

A large safety net structure is shown against a purple background. The net is made of a dark material with a grid pattern and is supported by a vertical post. The net is draped over the post and extends to the right, creating a series of vertical folds and a textured surface. The background is a solid purple color with a slightly grainy texture.

THE SAFETY NET BEST PRACTICE GUIDE

Australia



The safety net consists of the 10 National Employment Standards (NES) and modern awards, and sets the minimum terms and conditions of employment for all employees in the federal system. Set out below is a snapshot of particular elements of each NES entitlement.

COMPLIANCE WITH THE NES

An employer must comply with the NES in relation to each of its employees.

Any attempt to exclude the NES or provide less favourable entitlements will not be effective as the NES entitlement will simply prevail. Such an attempt may also put the employer at risk of breaching the NES, which may result in court proceedings, the imposition of a penalty and/or an order to make good any shortfall.

An employer can agree to supplement the NES by providing more favourable entitlements. Machinery terms that are ancillary or incidental to a NES entitlement are also permitted, eg specifying the manner in which an employee must apply for annual leave. Terms that are ancillary or incidental to the NES or that supplement the NES must not be detrimental to the employee.

Specific provisions in the NES allow modern awards or enterprise agreements to deal with issues that may otherwise be contrary to the NES, eg allowing for the cashing out of paid annual leave.

KEY POINTS

- The minimum entitlements in the NES cover standard conditions such as hours of work, leave, public holidays, notice of termination and redundancy pay.
- 123 modern awards came into effect on 1 January 2010 following an extensive review process that streamlined and simplified thousands of existing awards.
- The modern awards are either industry based or apply to certain occupations.

A SNAPSHOT OF THE NES

Maximum weekly hours of work

An employer may require or request an employee to work additional hours, but only if they are reasonable. An employee may refuse to work the additional hours if they are not reasonable. A non-exhaustive list of factors to take into account when determining reasonableness is included in the NES.

Requests for flexible working arrangements

An employer may refuse a request for flexible working arrangements made by an employee on 'reasonable business grounds'. If it does so, an employee cannot challenge the decision under the *Fair Work Act 2009* (Cth) (FW Act) unless the employer and employee have agreed to Fair Work Australia (FWA) or an independent third party dealing with the matter under a contract of employment, enterprise agreement or other written agreement. Depending on the circumstances, an employee may have a remedy available to them under applicable discrimination legislation if their request is refused.

The NES does not specifically identify what may or may not be "reasonable business grounds". Reasonableness should be assessed in the circumstances that apply when the request is made.

Examples of reasonable business grounds include:

- The effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service
- The inability to organise work among existing staff
- The inability to recruit a replacement employee or the practicality or otherwise of the arrangements that need to be put in place to accommodate the employee's request.

Parental leave

Under the NES, an employee is entitled to unpaid birth-related or adoption-related leave. The separate labels of maternity and paternity leave are no longer used.

The total period of leave may be 24 months from the date of birth or adoption. The entire period could be taken by one employee or by each member of an "employee couple" separately taking 12 months' leave.

If an employee, either on their own or as a member of an employee couple, wishes to take more than 12 months' leave, the employee may request a longer period from their employer. The period of the extension cannot exceed 12 months less any unpaid parental leave taken, or intended to be taken, by the other member of the employee couple.

An employer may refuse an employee's request for additional parental leave, but only on reasonable business grounds. The comments made earlier about FWA dealing with disputes and examples of reasonable business grounds equally apply here.

The period of "concurrent leave" (the period of leave that may be taken at the same time by the employee and the employee's spouse or de facto partner around the date of birth or adoption) has also been increased to three weeks.

Government-funded paid parental leave became available from 1 January 2011. The government-funded scheme provides eligible working parents with 18 weeks of pay at the minimum weekly wage. From 1 July 2011 employers are expected to act as paymasters under the scheme.

CASE STUDY I - PARENTAL LEAVE

Trevor and Glenys can each take up to 12 months of unpaid parental leave after the birth of their child, ie a total of 24 months so long as the periods do not overlap (but for an initial three week period) and one period starts after the other period ends.

If only Glenys is to take leave, she could take 12 months' leave and could take an additional 12 months' leave if she wanted to, subject to her employer approving the additional period. If Glenys takes the additional 12 months' leave, Trevor is not entitled to any unpaid parental leave.

If Glenys wants to take 18 months' leave, she must seek her employer's approval for the additional six months' leave and Trevor may take six months' leave.

Glenys and Trevor would need to apply to the Commonwealth Family Assistance Office for paid parental leave. The employer would receive the money from the government and pay the paid parental leave to the employee directly as a workplace entitlement.

Annual leave

The standard entitlement to four weeks of paid annual leave applies. The NES sets out arrangements for the cashing out of and directions to take leave.

The NES makes it clear that annual leave may only be cashed out in accordance with terms included in a modern award or enterprise agreement or by agreement between an employer and an award/agreement-free employee.

The cashing out of paid annual leave is not permitted if an award or agreement that applies to the employee does not include cashing out provisions. Specific conditions must be met to enable an employer and an award/agreement-free employee to agree to cash out leave.

Leave is to be taken at a time or times to be agreed between the employer and employee. An employer may also require an employee to take a period of annual leave in accordance with terms that may be included in a modern award or enterprise agreement or as agreed with an award/agreement-free employee, but only if the requirement is reasonable.

Personal/carer's leave and compassionate leave

The standard entitlement to ten days of paid personal/carer's leave and compassionate leave applies, together with the entitlement to unpaid carer's leave for employees who have exhausted their entitlement to paid leave. The entitlement to unpaid carer's leave is extended under the NES to casual employees. The ten day per year cap on the amount of paid carer's leave that could be taken no longer applies.

An employee may also cash out their entitlement to paid personal/carer's leave in accordance with express terms set out in a modern award or enterprise agreement.

The standard entitlement to two days of paid compassionate leave per occasion applies, and casual employees may take unpaid compassionate leave for the same period.

Community service leave

Employees (including casual employees) who engage in an eligible community service activity are entitled to be absent from their employment to engage in the activity.

An eligible community service activity includes:

- Jury service
- Voluntary emergency management activity (eg voluntary fire fighting).

The NES sets out the manner and circumstances in which an employee (other than a casual employee) is entitled to be paid while absent on jury service. The entitlement to payment under the NES is capped at 10 days in total, although the entitlement to payment for jury service under an applicable state or territory law would continue to apply if the period of jury service continues beyond the 10-day period.

The NES also does not exclude a state or territory law that provides more beneficial entitlements than the entitlements under the community service leave NES (eg state laws that entitle a casual employee to be paid for jury service).

Long service leave

The current long service leave (LSL) provision in the NES is a transitional provision and will eventually be replaced when the Federal Government develops a uniform national LSL standard. The Government has stated the LSL standard will be developed in consultation with the states and territories.

If any employee does not have an entitlement to LSL under the NES, then the entitlement set out in the applicable state or territory LSL legislation will apply.

Importantly, the state or territory LSL legislation does not form part of an employee's entitlement to LSL under the NES.

An employee will be entitled to LSL under the NES in accordance with any "applicable award-derived LSL terms". In limited circumstances, parties may apply to FWA to preserve genuine agreement-based national LSL schemes.

Public holidays

An employee is entitled to be absent from work on a day or part-day that is a public holiday (as prescribed by the NES) in the place where the employee is based for work purposes.

If an employee is absent from work on a day or part-day that is a public holiday, the employee is entitled to be paid at their base rate of pay for their ordinary hours of work on that day. An employee is not entitled to any payment for absence on a public holiday if they would not have ordinarily worked on that day.

For example, if a public holiday falls on a Tuesday and a part-time employee is only rostered to work on Wednesdays and Fridays, the employee is not entitled to payment for the public holiday that falls on a Tuesday.

Notice of termination and redundancy pay

The length of notice required to be given to an employee will depend on the duration of the employee's period of continuous service. At the lowest end, an employee who has been with their employer for less than a year is entitled to one week's notice. At the highest point, if an employee has been continuously employed with an employer for more than five years, they are entitled to four weeks' notice. An employee who is over 45 years old is entitled to an extra week of notice if they have at least two years of continuous service. Written notice of the day of termination must be given.

Employees are entitled to redundancy pay when their employment is terminated at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, or because the employer is bankrupt or insolvent. The entitlement is based on a sliding scale and calculated by reference to the length of the employee's continuous service on termination. An employee who has worked more than one year but less than two years is entitled to four weeks' pay. An employee who has been employed continuously for over two years but less than five years is entitled to eight weeks of redundancy pay. An employee who has been employed continuously for over five years but less than 10 years is entitled to 16 weeks of redundancy pay.

The length of an employee's service prior to 1 January 2010, when the NES came into operation, is only counted if the employee had an entitlement to redundancy pay under some other instrument, such as a modern award (or enterprise award), agreement or employment contract.

The NES standards for notice of termination and redundancy do not apply to employees such as casual or fixed-term employees, or to an employee summarily dismissed for serious misconduct.

Fair Work Information Statement

The Fair Work Ombudsman has prepared the form of the statement that must be given to an employee who starts employment.

The Fair Work Information Statement can be viewed at www.fairwork.gov.au

Q&A – IMPORTANT CONCEPTS AND DEFINITIONS FOR THE OPERATION OF THE NES

What are an employee's "ordinary hours of work"?

The ordinary hours of work for an employee to whom a modern award or enterprise agreement applies will be the ordinary hours specified in the award or agreement.

Modern awards are required to prescribe ordinary hours, or a means of determining them. While not a requirement, enterprise agreements should also do likewise.

In general terms, the ordinary hours of work for an award/agreement-free employee are the hours agreed as ordinary hours between the employee and his or her employer. Further rules enable the calculation of ordinary hours where no such agreement is reached and also provide protection for the employee where their agreed hours are less than their usual hours of work.

Who is an "award/agreement-free employee"?

An award/agreement-free employee is an employee to whom neither a modern award, an enterprise agreement or a "transitional instrument" (eg a workplace agreement, an Australian Workplace Agreement (AWA), or a pre-reform certified agreement) applies.

What is an employee's "base rate of pay"?

An employee's "base rate of pay" is the rate payable to the employee for his or her ordinary hours of work, but does not include the following:

- Incentive-based payments and bonuses
- Loadings
- Monetary allowances
- Overtime or penalty rates
- Any other separately identifiable amounts.

What is the relevance of an employee's "base rate of pay" under the NES?

An employee's "base rate of pay" is relevant to calculating the amount payable to an employee when they take the various forms of leave under the NES. This includes paid annual leave, paid personal/carer's leave, payment for an absence from work on a public holiday or when a female employee takes paid "no safe job" leave (an entitlement under the parental leave NES).

What is an employee's "full rate of pay"?

An employee's "full rate of pay" is the rate of pay payable to the employee, including all of the following:

- Incentive-based payments and bonuses
- Loadings
- Monetary allowances
- Overtime or penalty rates
- Any other separately identifiable amounts (eg amounts otherwise payable to an employee that the employee has agreed, under a salary sacrifice or other arrangement, to forgo in order to receive other benefits).

What is the relevance of an employee's "full rate of pay" under the NES?

An employee's "full rate of pay" applies in relation to two NES entitlements. An employee who receives a payment in lieu of notice on the termination of his or her employment is entitled to be paid at their full rate of pay, as is a pregnant female employee who is transferred to an appropriate safe job (an entitlement under the parental leave NES).

Who is an employee's "de facto partner"?

This term refers to a person who, although not legally married to the employee, lives with the employee in a relationship as a couple on a genuine domestic basis, whether the employee and the person are of the same or different sexes, and also includes a former de facto partner of the employee.

What is the relevance of the definition of "de facto partner" for the NES?

The definition of "de facto partner" has the effect of ensuring that entitlements under the NES to carer's leave, compassionate leave and birth-related unpaid parental leave apply equally to members of both sexes and same-sex couples and their children.

MODERN AWARDS

Modern awards form the second element of the safety net.

Who is covered?

The modern awards replace pre-reform federal awards (save for enterprise awards), notional agreements preserving state awards (NAPSAs) and state reference transitional awards.

The majority of Australian employees are likely to be covered by a modern award. The modern awards apply to employees and employers on an industry wide or occupational basis. However, modern awards will not generally cover those employees who, because of the seniority of their role, have not traditionally been covered by awards. Modern awards will also not apply to high income employees who have 'guaranteed annual earnings' in excess of a threshold amount (\$123,300 for the 2012/13 year and adjusted each year on 1 July). This exemption will only apply if the employer provides a written guarantee to pay the employee annual earnings at or in excess of the threshold.

It is also important to remember that whilst a modern award will cover the majority of employees, it does not mean it will apply directly to their employment. There is a number of excluded employees including those covered by workplace agreements (but not including pre-reform certified agreements), enterprise awards, preserved state agreements and AWAs.

What do modern awards cover?

Modern awards can supplement the NES and also include a further ten minimum terms and conditions of employment that cover:

- Minimum wages
- Types of employment (eg full-time, part-time, casual)
- Overtime and penalty rates
- Work arrangements (eg rosters)
- Annualised wage arrangements
- Allowances
- Leave, leaving loading
- Superannuation
- Consultation and dispute resolution
- Outworkers
- Industry-specific redundancy.

Another important aspect of modern awards is the scope to make individual flexibility agreements (IFAs) with any award-covered employees. These IFAs can make individual arrangements that could address example overtime, penalty rates, hours of work and allowances in terms different from the modern award. There are strict conditions that apply to the making of these agreements.

Important to the BOOT

Modern awards also underpin the collective bargaining process for award-covered employees, providing the benchmark against which enterprise agreements will be tested for the "better off overall" test.

IMPORTANT TRANSITIONAL ARRANGEMENTS FOR MODERN AWARDS

Arrangements have been put in place to enable the transition to modern awards. Modern awards contain “model transitional provisions”, which include a five-year phase-in period (with 20% annual increments over this period) in relation to changes in entitlements as a result of the modern awards. These transitional provisions commenced on 1 July 2010 (six months after the modern awards have commenced). The matters included in the model provisions relating to phase-in are:

- Minimum wages, including wages for junior employees, employees to whom training arrangements apply and employees with a disability
- Casual and part-time loadings
- Saturday, Sunday, public holidays, evenings and other penalties
- Shift allowances.

Although modern awards have been in operation since 1 January 2010, the phase-in period commenced on 1 July 2010. The challenge for employees is to correctly apply the transitional provisions as they are phased in over the next five years.

Effect on take-home pay

The “model transitional provisions” also make it clear that the making of the award or the operation of the transitional arrangements are not intended to result in a reduction in the take-home pay of employees covered by the award. In the event that this occurs the employee has a right to apply to FWA for take-home pay orders.

Enterprise awards

Many employers operate under enterprise-specific awards. For these employers the opportunity exists to apply to FWA to modernise their enterprise awards. Enterprise awards that have not been modernised will not apply after 31 December 2013.

PENALTIES

It is important that employers take steps to ensure compliance with the safety net (NES and modern awards). The Fair Work Ombudsman has a clear charter to enforce compliance and the FW Act imposes penalties (up to \$6,600 for an individual and \$33,000 for a corporation) for breaches of terms of the NES or a modern award.

COMPLIANCE CHECKLIST

- Have you reviewed your employment entitlement and leave policies and procedures to ensure they are compliant with the NES and modern awards?
- Have you made arrangements to communicate the changes to entitlements and respond to queries?
- Have you reviewed the modern awards that apply to your workers?
- Have you considered amending your contracts for high-income employees to provide for a ‘guaranteed annual earnings’ in excess of the threshold?
- Are your managers informed of the factors that may determine whether an employee’s request for flexible working arrangements or additional parental leave is reasonable?
- Are your employment contracts up to date with the new changes?

HOW CAN DLA PIPER ASSIST?

Our team has many expert lawyers who can help you comply with the safety net.

For more information, please contact:

Andrew Ball, Partner

T +61 2 9286 8449
andrew.ball@dlapiper.com

Rick Catanzariti, Partner

T +61 3 9274 5810
rick.catanzariti@dlapiper.com

Allan Drake-Brockman, Partner

T +61 8 6467 6205
allan.drake-brockman@dlapiper.com

Murray Procter, Partner

T +61 7 3246 4062
murray.procter@dlapiper.com

Pattie Walsh, Partner

T +61 2 9286 8197
pattie.walsh@dlapiper.com

www.dlapiper.com

DLA Piper is a global law firm operating through various separate and distinct legal entities.

Further details of these entities can be found at www.dlapiper.com

Copyright © 2013 DLA Piper. All rights reserved. | AUG13 | 2604738

This publication is intended as a first point of reference and should not be relied on as a substitute for professional advice. Specialist legal advice should always be sought in relation to any particular circumstances and no liability will be accepted for any losses incurred by those relying solely on this publication.