



Long service leave and the National Employment Standards

Australia's new workplace relations system

From 1 July 2009, most Australian workplaces are governed by a new system created by the *Fair Work Act 2009*.

The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. We provide education, information and advice, help to resolve workplace complaints, conduct investigations, and enforce relevant Commonwealth workplace laws.

Long service leave forms part of the National Employment Standards (NES). As of 1 January 2010, the NES apply to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment.

Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES, and those that do have no effect. An employer must not contravene a provision of the NES. A contravention of a provision of the NES may result in penalties of up to \$10,200 for an individual and \$51,000 for a corporation.

In addition to the NES, an employee's terms and conditions of employment generally come from an award or agreement. All references to an award or agreement in this fact sheet includes modern awards, enterprise agreements, and award or agreement-based transitional instruments.

Overview

The NES set out the entitlement to long service leave. This entitlement is a transitional entitlement pending the development of a uniform national long service standard.

What entitlements to long service leave will apply?

Under the NES, an employee is entitled to long service leave in accordance with their applicable pre-modernised award. Modern awards (from 1 January 2010) cannot include terms dealing with long service leave.

However, an employee's long service leave entitlement derived from a pre-modernised award does not apply where:

- a collective agreement, an Australian Workplace Agreement (AWA) made after 26 March 2006, or an Individual Transitional Employment Agreement (ITEA) came into operation before the commencement of the NES, and applies to the employee *or*
- one of the following kinds of instruments came into operation before the commencement of the NES, applies to the employee, and expressly deals with long service leave:
 - an enterprise agreement – agreements made after 1 July 2009 and approved by the Fair Work Commission
 - a preserved State agreement – an agreement made in the State system before 26 March 2006
 - a workplace determination – made by the Fair Work Commission
 - a certified agreement – an agreement made before 26 March 2006
 - an AWA – made before 26 March 2006
 - a section 170MX award – an award made by the Australian Industrial Relations Commission (AIRC) before 26 March 2006 after terminating a bargaining period
 - an old IR agreement – an agreement approved by the AIRC before December 1996.

When one of the above specified instruments ceases to operate, an employee is entitled to long service leave in accordance with an applicable pre-modernised award.

Interaction between State and Territory long service leave laws and enterprise agreements

The content of an enterprise agreement made during the period 1 July 2009 – 31 December 2009 will prevail over State or Territory long service leave laws.

From 1 January 2010, if a pre-modernised award does not apply to an employee, any entitlement to long service leave will be derived from applicable State or Territory long service leave laws. The State or Territory long service leave laws generally prevail over any provisions in an enterprise agreement to the extent that they are inconsistent with those laws.

Agreement-derived long service leave entitlements

In some circumstances, the Fair Work Commission can make an order which preserves long service leave entitlements contained in a collectively bargained agreement (such as enterprise agreements, collective agreements, pre-reform certified agreements and old IR agreements). In this instance, the agreement terms prevail over the State or Territory long service leave laws.

This can occur where:

- the agreement came into operation prior to 1 January 2010
- the agreement has terms dealing with long service leave
- the agreement applies to employees in more than one State or Territory
- the agreement provides entitlements which are equal to or greater than the relevant State or Territory long service leave laws
- there are no applicable long service leave entitlements derived from a pre-modernised award which applies to the employees.

What if there are no applicable award or agreement-derived long service leave entitlements?

If there are no award or agreement terms regarding long service leave as set out above, the entitlement to long service leave comes from State and Territory laws. These laws are subject to the interaction with any transitional instrument that applies to the employees. Generally, these transitional instruments prevail to the extent of any inconsistency over any State or Territory long service leave laws.

What are the minimum long service leave entitlements?

Depending on the relevant State/Territory law or industrial instrument (such as an award or agreement), an employee may be entitled to long service leave after a period of continuous service ranging from seven to fifteen years with the same or a related employer.

Untaken long service leave is usually paid on termination, although this can depend on the circumstances of termination. Depending on the relevant law or instrument, an employee may be eligible for a pro-rata payment on termination after a minimum period of five years continuous service.

Can an enterprise agreement discount periods of service for long service leave?

Where an enterprise agreement replaces a collective or individual agreement or other specified instrument (such as a workplace determination) that operated before the commencement of the NES, and stated the employee was not entitled to long service leave, an employee's service under the former agreement can be discounted for the purpose of long service leave.

The enterprise agreement may include terms that an employee's service with the employer during a specified period does not count as service for determining long service leave entitlements under either the NES or a State or Territory law. The period is some or all of the period when an employee was covered by the collective or individual agreement or other specified instrument (such as a workplace determination).

If the enterprise agreement includes terms excluding prior service, it does not count as service for determining long service leave entitlements under either the NES or a State or Territory law. However, the period for long service leave entitlement purposes can be reinstated by a later agreement, either through an enterprise agreement or a contract of employment.

Further Information

The Fair Work Ombudsman has published a fact sheet on each NES entitlement. For further information on a specific NES entitlement, please see the relevant fact sheets at www.fairwork.gov.au.

The Fair Work website also provides templates for long service leave application forms and an employee leave records template.

Long service leave is provided for by section 113 of the *Fair Work Act 2009*.

For further information, visit www.fairwork.gov.au or contact the Fair Work Infoline on **13 13 94**.

Related publications

Introduction to the NES

Maximum weekly hours and the NES

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