Employment SERVICES
not just a job

Fair Work Act: Information for Employment Services Workers

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The FWA removes many provisions that existed in Workchoices - which Australian working people believed were totally unjust - particularly the ability for employers to use statutory individual agreements – so no more Australian Workplace Agreements (AWAs).

At its heart the FWA strives to be fairer, ensures that employers must bargain in 'good faith', provides a strong safety net of legislated national employment standards and modern awards, allows workers to be represented by their union in collectively bargaining for an agreement, and sets up a strong independent umpire known as Fair Work Australia.

The new FWA provides 10 basic rights for Australian workers known as the National Employment Standards (NES). These are in addition to the conditions in your award. The NES include:

- A 38 hour week;
- A right to request flexible working arrangements for people who need to care for children;
- Guaranteed right to 4 weeks annual leave per year;
- Community service leave;
- Parental leave;
- Personal/carer's leave;
- Public holidays;
- Long service leave;
- Provision of Fair Work information Statement to all new employees;
- Notice of termination and redundancy.

The modern award (which comes into effect on 1 January 2010) will build on these where our industry standard is better.

Fair Work Australia

Fair Work Australia is the new 'independent umpire' and carries out similar functions to the old Industrial Relations Commission. It replaces the many organisations that existed under Work Choices. Its job is to approve enterprise agreements, assist in settling disputes, hear and resolve unfair dismissal and general protections cases, and update modern awards among other things. Importantly, Fair Work Australia can assist with Enterprise Bargaining.

Modern Awards

A modern Award for the employment services sector was finalised in early December 2009 called the 'Labour Market Assistance Industry Award 2010'. The ASU will produce a bulletin on the modern award for the sector regarding the conditions contained in the new award and its implications it will have for the employment sector.

By the first of January 2010, just about every worker in the employment sector will be covered by a new Modern Award which will provide a safety net for workers in addition to the NES.

The minimum wages in the award will be adjusted by Fair Work Australia each year and the whole award reviewed every four years. But it will remain an important safety net for those workers who cannot get an Enterprise Bargaining Agreement (EBA).

To improve on the award and lock in industry standard rates of pay and conditions, workers must collectively bargain, that is - get an EBA.

Enterprise Bargaining (EBAs)

An EBA will replace the Award, and before an EBA can be registered, Fair Work Australia must check that a worker will be better off overall compared with the new Award. This test will be known as the better off overall test (the BOOT).

An EBA can have any term in it agreed by the parties, so long as it relates to the employment relationship; thus the previous restricted matters no longer apply. For example, an agreement can provide for paid union training leave and things like seniority. Importantly, an agreement can require that a subcontractor employee is paid the same rates and conditions as an employee of a principal contractor. This will prevent workers being brought into a company in order to undercut the pay and conditions of existing permanent workers.

The Union's Role in Bargaining

The union is given a primary role in bargaining. Employers are no longer allowed to do green fields agreements without the union movement. Unions can also be involved in multi employer agreements. Unions will also be the default bargaining representatives for members in EBA negotiations. Employers will no longer be able to shut the union out from representing members in negotiations for improved wages and conditions.

A•S•U

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Good Faith Bargaining

Good faith bargaining is a new idea intended to make sure that agreement making is carried out fairly, with no 'capricious' conduct. This includes protection against any actions or repercussions against workers trying to get better pay. Employers must negotiate with unions in good faith, and parties must ensure they give each other relevant information, consider the material put to them, turn up to meetings, etc. If good faith bargaining fails, then Fair Work Australia can determine an agreement – that is, arbitrate.

If your boss does not want to bargain, the union can go to Fair Work Australia and get bargaining orders. It can't force your boss to agree to an EBA but it can get them to come to the table.

If your boss refuses to negotiate at all the union can go to Fair Work Australia to get a Majority Support Determination to prove that the workers do want a collective agreement.

General Protections

The Fair Work Act also introduces new provisions called 'general protections'. The general protections consolidate and streamline several protections that were previously available under the Workplace Relations Act 1996 and broaden them to make them easier to understand and apply. The general protections include upholding principles of freedom of association, and protections against unlawful termination, discrimination, and sham contracting among other things.

The general protections make it illegal for a boss to take adverse action, including dismissal, against a worker because s/he has a workplace right, or chooses to exercise or not exercise that workplace right. Workplace rights include things like the right to be involved in lawful industrial action and the right to be a member of a union. Importantly, a worker's right to make an inquiry or complaint in relation to their employment is a workplace right under the general protections. The general protections also make it illegal for a boss to take adverse action against a worker for a discriminatory reason, such as the worker's sex or nationality, or to sack a worker because they are temporarily absent from work due to sickness or injury.

These provisions apply to prospective workers, as well as those already employed.

Unfair dismissals

One of the biggest changes under Fair Work Australia is to ensure everyone covered by the new laws has unfair dismissal rights. A worker who is employed by a company with less than 100 workers now has a right to have their matter heard by Fair Work Australia, if they have served a minimum employment period.

What is more, a boss can no longer use the Work Choices excuse of 'operational reasons'. However, workers can still be dismissed in cases of genuine redundancy. A redundancy is genuine if the employer no longer requires the work to be done by anyone and the employer has complied with any obligation to consult about the redundancy in a modern award or enterprise agreement that applies to the worker. A redundancy is not genuine if it would have been reasonable in all circumstances for the worker to be redeployed in the business of an associated entity.

The new minimum employment periods for access to unfair dismissal protections are

- Small business (less than 15 workers)
  12 months employment
- All other business
  6 months

Part-timers and casuals working on a regular and systematic basis with a reasonable expectation of ongoing employment have the same right to unfair dismissal protections as full time workers.

Note: The new unfair dismissal system is designed to settle matters quickly and informally, and workers must get their applications in within 14 days.

How the ASU can help

The ASU provides advice and information to members regarding workplace rights and obligations. ASU members can contact their State ASU office for more information. If required the ASU provides members with individual representation.

To obtain the contact details of your local ASU Branch visit the ASU national website www.asu.asn.au or contact the JSA National Project Coordinator on (03) 9342 1400 or help@employmentservicesunion.org.au

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