

Employment and income

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Young Workers Legal Service**

Employment Law

State and national (federal) laws regulate employment law in Australia. Employment law is complex and has many different layers. A worker's employment can be governed by legislative minimum standards and/or a number of instruments, such as industry specific awards and workplace specific enterprise agreements, which set out the worker's rights and entitlements and the employer's obligations. Employment law is also complicated by the fact that an employee falls under either the state or national system. Generally, workers employed by a business, a non-government organisation or a financial institution are deemed a national system employees. While workers employed by the state government, a state government authority or a local council are deemed a state system employee. This distinction is relevant for a number of reasons. Most obviously state and national employees are affected by different pieces of legislation and must seek redress in the event that there has been a breach of an award or agreement through different tribunals. National system employees should seek assistance through Fair Work Australia (1300 799 675), the new national employment umpire while general advice is available from the Fair Work Ombudsman (13 13 94). State system employees should contact Safework SA (1300 365 255). It is important to remember that contacting these agencies is the best course of action when in doubt.

Minimum Age

Although there is no minimum age to work in South Australia, an employer has a duty to ensure that a child is safe and that the type of work they perform is appropriate for their age. Some awards and regulations state that those under 18 years cannot perform certain jobs or tasks. For example, you can only work serving alcohol in a hotel/restaurant if you are aged 18 years or over. It is compulsory for a person up to the age of 17 years to be at school (or in approved training/employment) and it is unlawful to allow a child work at any time that would stop the child from attending or properly benefiting from school.

Who is an employee?

Most young people who perform work for pay are employees. However, businesses or organisations sometimes engage a young person as an “independent contractor.” An independent contractor is a worker who has a significant amount *control* over their work. For some, this can mean they have the power to do their work at their own pace or delegate it to others. An independent contractor should get paid substantially more than an employee. This is because independent contractors are exposed to more liability and risk. Independent contractors are required to take out their own insurances and do not have the same protections (such as the right to ongoing work) and entitlements (such as superannuation) as employees. Moreover, unlike employees, independent contractors are personally liable for mistakes made during the course of their employment. It is important to note that ‘sham’ contracting arrangements are prohibited by Australian law. Such arrangements should be reported to the Fair Work Ombudsman.

Casual and part time employment

There are different types of employment. Most commonly, young people are employed on a part time or on a casual basis. There is a difference between part time and casual employment.

Part time employment involves a minimum number of hours each week, which are less than the full time employment hours. For example, if full time is 38 hours, and you work 20 hours, you are a part-time employee. As a part time employee you can generally receive most of the benefits of a full time employee but according to the amount of time you work. You can agree to work hours in addition to your normal employment, but you cannot be forced to do so.

Casual work means that you are employed to work one shift at a time. Originally this kind of work was generally performed on an irregular basis, however in recent times it has become more common to employ people with a set bracket of hours, but still on a casual basis. If you are casual, it might mean that you get called to work with little notice, say during busy times. Casual employees do not have the same entitlements as full time or part time worker. But they generally get a loading (extra money on an hourly rate) because they do not accrue any annual leave or sick leave. Casual employees are not required to give more than a day’s notice should they wish to resign.

Contract of employment

When a worker accepts the offer of a paid job, a contract of employment is formed. It can be formed either verbally or in writing or formally or informally. It usually specifies things such as your pay, hours of work, the governing instrument (i.e. Award) and your leave entitlements. You have the right to request a copy of the finalised contract for your records. In the majority of situations, the terms and conditions of the employment contract are outlined in the appropriate award (state or national) or agreement (state or national).

In July 2008 the right to make Australian Workplace Agreements (AWA) in the national system was abolished. AWAs were individual agreements between a single employee and their employer. AWAs made before July 2008 can remain in force until their nominal expiry dates. Moreover, employers that have employees on AWAs can offer new employees Individual Transitional Employment Agreements (ITEAs) until December 2009, but not thereafter.

Minimum Standards and Awards

Awards are instruments with legislative force that set out employment conditions and pay for a particular sector. The Howard government's Workchoices legislation complicated the award system and made it hard for workers to find out which award applied to their work. As of 1 January 2010, the award system in Australia will again undergo some significant changes. The introduction of the *Fair Work Act 2009* (Commonwealth) introduced the process of Award modernisation, which aims to create a new and simpler national system of awards for nearly all sectors of the workforce. The modern awards will apply to national system employees and will come into effect on 1 January 2010, though there will be some transitional provisions (eg relating to pay, penalty rates etc) which will be phased in over time

The National Employment Standards (NES) will also come into effect on 1 January 2010. These apply to **all** national system employees and include the following 10 matters:

- Maximum working hours – 38 hours plus reasonable overtime
- Flexible work - requests from certain parents
- Parental leave –up to 12 months unpaid leave with the right to request another 12 months
- Annual leave – 4 weeks, with an additional week for certain shift workers

- Personal leave – 10 days paid, 2 days unpaid carer's, and 2 days compassionate leave (unpaid for casuals)
- Community service leave – unpaid leave for emergency management activities, jury service
- Long service leave
- Public holidays – paid day off unless reasonably requested to work
- Notice of termination and redundancy pay
- Fair Work Information Statement – a right to receive this upon being employed

If you need information about national awards that operated prior to 1 January 2010 it is best to contact Fair Work Australia.

South Australian awards and minimum standards govern the pay, terms and conditions of those in the state system. If you are a state system employee you can contact the Safe Work SA Help Centre on 1300 365 255 to find out which award you are covered by.

Enterprise and collective agreements

Enterprise agreements are formed between employees of a business who are often represented by a trade union and an employer who may be represented by a business association or industry group. These agreements are registered and set out pay, conditions and other matters pertaining to the employment relationship. Enterprise agreements should be more beneficial for employees than the award. The process of forming an enterprise agreement is called bargaining. Employees have certain protections while bargaining, such as the right to take protected action (i.e. an authorised strike) against an employer who is not negotiating in good faith.

Wages and Junior Rates

Employees are generally paid in monetary form for the work they perform. They should be paid according to the relevant award or agreement. They should also be provided with a payslip either in hard copy or electronically. Where there is no award or agreement, an employee should be paid the minimum wage, which, for national employees, is adjusted each year by Fair Work Australia. Employees can be paid on a weekly, fortnightly, monthly or piecemeal basis.

The law provides that they must be paid at least monthly. Employers do not have the right to deduct money from an employee's wage unless it is expressly authorised in writing by an employee, or if they are under 18 years old by their parent or guardian. Moreover, a deduction made for the benefit of an employer that is unreasonable in the circumstances may be deemed invalid by the courts.

Awards often set junior rates for employees under the age of 21. They also set special rates for trainees and apprentices to recognise that part of their working week is taken up by off the job training. It is important for juniors, trainees and apprentices to be satisfied that their pay rate is correct and has been derived from the correct award.

Trainees and apprentices also have important protections under the state Training and Skills Development Act 2008. Information is available from the Training and Skills Commission at <http://www.tasc.sa.gov.au/Guidelines/tabid/95/Default.aspx>

Additionally, information is available from the Department of Further Education, Employment, Science and Technology (DFEEST) at http://www.employment.sa.gov.au/employ/files/links/Tas_brochure_WEB_version.pdf and a comprehensive booklet is available at http://www.employment.sa.gov.au/employ/files/links/SATAS_Booklet_FINAL_Sept_0.pdf

It is important for employees to keep their payslips and record all of the hours they work in a personal diary. Employees have 6 years to pursue an underpayment of wages.

Superannuation

Superannuation is paid by your employer into a fund which you can generally only access once you have retired. Your employer should pay super whether you are full, part time or casual. However, you are not eligible to receive super if you make less than \$450 per month, work less than 30 hours per week, are paid to do private or domestic work for less than 30 hours a week, or you work part-time and you are under 18.

Employers are required to contribute 9% (or more) of your ordinary time earnings into your nominated fund.

You have a right to get paid superannuation and when you begin work you should be given a form to fill in to join a super fund. There is a Superannuation Helpline: 13 28 65.

Also <http://www.ato.gov.au/individuals/content.asp?doc=/content/33301.htm>

Trade unions

Trade unions represent the interests and rights of workers in a particular industry or job. There will be a union covering every sort of job, trade or occupation. Trade unions can help workers with advice on work, health and safety in the workplace, pay issues, bargaining and negotiations, discrimination issues. They can also engage in collective bargaining with their members. Trade union officials can come into a workplace at certain times, and investigate whether a breach of laws or awards has occurred.

You have a right to choose whether you will join a trade union. An employer does not need to know a worker is a member of a trade union. It is unlawful for an employer to discriminate against you on the grounds of membership or not, of a trade union. There are membership fees for joining a union. Members have a say in the union's policies. SA Unions can provide guidance about unions and which one might be appropriate for you to join. For further information contact SA Unions on telephone (08) 8279 2222. Workers can also join online at <http://www.unionsaustralia.com.au/>

Equal Opportunity and Discrimination

Employers are prohibited from treating employees or prospective employees less favourably as a result of certain characteristics, such as race or ethnicity, gender, sexual orientation, family responsibilities, marital status, pregnancy, disability, and age. The full range of prohibitions depends on the legislation. The State Act is at

http://www.eoc.sa.gov.au/site/eo_for_you/discrimination_laws/south_australian_laws/equal_opportunity_act.jsp

Federal Act at

http://www.austlii.edu.au/au/legis/sa/consol_act/EOA1984250/

Employers are also prohibited from imposing a requirement or condition on an employee that is unreasonable and disadvantages a certain group of employees. For example, the requirement that an employee may be a certain height may have a disproportionate effect on females.

It is also unlawful for an employer to treat an employee differently because they have made a complaint or exercised a workplace right.

If you think you have been a victim of discrimination or bullying contact the Equal Opportunities Commission on 8207 1977, the Australian Human Rights Commission on 1300 656 419 or the Fair Work Ombudsman on 13 13 94.

Bullying and Harassment

Sexual harassment by a co-worker, employer or client is unlawful. Sexual harassment can be defined as conduct of a sexual nature that could reasonably be expected to offend, humiliate or intimidate a person. Employees who are subject to any form of sexual harassment should (where appropriate) inform their manager or supervisor. Employers then have a duty to take steps to ensure the harassment ceases and the complainant is comfortable and safe. If an employer is the perpetrator or fails to fulfill its duty of care, an employee should consider making a complaint to the Equal Opportunity Commission.

In South Australia bullying and harassment is a safety issue. Workplace bullying is the continual bad treatment of someone at work by one or more people. Bullying should be treated seriously, as it can be harmful to a person's health and wellbeing. An employee who is being bullied should contact Safework SA as soon as possible.

Unfair Termination

Unfair dismissal applications can be made where your dismissal by your employer is harsh, unjust or unreasonable, for example if you are not given a reason for your dismissal or if you are not given a fair chance to respond to allegations made by your employer. All employees have the right to respond to any allegations put to them. They also have the right to be given

adequate notice of a termination meeting so that they can prepare and organise to bring a witness, representative or support person.

Generally, employers should give employees warnings with respect to performance issues. Employees should then be given the opportunity and support to improve. Where an employee has been given multiple warnings and adequate training and support, but has not improved, an employer may terminate the employment relationship.

In limited instances, an employee can be instantly dismissed, for example an employment relationship can be terminated if it can be proven that employee has engaged in serious and wilful misconduct, such as physical assault or theft.

National system employees should make these applications to Fair Work Australia within **14 days** of their dismissal. In order to bring an application an employee must have worked on a regular and systematic basis for the “required period”. The required period is 12 months for a small business with fewer than 15 employees and 6 months for an employer with more than 15 employees. The first stage of an unfair dismissal application is a conciliation conference, where the parties meet and sometimes reach an agreement. Employees can request compensation for loss of earnings or ask to be reinstated. It is recommendable to contact Fair Work Australia and the Young Workers’ Legal Service as soon as you have been terminated.

State system employees can make an unfair dismissal application through the South Australian Industrial Relations Commission. An application needs to be filed within 21 days of being dismissed from your job, although later applications can be accepted if you have a reason for the delay in lodging the application.

Unlawful termination

This is different to an unfair dismissal and applies to employees in the national system.. A termination of employment is unlawful where it done for a prohibited reason.

It's illegal for an employer to dismiss an employee for a number of reasons. These reasons include:

- a person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (some exceptions apply, such as where it's based on the inherent requirements of the job)
- temporary absence from work because of illness or injury
- trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours
- non-membership of a trade union
- seeking office as, or acting as, a representative of employees
- being absent from work during maternity leave or other parental leave
- temporary absence from work to engage in a voluntary emergency management activity
- filing a complaint, or participating in proceedings against an employer.

Redundancy

Sometimes employees can be dismissed on the basis that their **position** is no longer needed. This is known as redundancy. The most common reason for redundancy is shortage of work. An employer must show that the redundancy is genuine and must also be able to show why it was that a particular employee's position should go. Moreover, if there is more than one person doing similar work, the employer must show why only one of them was selected for redundancy.

Further Information

SA Unions can provide you with information on your relevant trade union. You can contact them on 8279 2222.

The Young Workers' Legal Service (YWLS) can provide advice, assistance and representation to workers under the age of 30. You can contact the YWLS on 8279 2233.

The Working Women's Centre (WWC) provides women in SA with advice, assistance and representation. You can contact the WWC on 8410 6499.

Traineeship and Apprenticeship Services deal with issues facing apprentices and trainees. They can be contacted on 1800 673 097