less than eight years – 13 weeks.
- At least eight years but less than nine years – 14 weeks.

- At least nine years but less than 10 years – 16 weeks.
- At least 10 years – 12 weeks.

11. Fair Work Information Statements

All new employees must be given a Fair Work Information Statement containing key terms before, or as soon as possible after, the commencement of employment.

All new casual employees must be given a Casual Information Statement containing key terms before, or as soon as possible after, the commencement of employment.

There is also a requirement to provide a Fixed Term Contract Information Statement to fixed-term staff who are protected by the fixed-term limitations on employment contracts.

Superannuation

Employees have a right to superannuation (or pension type) contributions under legislation.

Under the Superannuation Guarantee scheme, employers are effectively required to contribute 11% of employees' quarterly base salary to employee superannuation funds. Most employers make regular contributions in line with the pay period. This figure will rise in the next two years to a maximum of 12%.

Overtime

In many cases, and in particular for those employees covered by a registered agreement or award, time worked outside of ordinary hours can attract overtime rates.

Discretionary Benefits

Bonuses

It is common for employers to include bonus provisions in employment contracts. Bonuses are usually dependent on individual, department or company performance and are paid at the employer's discretion.

Salary Sacrifice

Some employers offer employees an additional two to four weeks' paid annual leave per year in exchange for employees sacrificing part of their salary each pay period.

Paid Parental Leave

Some employers offer paid parental leave schemes, which either supplement the income provided by the legislated parental leave pay scheme or offer additional periods of paid parental leave.

Other common discretionary benefits include provision of a mobile telephone, a laptop or a car.

TERMINATION OF EMPLOYMENT

I. GROUNDS

Termination can be brought about by mutual agreement, upon expiry of a fixed-term contract, termination by the employer with or without notice and termination (or resignation) by the employee.

II. MINIMUM ENTITLEMENTS

Notice

When an employer terminates a full-time or part-time employee's employment for reasons other than serious misconduct, they must provide the following notice:

- Less than one year of service – one week.
- Between one to three years of service – two weeks.
- Between three to five years of service – three weeks.
- Over five years of service – four weeks.

Where an employee is over 45 years of age and has completed at least two continuous years of service, he or she is entitled to another week's notice.

Alternatively, an employer can make a payment in lieu of notice.

Notice does not need to be provided when an employer terminates an employee for serious misconduct.

When an employee resigns, he or she has to provide notice as specified in the relevant registered agreement, award or contract.

Statutory Entitlements

Payment on termination includes:

- Outstanding wages for hours already worked.
- Accrued annual leave.
- Redundancy pay (if applicable).
- Accrued long service leave (if applicable).

III. REDUNDANCY

Genuine Redundancy

Redundancy is only available in circumstances where an employer no longer needs a full-time or part-time employee's job to be done by anyone.

Consultation

If the position being made redundant is covered by an award or registered agreement, the consultation provisions in that award or registered agreement should be followed.

Payment

An employee is entitled to the following redundancy payment (unless an employment contract or registered agreement specifies a higher payment):

- At least one year but less than two years – four weeks.
- At least two years but less than three years – six weeks.
- At least three years but less than four years – seven weeks.
- At least four years but less than five years – eight weeks.
- At least five years but less than six years – 10 weeks.
- At least six years but less than seven years – 11 weeks.
- At least seven years but less than eight years – 13 weeks.
- At least eight years but less than nine years – 14 weeks.
- At least nine years but less than 10 years – 16 weeks.
- At least 10 years – 12 weeks.

IV. POST-TERMINATION RESTRAINTS

Those that protect the employee’s legitimate business interests can be enforced if reasonable under the circumstances.

Non-Competes

Typically no longer than 12 months (with some exceptions).

Customer Non-Solicits

Permissible.

Employee Non-Solicits

Permissible.

V. REMEDIES

Unfair Dismissal

Eligible employees who have completed six months of service with their employer (or 12 months in the case of a small business employer with fewer than 15 employees) and earn up to the high-income threshold (AU\$167,500 for Financial Year (FY) 2023–2024) or are covered by a modern award or registered agreement are eligible to make a claim for unfair dismissal.

Remedy can vary and includes reinstatement or an award for compensation (up to six months’ salary being a maximum of AU\$83,750 for FY 2023–2024).

Adverse Action

Employers are prohibited from taking “adverse action” (including termination) against employees because an employee has or exercises a “workplace right” or engages in “industrial activity” or because of a protected attribute. Further protections include a prohibition on an employer dismissing an employee because the employee is temporarily absent from work due to injury or illness.

Remedy can vary and includes reinstatement or an award for compensation (with no maximum amount).

A “workplace right” includes an employee’s right to share, or not share, information about his or her pay or employment terms and conditions, or an employee’s right to ask other employees about their pay or employment terms and conditions.

VI. CORPORATE REGULATIONS

Payment of Benefits/Directors

Company officers or directors are not entitled to termination benefits or an increase in termination benefits if there is a change in shareholding or control of a company.

VII. STATUTORY REQUIREMENTS

Transfer of Business

The Fair Work Act contains a number of rules that apply if there has been a “transfer of business”.

These rules apply when:

- There is a connection between two employers (including the sale of all or part of a business, certain outsourcing and in-sourcing arrangements, and where the two employers have associated entities).
- The new employer agrees to employ some or all employees of the old employer.
- An employee begins working for the new employer within three months of ending his or her job with the previous employer.
- The employee’s role has not significantly changed.

The main effect of the rules is that a transferable instrument (i.e., a registered agreement) that covers the employee before the transfer will continue to apply after the transfer. The Fair Work Commission can make certain orders altering the effect of the rules if it deems it appropriate.

At common law, employees cannot be transferred from one employer to another without their consent.

There are statutory provisions which require continuity of service when there is a transfer between related entities or where service is recognised by the purchasing employer.

VIII. RESTRUCTURING

Notification

Awards and registered agreements require employers to notify employees of the likely effects of any restructure and to discuss the change with employees.

Consultation

If a position that is subject to restructure is covered by an award or registered agreement, the consultation provisions in that award or registered agreement should be followed.

PROTECTION OF ASSETS

I. CONFIDENTIAL INFORMATION

Most contracts of employment include provisions protecting the employer's confidential information, including intellectual property, clients and other company employees.

II. CONTRACTUAL RESTRAINTS

Confidentiality provisions restrict employees from using confidential information for anything other than their duties. These provisions restrain employees from using confidential information during, and for a period of time after termination of, employment.

III. PRIVACY OBLIGATIONS

State and federal legislation imposes stringent obligations with respect to an employer's collection, use and disclosure of an employee's personal information. The Australian Privacy Principles, which apply to all businesses with an annual turnover of over AU\$3 million a year, protect an individual's personal information, unless the information falls within one of the legislated exemptions. The privacy laws only apply to some employee records. In determining this, employers follow the Australian Privacy Principles and enforce policies to restrict use of personal information.

IV. WORKPLACE SURVEILLANCE

There are limitations on the way in which employers may monitor employees. Generally, the law prohibits employee monitoring in areas such as toilets, bathrooms and changing rooms. Some states also limit employee surveillance on computers, telephones and cameras without first notifying employees of that surveillance and the nature of the surveillance.

V. WORKPLACE INVESTIGATIONS

Employers use workplace investigations as a management and conflict resolution tool to determine policy breaches, misconduct or misuse of confidential information. The conduct of these investigations is determined by company policy. Outcomes of workplace investigations are often used to manage employees or to determine whether to terminate an employee's employment.

WORKPLACE BEHAVIOUR

I. MANAGING PERFORMANCE AND CONDUCT

Employment contracts, policies and agreements provide for management of employee performance and conduct.

Unfair dismissal provisions and caselaw require an employer to warn an employee before terminating his or her employment due to poor performance.

Employee misconduct may also warrant a warning, disciplinary action or, if the conduct is serious, termination of employment. Employees terminated for serious misconduct do not receive all of their usual notice and statutory entitlements on termination of employment.

II. BULLYING AND HARASSMENT

Bullying

Bullying is covered by the Fair Work Act and work health and safety laws. These cover all employees, contractors, outworkers, students gaining experience and volunteers.

A worker is bullied at work if:

- A person or group of people repeatedly act unreasonably towards them or a group of workers.
- The behaviour creates a risk to health and safety.

Reasonable performance management action carried out in a reasonable way is not bullying.

Harassment

Harassment is unwanted behaviour which is aimed at offending, humiliating or intimidating another person. Harassment in employment for an unlawful reason, such as sexual harassment, is prohibited by anti-discrimination legislation.

The Fair Work Act specifically prohibits a person from sexually harassing another person who is a worker (or seeking to become a worker) in a business or undertaking, or conducts a business or undertaking, in connection with work.

III. MANAGEMENT OF RISKS TO PSYCHOSOCIAL HEALTH

To help address mental health issues in the workplace, each Australian state and territory has introduced new regulations specifically requiring employers to identify and mitigate risks to psychosocial health in the workplace. The common psychosocial risks include bullying, harassment, violence, aggression, traumatic events, job demands and poor support.

To comply with these requirements, each employer needs to, at minimum, conduct a risk assessment to identify the risks to psychosocial health across their organisation and reasonably practicable measures to control those risks.

IV. DISCRIMINATION

Discrimination in employment, on certain grounds, is prohibited by state and federal anti-discrimination legislation. The legislation differs from state to state. Most jurisdictions make it unlawful to discriminate on the basis of sex, colour, race, sexual preference, disability (both mental and

physical), age, marital status, family or carer's responsibilities, pregnancy, breastfeeding, religion, political opinion, nationality, social origin, intersex status, gender identity or trade union membership.

In most cases, an employer is taken to be vicariously liable for its employees' actions. Employers also have a positive obligation to eliminate sexual harassment, sex-based harassment, conduct that subjects a person to a hostile work environment and victimisation under the Sex Discrimination Act 1984 (Cth).

Employees also have recourse for unlawful discrimination through the general protection provisions of the Fair Work Act.

In the anti-discrimination jurisdiction, the most common form of remedy is compensation. Reinstatement is also a remedy for unlawful discrimination under the Fair Work Act.

V. THEFT/FRAUD/ASSAULT

These are criminal acts which can amount to serious misconduct and result in immediate dismissal from employment.

VI. UNIONS

Representation

All employees and independent contractors can choose to be represented by a union or not. Any union validly appointed to represent an employee or employees must be recognised and dealt with according to the law.

Right of Entry

Union officials can enter the workplace if:

- The employer agrees for them to enter.
- They have a valid right-of-entry permit issued by the Fair Work Commission.

There are many rules surrounding union officials entering a workplace.

Industrial Disputation

It is only lawful to take industrial action (e.g., strikes, lockouts, slowdowns) during particular times.


VII. STAND DOWN – FAIR WORK ACT

Employers may, in some circumstances, stand down an employee without pay during a period in which the employee cannot usefully be employed because of:

- Industrial action (other than industrial action organised or engaged in by the employer).
- A breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown.
- A stoppage of work for any cause for which the employer cannot reasonably be held responsible.

VIII. REMOTE/HYBRID WORK

There has been a sizeable increase in the number of employees working remotely, usually on a hybrid basis, arising from the experience of doing so during COVID-19 lockdowns or as a cautionary measure to minimise risk of infection.



While there has been no change in laws governing the right to work remotely, the union movement is calling for this to be included as a right in collective agreements, and employers are acutely conscious of permitting hybrid working models in order to attract and retain staff.

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