NATIONAL EMPLOYMENT STANDARDS - OVERVIEW

On 1 January 2010, the National Employment Standards (NES) took effect, replacing the Australian Fair Pay and Conditions Standards. The desire to create "a safety net of minimum conditions" was one of the principal objectives.

This fact sheet provides an overview of the National Employment Standards and what they contain. For more detailed information on each of these entitlements, see the relevant Victorian Chamber fact sheet.

The Coverage of the NES

The NES establishes a set of core employment conditions that apply as minimum standards for all Australian employees.

The NES cannot be varied, even where there is agreement by both parties. However, awards can supplement the standards or provide clarification about how they are to be applied – for example, an award might provide that the annual leave entitlement in the NES could be taken by "cashing out" part of the leave entitlement.

In some cases, the NES simply confirm entitlements that already exist for most employees. In other cases, new and existing employees may receive new entitlements.

The Standards

The Standards are grouped under ten headings. The following is a summary of the ten entitlements created by each of the Standards.

1) Maximum weekly hours  See Fair Work Act s. 62-64

Normal working hours should not exceed 38 hours per week, however an employer may request/require "reasonable additional hours" to be worked. Determining whether additional hours are reasonable will depend upon a range of factors including the following:

- any risk to employee health and safety from working the additional hours;
- the employee's personal circumstances, including family responsibilities;
- the needs of the workplace or enterprise in which the employee is employed;
- 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;
- any notice given by the employer of any request or requirement to work the additional hours;
- any notice given by the employee of his or her intention to refuse to work the additional hours;
- the usual patterns of work in the industry, or the part of an industry, in which the employee works;
- the nature of the employee's role, and the employee's level of responsibility;
- whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64; or
- any other relevant matter.

Hours for award or agreement free employees can be averaged over a work cycle of not more than 26 weeks.

2) Requests for flexible working arrangements See Fair Work Act s. 65 - 66

This part of the NES introduces a new entitlement for most employees. An employee will be eligible to make a request to change their working arrangements if they meet any of the following criteria:

- the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
- the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);
- have a disability;
- 55 years old or older;
- experiencing violence from a member of the employee's family;
- providing support to a member of his or her immediate family or member of his or her household who requires care/support because the member is experiencing violence from the member's family;

This entitled is only available to employees with at least 12 months continuous service and any request must be in writing. The employer must respond to the request in writing within 21 days and can only refuse on "reasonable business grounds". Reasonable business grounds can include but are not limited the following:

- that the new working arrangements requested by the employee would be too costly for the employer;
- that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
- that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
- that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
- that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

3) Parental Leave See Fair Work Act s. 67-85

When a child is born or adopted, each parent is entitled to take up to 12 months unpaid parental leave. Only one parent may take parental leave at a time, except for a limited period of 8 weeks where both parents may take leave concurrently. The NES also permit either parent to request an extension of the leave period by a further 12 months, as long as the combined total of parental leave taken does not exceed 24 months.

Any request for extension must be made in writing at least four weeks prior to the end of leave, and the employee must be given a reasonable opportunity to discuss the request. An employer can only refuse the request on reasonable business grounds, and must notify the employee of their decision within 21 days.

Whilst under the NES, parental leave is an unpaid entitlement, the primary carer may apply to the Department of Human Services to obtain up to 18 weeks parental leave pay.

4) Annual Leave See Fair Work Act s. 86 - 94

Full-time employees accrue four weeks leave per year (five weeks for shift workers), or equivalent pro-rata for a part-time employee. The entitlement accrues progressively and is cumulative. Any ability to "cash out" will be left to awards or agreements to define, however award free employees are able to cash out annual leave. Any agreement to cash out annual leave must ensure that the employee is to retain a minimum balance of four weeks. A separate agreement must be documented in writing on each separate occasion of cashing out.

5) Personal/Carer's/Compassionate Leave See Fair Work Act s. 95-107

Under the NES, employees are entitled to 10 days paid personal/carer's leave per year which accrues progressively and is cumulative if unused. When paid carer's leave is exhausted, an additional two days unpaid carer's leave can be used on each separate occasion. Compassionate Leave is a standalone entitlement and does not accrue, with an entitlement of two days paid leave payable on each separate occasion.

6) Community Service Leave See Fair Work Act s. 108-112

Employees are entitled to be absent from work if engaged in "eligible community service activity" such as voluntary emergency management activity like CFA or SES. The absence must be "reasonable". Employees are also entitled to Jury Service Leave which is paid leave.

7) Long Service Leave See Fair Work Act s. 113

Existing award or State based entitlements continue to apply.

8) Public Holidays See Fair Work Act s. 114 - 116

Employees are entitled to be absent on the designated public holidays without loss of pay unless they have been requested to work. In such cases they may refuse to work if "the request is not reasonable or the refusal is reasonable".

9) Notice of Termination and Redundancy Pay See Fair Work Act s. 117 -123

An employer must give a permanent employee written notice of termination. The amount of notice required will vary according to length of service, and in some cases, age. Where an employee is made redundant, they will be entitled to redundancy pay, also based on their period of continuous employment. Exclusions apply if the employer is a small business employing less than 15 equivalent full-time employees or if the employee made redundant is employed on a casual basis. Certain modern awards may also provide for an industry specific redundancy scheme.

10) Fair Work Information Statement See Fair Work Act s. 124 - 131

Employers are required to provide employees with a statement setting out a summary of basic entitlements. This information sheet has been developed by the Fair Work Ombudsman and is available on our website.

The Application of the NES

The NES applies to all employees covered by the national workplace relations system regardless of the applicable industrial instrument or contract of employment. Terms of awards, agreements, and employment contracts cannot exclude or provide for an entitlement less than the NES, and therefore have no effect.

Note: Awards and agreements are specifically allowed to affect the operation of the NES in certain ways.

Examples of specific terms are:

- averaging ordinary hours;
- cashing out and taking paid annual leave;
- cashing out of paid personal/carer's leave;
- substitution of public holidays; and
- situations when redundancy pay entitlements don't apply.

Employers can also supplement the NES by providing entitlements that are more favourable for employees.

Casual Employees and the NES

Certain entitlements under the NES do not apply to casuals, such as annual leave and redundancy pay.

The NES entitlements that casuals receive are listed below:

- two days unpaid carer's leave and two days compassionate leave per occasion;
- maximum weekly hours;
- community service leave;
- the ability to reasonably seek a day off on a public holiday; and
- the provision of the FW Information Statement.

In addition, if employed for at least 12 months by an employer on a regular and systematic basis, and with an expectation of ongoing employment casuals are entitled to:

- make requests for flexible work arrangements; and
- parental leave.

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Contacting the Victorian Chamber of Commerce and Industry

The Victorian Chamber's team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222.**

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