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# FACT SHEET

## National Employment Standards

The National Employment Standards ('NES') form part of the *Fair Work Act 2009* (the 'Act').

The NES provide for the minimum employment conditions for every employee subject to the federal system, regardless of what industrial instrument governs the employee's terms and conditions of employment. If no industrial instrument applies to an employee, the NES will represent minimum conditions of employment.

The NES covers:

1. Maximum Hours of Work – 38 per week for full time employees, plus reasonable additional hours.
2. Flexible Working Arrangements – The ability for an employee with parental or guardian responsibilities to request a change to working arrangements to assist with the care of the child. The child must be under school age or be under 18 years of age and have a disability.
3. Parental Leave – Both parents each having up to 12 months unpaid parental leave entitlements.
4. Annual Leave – four weeks paid leave per year, plus an additional week for certain shift workers.
5. Personal / Carer's Leave (including Compassionate Leave) - 10 days paid personal/carer's leave, two days unpaid carer's leave as required, and two days compassionate leave (unpaid for casuals) as required.
6. Community Service Leave – Unpaid leave to undertake eligible community service such as jury service or voluntary emergency management.
7. Long Service Leave – This entitlement will reflect state and territory entitlements. In Queensland, long service leave is provided for in the *Industrial Relations Act 1999*.
8. Public Holidays – Holidays that are recognised and working arrangements.
9. Notice of Termination and Redundancy Pay – Requirements for notice by an employer and redundancy pay.
10. Fair Work Statement – A requirement for employers to provide all new employees with this Statement.

This Fact Sheet provides further detail about each of the NES, but does not represent a complete document. For a complete version of how the NES appears in the Act, please refer to Part 2, Section 59-131 of the Act. Alternatively a full copy of the NES can be downloaded from the QHA website ([www.qha.org.au](http://www.qha.org.au)).

The NES addresses the 10 points listed above and all of which have been briefly summarised below:

## **1. MAXIMUM HOURS OF WORK**

For full-time employees, the maximum hours of work cannot exceed 38 hours per week plus reasonable additional hours.

For an employee other than a full-time employee, the maximum hours of work are the lesser of:

- 38 hours per week; and
- the employee's ordinary hours in a week;

While the employer may request or require an employee to work reasonable additional hours, an employee can refuse to work additional hours if the additional hours are unreasonable.

In determining whether the additional hours are reasonable or unreasonable, consideration must be given to the following:

- Any risk to the employee's health and safety from working the additional hours;
- The employee's personal circumstances, including family responsibilities;
- The needs of the workplace or enterprise;
- Whether there is an entitlement to overtime payments, penalty rates, or other compensation for working the additional hours;
- The notice given by the employer of any request or requirement to work the additional hours;
- The notice given by the employee of his/her intention to refuse to work the additional hours;
- The usual patterns of work in the industry, or part of an industry;
- The nature of the employee's role and level of responsibility;
- Whether the additional hours are in accordance with the averaging provisions in a modern award or enterprise agreement that applies to the employee;
- Any other relevant matter.

The NES allows for an award or Agreement (ie a formal Workplace Agreement such as an Enterprise Agreement) to include provisions for the averaging of hours of work over a specified period. The average weekly hours over the period must not exceed:

- for a full-time employee, 38 hours; or
- for an employee other than a full-time employee, the lesser of:
  - 38 hours; or
  - the employee's ordinary hours of work in a week.

An award or Agreement may provide for the averaging of weekly hours that exceed the hours listed above if those additional hours are considered reasonable. The hours worked in excess of the above average weekly hours will be treated as additional hours and the averaging provisions will be relevant in determining whether the additional hours are reasonable or not.

Please note that in addition to the above, the NES provides that an employer and award/agreement-free employee may agree in writing to an arrangement to average the employee's ordinary hours of work over a specific period of not more than 26 weeks.

## **2. FLEXIBLE WORKING ARRANGEMENTS**

Division 4 of the NES provides that an employee, who has completed 12 months' continuous service with an employer, and, in the case of a casual employee, has been working on a regular and systematic basis with a reasonable expectation of continuing employment, may request a change in their working arrangements if any of the following circumstances apply:

- the employee is the parent, or has responsibility for the care, of a child who is school age or younger;
- the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);
- the employee has a disability;
- the employee is 55 or older;

- the employee is experiencing violence from a member of the employee's family;
- the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

The request for flexible work arrangements must be in writing and detail the changes sought and the reasons for the change.

An employer must consider the request for flexible working arrangements and provide a written response to the employee within 21 days of receiving the request. An employer can only refuse the request on reasonable business grounds. If the request is refused, the employer must include the reasons for the refusal in the written response.

The NES details a non-exhaustive list of what may constitute reasonable business grounds, including:

- 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 significant negative impact on customer service.

*Refer: QHA's Flexible Work Request Fact Sheet*

### **3. PARENTAL LEAVE**

#### **Basic Entitlement**

An eligible employee is entitled to 12 months' unpaid parental leave –

- following the birth of a child of the employee or the employee's spouse or de facto partner; or
- the placement of a child with the employee for adoption.

Employees are eligible to unpaid parental leave if they have completed at least 12 months of continuous service with their current employer immediately before the date, or expected date, of the birth of the child, or the date, or expected date, of placement of the adopted child.

Casual employees are entitled to unpaid parental leave where:

- they are, or will be, a long term casual and have been employed by the employer on a regular and systematic basis over the last 12 months; and
- they have a reasonable expectation of continuing employment with the employer on a regular and systematic basis.

#### **Notice and Evidence Requirements**

An employee must give an employer written notice of the taking of unpaid parental leave at least 10 weeks before starting the leave; or if that is not practicable, as soon as practicable (which may be a time after the leave has started). The notice must specify the intended start and end dates of the leave.

At least 4 weeks before the intended start date specified in the notice given to the employer, the employee must:

- (a) confirm the intended start and end dates of the leave; or
- (b) advise the employer of any changes to the intended start and end dates of the leave, unless it is not practicable to do so.

If required by the employer, an employee must give the employer the following evidence:

- (a) if the leave is birth-related leave – the date of birth, or the expected date of birth of the child; or
- (b) if the leave is adoption-related leave:
  - i. the day of placement, or the expected day of placement of the child; and
  - ii. that the child is, or will be, under 16 as at the day of placement, or the expected day of placement.

Where the leave is to be taken in two separate periods in accordance with section 74 of the NES (concurrent leave), the employee must only provide the employer with 4 weeks' notice before the starting period of the second period or subsequent periods of concurrent leave, or as soon as practicable (which may be a time after the leave has started).

An employee is not entitled to take unpaid parental leave unless the employee complies with the notice and evidence requirements of the NES.

### **Return to Work Requirements**

On ending unpaid parental leave, an employee is entitled to return to:

- (a) the employee's pre-parental leave position; or
- (b) if that position no longer exists, an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.

### **Interaction with Paid Leave**

An employee is not prevented from taking any other kind of paid leave (except for personal/carer's leave or compassionate leave) while taking unpaid parental leave.

*Refer: QHA's Parental Leave under the NES Fact Sheet*

## **4. ANNUAL LEAVE**

### **Entitlement**

All employees, other than casuals, are entitled to paid annual leave. For each year of service with an employer, an employee is entitled to:

- (a) 4 weeks of paid annual leave; or
- (b) 5 weeks of paid annual leave, if:
  - a. a modern award applies to the employee and defines or describes the employee as a shiftworker for the purposes of the NES; or
  - b. an Enterprise Agreement applies to the employee and defines or describes the employee as a shiftworker for the purposes of the NES; or
  - c. the employee qualifies for the shiftworker annual leave entitlement provided by the NES.

### **Accrual**

Annual leave accrues progressively during the year according to the employee's ordinary hours of work and can only be taken at a mutually agreed time. An employer must not unreasonably refuse to agree to a request for taking a period of annual leave.

Annual leave is exclusive of public holidays and other forms of leave (eg. community service leave, personal/carer's leave) but not unpaid parental leave.

## **Payment of Annual Leave**

An employer must pay an employee at their base rate of pay for their ordinary hours of work in the period. On termination of employment, an employee is entitled to be paid for all unused annual leave the employee has accrued.

*Refer: QHA's Annual Leave Fact Sheet*

## **5. PERSONAL / CARER'S LEAVE (INCLUDING COMPASSIONATE LEAVE)**

### **Entitlement to Personal/Carer's Leave**

All employees, other than casuals, are entitled to paid personal/carers leave. For each year of service with an employer, an employee is entitled to 10 days of paid personal/carers leave.

An employee may take paid personal/carers leave for the purposes of personal illness or injury or to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:

- (a) a personal illness, or personal injury, affecting the member; or
- (b) an unexpected emergency affecting the member.

### **Accrual of Personal/Carer's Leave**

An employee's entitlement to paid personal/carers leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year. Personal/carers leave is exclusive of public holidays.

### **Payment for Personal/Carer's Leave**

An employer must pay an employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

### **Entitlement to Unpaid Carer's Leave**

An employee is entitled to 2 days of unpaid carer's leave for each permissible occasion when a member of the employee's immediate family, or a member of the employee's household, requires care or support because of:

- (a) a personal illness, or personal injury, affecting the member;
- (b) an unexpected emergency affecting the member.

Unpaid carer's leave may be taken as:

- (a) a single continuous period of up to 2 days; or
- (b) any separate periods to which the employee and his or her employer agree.

An employee cannot take unpaid carer's leave during a particular period if the employee could instead take paid personal/carers leave.

### **Entitlement to Compassionate Leave**

An employee is entitled to 2 days of compassionate leave for each permissible occasion when a member of the employee's immediate family, or a member of the employee's household:

- (a) contracts or develops a personal illness that poses a serious threat to his or her life; or
- (b) sustains a personal injury that poses a serious threat to his or her life; or
- (c) dies.

An employee may take compassionate leave for a particular permissible occasion as:

- (a) a single continuous 2 day period; or
- (b) 2 separate periods of 1 day each; or
- (c) any separate periods to which the employee and the employer agree.

## Payment for Compassionate Leave

Unless the employee is a casual, an employer must pay an employee at their base rate of pay for the employee's ordinary hours of work in the period.

## Notice and Evidence Requirements

As soon as reasonably practicable, an employee must give an employer notice of the taking of leave. This may be a time after the leave has started. The notice must advise the employer of the period, or expected period, of the leave.

Further, an employee who has given an employer notice of the taking of leave must, if required by the employer, give the employer evidence that:

- (a) if it is paid personal/carer's leave - the leave is taken for a reason allowed under the NES or
- (b) if it is unpaid carer's leave or compassionate leave - the leave is being taken for a permissible occasion.

Refer: QHA's Personal/Carer's Leave and Compassionate Leave Fact Sheet

## 6. COMMUNITY SERVICE LEAVE

### Entitlement

An employee who engages in an eligible community service activity is entitled to be absent from employment for a period during which the employee is engaged in one or more of the following:

- community service activity;
- reasonable travelling time associated with the activity;
- a reasonable period of rest time immediately following the activity, if required by the employee.

Unless the activity is jury service, the employee's absence must be reasonable in all the circumstances.

The following activities are considered to be **eligible community service activities**:

- (a) jury service (including attendance for jury selection) that is required by or under a law of the Commonwealth, a State or a Territory; or
- (b) a voluntary emergency management activity; or
- (c) an activity prescribed in the *Fair Work Regulation 2009*.

An employee engages in a **voluntary emergency management activity** if:

- (a) the employee engages in an activity that involves dealing with an emergency or natural disaster; and
- (b) the employee engages in the activity on a voluntary basis (whether or not the employee directly or indirectly takes or agrees to take an honorarium, gratuity or similar payment wholly or partly for engaging in the activity); and
- (c) the employee is a member of, or has a member-like association with, a recognised emergency management body; and
- (d) either:
  - (i) the employee was requested by or on behalf of the body to engage in the activity; or
  - (ii) no such request was made, but it would be reasonable to expect that, if the circumstances had permitted the making of such a request, it is likely that such a request would have been made.

### Notice and Evidence Requirements

As soon as reasonably practicable, an employee must give an employer notice of the absence. This may be a time after the leave has started. The notice must advise the employer of the period, or expected period, of the absence.

Further, an employee who has given an employer notice of the taking of leave must, if required by the employer, give the employer evidence that the absence is because the employee has been or will be engaging in an eligible community service activity.

## Payment to Employees on Jury Service

All employees, other than casuals, are entitled to be paid for a period of time for which they are absent from employment due to jury service. An employer must pay an employee at the employee's base rate of pay for the employee's ordinary hours of work in the period, up to a maximum of 10 days.

Should the employee's absence exceed 10 days in total, the remainder of the period is taken to be unpaid leave, unless there is an agreement to take annual leave.

An employer may require an employee to give the employer evidence:

- (a) that the employee has taken all necessary steps to obtain any amount of jury service pay to which the employee is entitled; and
- (b) of the total amount (even if it is a nil amount) of jury service pay that has been paid, or is payable, to the employee for the period.

If the employer requires the employee to give evidence of jury service and the employee does not do so, the employee will not be entitled to payment.

If the employee provides the evidence, the amount payable to the employee is reduced by the total amount of jury service pay that has been paid, or is payable, to the employee, as disclosed in the evidence. Jury service pay means an amount paid in relation to jury service under a law of the Commonwealth, a State or a Territory, other than an amount that is, or that is in the nature of, an expense-related allowance.

## 7. LONG SERVICE LEAVE

Long service leave entitlements are provided in accordance with the following industrial instruments:

- An existing award or NAPSA; or
- A Workplace Agreement; or
- The relevant state or territory laws.

In Queensland, the *Industrial Relations Act 1999* (Qld) provides for Long Service Leave ('LSL') entitlements and are as follows:

- 8.6667 weeks paid leave after 10 years of continuous service (differing formulas apply to leave taken whilst employed versus leave paid on termination);
- Further proportionate leave after 5 year periods, for example after the 15<sup>th</sup> year of continuous service etc.

A proportionate LSL payment on termination is available for employees who have completed at least 7 years continuous service if employment is terminated for one of the following reasons:

- (a) employment is terminated due to the employee's death;
- (b) the employee terminates their service for reasons of an illness or incapacity, or a domestic pressing necessity;
- (c) employment is terminated by the employer for a reason other than his/her conduct, capacity or performance.

## Casual Employees

The following timeline confirms entitlement arrangements for casual employees:

### *Prior to 23 June 1990*

- Casual employees did not accrue LSL prior to this date.

### *Between 23 June 1990 and 30 March 1994*

- Only casual employees who worked a minimum of 32 hours during *each and every* four-week consecutive period (between the above dates) were entitled to accrue LSL.

From 30 March 1994

- All casual employees accrue LSL in accordance with the legislation.

Refer: QHA's Long Service Leave Fact Sheet

## **8. PUBLIC HOLIDAYS**

The following days are deemed **public holidays**:

- 1 January (New Year's Day);
- 26 January (Australia Day);
- Good Friday;
- Easter Monday;
- 25 April (Anzac Day);
- the Queen's birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);
- 25 December (Christmas Day);
- 26 December (Boxing Day);
- any other day, or part-day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday.

### **Entitlement to be Absent from Employment on Public Holiday**

An employee is entitled to be absent from employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes. However, an employer may request an employee to work on a public holiday if the request is reasonable.

If an employer requests an employee to work on a public holiday, the employee may only refuse the request if:

- the request is not reasonable; or
- the refusal is reasonable.

In determining whether a request, or a refusal of a request, to work on a public holiday is reasonable, the following must be taken into account:

- the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;
- the employee's personal circumstances, including family responsibilities;
- whether the employee could reasonably expect that the employer might request work on the public holiday;
- 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, work on the public holiday;
- the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork);
- the amount of notice in advance of the public holiday given by the employer when making the request;
- in relation to the refusal of a request - the amount of notice in advance of the public holiday given by the employee when refusing the request;
- any other relevant matter.

### **Payment for Absence on Public Holiday**

If an employee is absent from employment on a day or part-day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day.

If the employee does not have ordinary hours of work on the public holiday, the employee is not entitled to payment for the public holiday. For example, the employee is not entitled to payment if the employee is a casual employee who is not rostered on for the public holiday, or is a part-time employee whose part-time hours do not include the day of the week on which the public holiday occurs.



## **9. NOTICE OF TERMINATION AND REDUNDANCY PAY**

### **Termination**

#### ***Notice of Termination by Employer***

Where termination of employment is at the initiative of the employer, the employer must give the employee written notice of the day of the termination (which cannot be before the day the notice is given). The notice may be given to an employee by:

- (a) delivering it personally; or
- (b) leaving it at the employee's last known address; or
- (c) sending it by registered post to the employee's last known address.

#### ***Amount of Notice Required***

The minimum period of notice required to be given by the employer is as follows:

<b>Employee's period of continuous service with the employer at the end of the of the day the notice is given</b>	<b>Period</b>
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

In addition, if the employee is over 45 years of age and has completed at least 2 years' continuous service with the employer, the employee is entitled to an additional week of notice.

As an alternative to the employee working until the end of the notice period, the employer may elect to pay the employee a payment in lieu of notice of at least the amount the employer would have been liable to pay the employee at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

*Refer: QHA's Termination Provisions Fact Sheet*

#### ***Notice of Termination by Employee***

A modern award or Enterprise Agreement may include terms specifying the period of notice an employee must give in order to terminate the employment.

### **Redundancy**

Prior to the commencement of the NES on 1 January 2010, redundancy pay previously had only been a legal entitlement for award and/or Agreement-covered employees. However, the NES now provides a statutory entitlement to redundancy pay for all permanent employees, except for those employees specifically excluded from receiving redundancy pay under the NES.

#### ***Payment***

An employee is entitled to be paid redundancy pay by an employer if the employee's employment is terminated:

- (a) 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; or
- (b) because of the insolvency or bankruptcy of the employer.

The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee's base rate of pay for his or her ordinary hours of work:

Employee's period of continuous service with employer on termination	Redundancy pay period
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks
At least 9 years but less than 10 years	16 weeks
At least 10 years	12 weeks

The NES recognises an employee's service with their employer prior to 1 January 2010, provided the terms of an award, Agreement or the employee's contract of employment included an entitlement to redundancy pay. Where the award, Agreement or contract of employment did not include an entitlement to redundancy pay, service for the purposes of calculating redundancy pay under the NES commences from 1 January 2010 only.

In most cases this will primarily affect award/agreement-free employees who did not have a previous entitlement to redundancy pay under the conditions of their contract of employment.

#### ***Variation of Redundancy Pay for Other Employment***

An employer may make an application to the Fair Work Commission ('FWC') to have the amount of redundancy pay owed to the employee reduced to an amount (which may be nil) that the FWC considers appropriate because the employer has obtained other acceptable employment for the employee or cannot pay the amount.

#### ***Employees Excluded from Redundancy Pay***

An employer does not have an obligation to pay redundancy pay if immediately before the time of the termination, or at the time when the person was given notice of the termination:

- (a) the employee's period of continuous service with the employer is less than 12 months;
- (b) the employer is a small business employer (employs fewer than 15 employees);
- (c) on transmission of business where an employee was offered a position with new employer that was substantially similar to, and no less favourable than, the conditions with the old employer and -
  - i. the employee rejects the offer with the new employer; and
  - ii. The offer recognises the employee's service with the old employer.

#### ***Termination and Redundancy Provisions***

The notice of termination and redundancy provisions do not apply to any of the following employees:

- (a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;
- (b) an employee whose employment was terminated because of serious misconduct;
- (c) a casual employee;
- (d) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement.

Further an employee will not be entitled to redundancy pay where, immediately before the time or at the time when the person was given notice of the termination due to redundancy, the employee's period of continuous service with the employer is less than 12 months or where the employer is a small business employer.

Refer: QHA's Redundancy Fact Sheet

## **10. FAIR WORK STATEMENT**

The Fair Work Statement is published by FWC and contains information about the following:

- (a) the National Employment Standards;
- (b) modern awards;
- (c) agreement-making;
- (d) the right to freedom of association;
- (e) the role of FWC and the Fair Work Ombudsman;
- (f) termination of employment;
- (g) individual flexibility arrangements; and
- (h) right of entry.

An employer must give each employee the Fair Work Information Statement before, or as soon as practicable after, the employee commences employment.

By way of evidence that the Fair Work Information Statement has been distributed to employees, it is recommended that the employer maintain records of this nature.

### **Further Assistance**

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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