



# Employing someone

An easy guide for  
**small business employers**



A guide to key employment matters for small business owners to develop a fairer, flexible and more productive workplace.



## How to use this guide

This publication provides an overview of the key employment matters that small business owners must consider when employing someone.

It is intended as a guide only – and should not be considered as legal advice.

This guide contains a number of useful checklists and notes to help you develop a fairer, flexible and more productive workplace.

A reference guide to agencies offering assistance in employment matters is inside the back cover.

For further information on any of the issues raised in this publication, small business owners are encouraged to contact Wageline on **1300 655 266**.

## Important note

### State versus Federal jurisdiction

Western Australian businesses and their respective employees are covered by either the State or Federal labour relations systems.

This depends entirely on whether the business concerned is a constitutional corporation.

It is important that you identify which system applies to your business - this will determine the relevant legislation, employment obligations and options.

The information provided in this publication deals primarily with the State labour relations system (unless otherwise stated). Contact Wageline on **1300 655 266** for further assistance.

**Disclaimer:** The Department of Consumer and Employment Protection (DOCEP) has prepared the following information to provide advice and assistance to employers. It is provided as a general guide only and is not designed to be comprehensive nor to give legal advice. Readers should not rely on the contents of the following information without first obtaining legal advice. DOCEP does not accept liability for any claim which may arise from any person acting on, or not acting on, this information.

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# Offering employment

## When is an employment contract created?

An employment contract is generally considered to have been made between an employer and employee if:

- there is an offer of employment;
- the offer is accepted;
- each party has accepted an obligation to perform his or her part of the agreement eg the employee will receive a wage in return for working;
- both parties intend to create a legally enforceable bargain eg the contract will be binding;
- each party has the capacity to enter into a contract eg the employee is of sound mind;
- both parties truly consent to the terms of the agreement; and
- the contract does not contradict a legal requirement eg paying an employee less than the minimum wage.

There are a number of rules that relate to making an employment contract. If you are unsure of what is required, it is advisable to seek legal advice.



## Does the employment contract have to be in writing?

An employment contract does not have to be in writing. However, it may be difficult to prove a particular aspect of the employment relationship without a written contract.

Developing a written contract is good practice, especially if:

- the employee is not covered by an award or agreement; or
- you wish to provide an entitlement above the relevant award or agreement.

The basic wage and entitlements for some employees are detailed in the relevant award or agreement. Some employers simply choose to stipulate that the award or agreement forms the contract of employment through a letter of confirmation.

## What should be included in a contract of employment?

The purpose of a written employment contract is to specify rights, obligations and conditions of employment.

You should ensure the contract outlines the key employment conditions, while also meeting all required legal obligations eg those found in legislation and/or the relevant agreement or award.

The employment contract should be written in plain English, using terms which relate to the workplace that are easily understood.

You may choose to include some of the following information:

## Basic information

- Name and details of the employer and employee
- Place of work
- Job title
- Employment status eg full time, part time or casual
- Start/end dates
- Length of probationary period
- Date of birth of employee
- Who employees report to in the organisation

## Employment conditions

- Rate of pay
- Hours of work and what arrangements apply for additional hours
- Rosters /shift work
- Meal breaks
- Leave entitlements
- Allowances
- Flexible work arrangements
- Performance bonuses
- Travel arrangements eg accommodation

## Other issues

- Key job duties and/or performance standards
- Training and development
- Uniform or dress standards
- Arrangements in relation to parking or use of a company vehicle
- Safety issues
- Customer service requirements
- Confidentiality
- Company policies and rules eg code of conduct
- Use of work equipment

For employers operating in the State system, the State minimum conditions of employment, along with any relevant award or agreement, are implied into most employment contracts.

## Steps for developing a contract of employment

The following is a brief overview of the steps involved in establishing a written employment contract for new employees.

Step	
Establish whether an award or agreement applies to the employee by calling Wageline on 1300 655 266.	✓
Establish employment conditions appropriate for the job, which are consistent with award/ agreement provisions.	✓
Ensure that these comply with legislative and other employment obligations.	✓
Draft the contract document, preferably in plain English.	✓
Negotiate terms of the contract as required.	✓
Discuss the contract with the new employee to make sure each party understands all conditions, pay and obligations.	✓
When agreement is reached, give employee a copy of the contract to the employee and keep the original on file.	✓

# Types of employment

It is important that you have the right mix of employment arrangements to suit the needs of your business.

It is also essential that employees are classified correctly, with their status or type of employment actually matching the nature of the working arrangements. Getting it wrong can be costly.

This chapter explains the employment options available.

## Full time employment

Full time employees generally work 38 hours a week, depending on the relevant award, agreement or contract of employment.

These employees are generally entitled to four weeks of annual leave and two weeks of sick leave, depending on the relevant award, agreement or contract of employment.

Engaging full time employees is an option when your business has a consistent workflow or specific projects to complete.

## Part time employment

Part time employees generally work fewer hours than full time employees.

Part time employees accrue annual and sick leave based on the average number of hours worked per week.

Part time employment allows employers to provide for job sharing and to accommodate employees with family responsibilities or other commitments such as study. It is a useful option for businesses that experience regular peaks and troughs in the weekly or daily workload.

## Casual employment

Casual employees are engaged and paid by the hour, with no guarantee of ongoing employment.

Casual employees receive a loading in addition to the ordinary rate of pay to compensate for lack of other employment benefits such as security of employment, sick leave, annual leave and payment for public holidays. Such employees are still entitled to long service leave.

Casual employment may be an appropriate option:

- at busy times or peak periods that require a larger labour force;
- for seasonal work;
- when other employees are sick or on leave; or
- if the business has variable demand.

## Fixed term

Fixed term or contract employees are generally hired for an agreed length of time to do work on a specific task or project.

Fixed term employees are generally entitled to the same wages and conditions as other arrangements, but on a proportionate basis for the period of their employment.

When fixed term employees are hired, it is important that the length of employment is agreed to in advance and formalised in writing. Fixed term employment may also be an appropriate option when replacing staff absent for a set period of time eg long service leave or parental leave.

## Probationary employment

A probationary period may be used at the commencement of employment to assess whether or not an employee is suitable and capable of doing the work for which they were employed.

During this time (often between one and three months), both the employer and employee have rights and duties associated with the employment relationship eg wages, annual leave.

To gain maximum benefit from a probation period, it is important that employers and employees negotiate and agree, preferably in writing, on issues such as:

- the length of the probationary period;
- how employee performance will be assessed; and
- employer expectations and obligations.

## Job sharing

A job sharing arrangement occurs when two or more part time employees share a full time position. This is a great way to provide workplace flexibility.

Job sharing arrangements are ideal for:

- people returning from parental leave;
- mature age workers who no longer wish to work full time hours;
- people with caring responsibilities; or
- employees who study.

## Commission

Employees working on commission receive a percentage for each sale they make.

Employees in this category may be paid on a 'commission only' basis, which means they only receive money when they sell or achieve a specific target.



Employees can also be employed on a 'commission and retainer' basis, where they receive a fixed amount with an additional commission paid if specific sales targets are achieved.

## Piece rate

Piece rate employees receive a set amount for completing a specific task that can be counted or measured. For example, payment based on number of boxes of fruit packed or tonnage of timber cut. This type of employment arrangement is commonly associated with seasonal work.

## Apprenticeships

An apprenticeship is a structured program that incorporates on and off the job training for a fixed duration. Successful completion of an apprenticeship leads to a trade or nationally recognised qualification.

Apprenticeships are registered with the Department of Education and Training.

### Important note: Non-employment arrangements

There is a range of work options available that do not necessarily form an employment relationship between an employer and employee, including:

- trial work;
- work experience;
- labour hire; and
- subcontracting.

Employers should seek independent advice when considering any of the following options. Failing to correctly identify workers as employees can result in significant penalties and back payments.



### What is the right type of employment option for your business?

This can be a difficult question to answer, as every business has different demands. The following checklist outlines some questions you should ask before hiring an employee.

#### Questions to ask

- Does the relevant award or agreement require you to engage an employee in a specific way eg it might require the employee to be engaged on a full time basis?
- Are you looking for a short term solution or a long term development of your workforce?
- What type of hours will be required from the employee?
- What are the employee's work life balance needs?
- Do you envisage that there will be constant and ongoing work to justify a full time employee?
- Is the work seasonal or piece rate?
- Is there a need for greater flexibility within your workforce that might be addressed through a job sharing arrangement or part time employment?
- Will engaging a trainee or apprentice assist in retaining skilled employees in the long term?
- Have you calculated the cost of engaging an employee on a full time, part time or casual basis?

# Awards and agreements

The Western Australian labour relations system has been designed to balance the rights and obligations of employees and employers. Fairness and flexibility are key ingredients in the development of well managed workplaces.

Employees in Western Australia are covered by either the State or Federal labour relations systems. This chapter provides information on employment options in the State system.

## Important note: Federal employment arrangements

Many Western Australian businesses operate under the Federal industrial relations system as regulated by the *Workplace Relations Act 1996*. Information on federal employment arrangements can be obtained from [www.airc.gov.au](http://www.airc.gov.au)

Employees in the State system can be employed under:

- the *Minimum Conditions of Employment Act 1993*;
- a State award;
- an industrial agreement;
- an Employer Employee Agreement (EEA); and/or
- a 'common law' contract of employment.

## Minimum conditions of employment

The *Minimum Conditions of Employment Act 1993* (the Act) establishes the minimum standards of pay and conditions for employees in Western Australia.

For award free employees, the Act provides an important safety net for negotiating employment contracts. The Act is implied into most employment arrangements in the State labour relations system.

Any contractual provision that is less favourable to employees than a minimum condition of employment has no effect. Most awards and agreements generally provide conditions equal or superior to the Act.

The Act provides for minimum conditions in relation to:

- minimum wage;
- reasonable working hours;
- annual leave;
- sick leave;
- carer's leave;
- bereavement leave;
- parental leave;
- public holidays;
- significant effect and redundancy; and
- record keeping.

## State awards

Awards are binding documents outlining the wages and conditions of employment for groups of employees in an industry or class of work. There are more than 300 registered State awards covering a wide range of industries and occupations.

State awards are registered with the Western Australian Industrial Relations Commission (WAIRC), and can be negotiated by unions,

employees, one or more employers, or an employer association.

Awards contain provisions for various employment matters, including:

- who the award applies to;
- types of employment (eg part time, full time, casual);
- wages and penalty rates;
- job classifications;
- hours of work;
- leave entitlements;
- allowances; and
- dispute settlement procedures.

Employers and employees cannot contract out of award entitlements by agreeing to lesser conditions or ignoring the award. Agreements providing for pay and conditions above the award are allowed.

Copies of state awards can be downloaded from the WAIRC at [www.wairc.wa.gov.au](http://www.wairc.wa.gov.au). Registered copies of the State's most common 50 awards can be purchased online from the State Law Publisher at [www.slp.wa.gov.au](http://www.slp.wa.gov.au). Wage summaries for common state awards may be viewed on the DOCEP website at [www.docep.wa.gov.au](http://www.docep.wa.gov.au).

## Industrial agreements

Industrial agreements are collective arrangements establishing conditions of employment for specific employees and businesses.

Industrial agreements are negotiated between unions and employers and registered with the WAIRC. Once registered, the agreement's provisions apply to all employees in the workplace who perform work covered by the Industrial agreement.

Industrial agreements can work in conjunction with, or entirely replace, an existing award. If

there is inconsistency between the provisions of an award and an industrial agreement, the agreement will generally prevail unless otherwise stated.

## Employer Employee Agreements

Employer Employee Agreements (EEAs) are individual agreements between an employer and an employee that deal with the terms and conditions of employment. EEAs operate to the exclusion of any award unless otherwise provided in the agreement.

EEAs:

- must meet a no disadvantage test to ensure the employee is not disadvantaged in comparison with a relevant or comparable award;
- cannot be offered as a condition of employment, promotion or transfer;
- operate for up to three years; and
- must be registered with the WAIRC.

## Common law employment contracts

The legal relationship existing between an employer and employee is called a common law employment contract. Most of these contracts are read in conjunction with the *Minimum Conditions of Employment Act 1993* and any relevant award or agreement.

Common law contracts can also include conditions of employment not covered in legislation, awards or agreements. This may include performance standards and reviews, disciplinary procedures and make reference to external company policies and procedures.

## What applies to my workforce?

It can be difficult to determine which award or agreement applies to your employees. Call Wageline on 1300 655 266 for assistance.

# Minimum conditions of employment

The *Minimum Conditions of Employment Act 1993* (the Act) outlines a number of employment conditions that apply to most employees engaged in the Western Australian labour relations system.

## Important note: Awards and agreements

Awards and agreements in both the State and Federal labour relations systems may provide for greater entitlements than outlined here. Please contact Wageline on 1300 655 266 for further information.

## Minimum wage

All full time adult employees (21 years or older) must be paid at least the minimum wage prescribed by the Act.

Part time employees receive an hourly rate of pay calculated by dividing the minimum weekly wage by 38. Casual employees receive a 20 per cent loading on top of the minimum hourly wage. Junior employees receive a percentage of the minimum wage based on their age.

Special minimum rates of pay apply to award free apprentices and trainees.

## Reasonable working hours

Under the Act, an employer cannot require or request that an employee work more than:

- the ordinary hours specified in an award or agreement; or
- 38 ordinary hours per week (where there is no relevant award or agreement); and
- reasonable additional hours.

Various factors need to be considered when determining reasonable additional hours, as outlined by the Act.

## Annual leave

The minimum entitlement to annual leave for full time employees is 152 hours each year or four weeks. Part time employees are also entitled to annual leave, based on the average number of hours worked over a four week period.

After completing any year of service, an employer and employee may agree that up to 50 per cent of accrued annual leave entitlement may be foregone for an equivalent benefit (usually cash). Any agreement must be in writing and cannot be made a condition of employment. It is not possible to cash out annual leave if an award applies.

Untaken leave accumulates and is generally paid out on termination, although conditions apply for employees who leave unlawfully or are dismissed for misconduct.

Annual leave loading is not a minimum condition of employment. However, most awards require employees to be paid a 17.5 per cent annual leave loading when taking annual leave.

## Sick leave

For each year of service, full time and part time employees accrue paid sick leave based on the average hours worked in a two week period, up to 76 hours.

The unused portions of this entitlement are cumulative from year to year. However, unused sick leave is not generally paid out on termination.

An employer can require an employee to produce reasonable evidence to substantiate a claim for paid sick leave. Reasonable evidence may include, but is not limited to, the following:

- medical certificate;
- statutory declaration by a friend or family member;
- the employer's knowledge of an employee's pre-existing condition or long-term illness; or
- the employee's physical appearance.

### Carer's leave

Accrued sick leave can also be used to provide care or support to a member of the employee's family or household who requires care because of an illness, injury or in the case of an unexpected emergency.

Where paid sick and carer's leave has been exhausted, employees can take up to two days of unpaid carer's leave, on any one occasion, to care for a family or household member. Casual employees are also entitled to unpaid carer's leave.

An employer may request reasonable evidence to substantiate a claim for carer's leave.

### Bereavement leave

All employees (including casuals) are entitled to up to two days of paid bereavement leave per occasion on the death of a:

- spouse or de facto spouse;
- child, step-child or grandchild;
- parent, step-parent or grandparent;
- sibling; or
- person who, immediately before that person's death, lived with the employee as a member of the employee's family.

An employer can ask for reasonable proof relating to this leave.

### Parental leave

All male and female employees, including eligible casuals, with more than a year's service with an employer are entitled to 52 weeks unpaid parental leave following the birth or adoption of a child.

Only one partner can be on leave at any time, except for the week immediately after the birth of a child. This period can be extended by a further seven weeks.

The Act provides a number of other conditions and entitlements in relation to parental leave.

### Public holidays

Full time and part time employees are entitled to be paid if they are not required to work their normal shift on a day solely because it is a public holiday. The Act recognises the following public holidays:

- New Year's Day
- Australia Day
- Labour Day
- Good Friday
- Easter Monday
- Anzac Day
- Foundation Day
- Queen's Birthday
- Christmas Day
- Boxing Day

Awards and agreements may set down exact days on which public holidays are observed.

The Act does not require employees to be paid a higher wage for working on public holiday. Awards and agreements may provide for a public holiday penalty rate – generally double time and a half.

### Significant effect and redundancy

Employees, other than seasonal workers, who are to be made redundant must be told as soon as possible after the decision has been made and are entitled to receive up to eight hours paid leave during the notice period to attend job interviews.

# Employing children

The *Children and Community Services Act 2004* (the CCS Act) and, to an extent, the *School Education Act 1999*, governs the employment of children in Western Australia. Before employing children, it is important that you understand these regulations. Failure to comply may result in significant penalties for employers. The following information provides an overview of the issues you need to consider.

## What is considered to be 'employment' of children?

Children are considered to be employed when they are engaged to carry out work in a business, trade or occupation carried on for profit, whether or not they are paid or receive any other kind of reward.

Employment for the purposes of the CCS Act includes traditional employment arrangements, contracting and piece work engagements.

## Can school aged children be employed?

While school aged children can be employed, the *School Education Act 1999* provides:

- that children are required to attend school up to the year they turn 17 in 2008 (this age requirement will increase to 18 in 2009);
- that children cannot be employed during normal school hours; and
- when and what exemptions apply to compulsory attendance and employment during school hours.

The parents of a child wishing to leave school for full time employment earlier than the year they turn 17 (or 18 from 2009) must have prior approval from the Minister of Education.

The child can only be employed in 'approved employment'. The Department of Education is responsible for determining if the employment meets this requirement.

## What type of work is a child allowed to do?

The age of a child and the type of work that a child performs depends on a number of factors, which includes:

- whether the work is in addition to full time school eg part time, casual or holiday work;
- whether the work is an alternative to full time school;
- the industry of the work;
- certain conditions such as parental supervision or approval; and
- the hours of work.

### Important note: Prohibition on employment of child to perform in indecent manner

A person who employs a child, or a parent who permits their child to undertake work to perform in an indecent, obscene or pornographic manner in the course of participating in an entertainment or exhibition or in the making of an advertisement is guilty of a crime, and is liable to imprisonment for 10 years.

## Are there age restrictions?

Generally children need to be at least 15 years of age to be employed. It is unlawful for children under 15 to be employed in work in industries other than the exemptions set out on this page.

### Important note: the *School Education Act 1999*

Employment of children under these exemptions is still subject to the *School Education Act 1999* and accordingly children under 17 years (or 18 from 2009) should not be employed in these activities during normal school hours.



### Children 10 years to less than 13 years

A child may be employed to deliver newspapers, pamphlets or advertising material, as long as:

- it is between the hours of 6.00 am and 7.00 pm;
- it is outside school hours; and
- the child is accompanied by a parent or adult whom the child's parent has given written permission to accompany the child, while carrying out the delivery work.

### Children 13 years and less than 15 years

A child may, after providing a parent's written permission, be employed in the following:

- delivering newspapers, pamphlets or advertising material;
- working in a shop, retail outlet or restaurant;
- collecting shopping trolleys from a shop or retail outlet, including adjacent areas.

The work must be carried out between the hours of 6.00 am and 10.00 pm and the work must occur outside school hours.

### No age restrictions

There are no age restrictions for children working in:

- a family business;
- a dramatic or musical performance, or any other form of entertainment; or
- the making of an advertisement.

## What are the penalties for breaching this legislation?

A person who employs a child, or a parent who permits their child to undertake work that is in breach of the CCS Act, could be prosecuted and fined up to \$24,000. An incorporated employer could be prosecuted and fined up to \$120,000.

For more information on the employment of children provisions under the CCS Act, please contact Wageline on 1300 655 266.

# Record keeping and pay slips

All employers are legally required by employment laws to keep time and wages records.

Time and wages records are a written or electronic record of information about employees, including personal information, details of hours worked and wages paid, and leave entitlements accrued and taken.

Record keeping helps to prove that employees have been paid correctly and received all relevant entitlements. Employment records may also be required for other purposes eg taxation and superannuation.

Failing to keep correct time and wages records can be costly for employers.

## What information should be recorded?

Your specific record keeping obligations will depend on the relevant legislation, award or agreement that applies to your employees. You should contact Wageline on 1300 655 266 for further information.

You may be required to keep records on:

- employee's name;
- date of birth;
- name of the award or agreement that applies;

- employee classification;
- employee status (full time/part time/casual);
- commencement date;
- start and finish times;
- the number of ordinary and overtime hours worked each day;
- meal breaks;
- hourly rate of pay;
- gross and net pay;
- deductions;
- allowances;
- shift penalties;
- all annual leave, paid or unpaid sick leave, bereavement leave or long service leave taken; and
- long service leave information.

## How should this information be recorded?

Records can be kept either in written form or electronically. If kept in writing, records must be legible and made in indelible ink. Written records must be on a separate page for each employee.

A pre-printed time and wages book from a news agency or stationery supplier may be appropriate. You should check that any pre-printed time and wages books fulfill all their legal record keeping requirements.

Electronic records must be in an electronic form that is capable of being reproduced in a legible printed format, and be able to be printed out on separate pages for each employee.

The records must be kept in a manner that allows anyone inspecting the records to determine whether the rates and conditions set by the relevant award, agreement or contract are being provided by employers.

### How long must time and wage records be kept?

Employers must keep all time and wages records for at least seven years – even for employees who have left the company.

Any records relating to the calculation of an employee's entitlement to long service leave must be kept for at least 10 years.

### Can time and wages records be altered?

Time and wage records should only be corrected if there is a genuine error.

Employers must correct any error in their records as soon as they become aware of it. The correction must record the nature of the error and correction and identify who made it and when it was done.

### Who can look at the records?

Employees (past and present) are able to access their individual time and wages records.

In addition, certain persons have rights to access time and wages records to ensure that employers are complying with their obligations. Exactly who can access an employee's records will depend on the employment arrangement.

This may include industrial inspectors from government, union representatives or other persons authorised by the employee to do so.

### Are pay slips compulsory?

Pay slips are not compulsory for businesses covered by the Western Australian labour relations system.

However, it is good practice to issue pay slips, as they enable employees to be fully informed about what they are being paid.

Pay slips should detail:

- the employee's name;
- classification or job title;
- date of payment;
- period of payment;
- the ordinary hourly rate;
- number of hours worked;
- gross and net amount of wage payable;
- allowances paid such as overtime or penalty rates;
- deductions from pay; and
- superannuation details.

# Employee complaints

Under Western Australian law, employers are required to pay employees their correct employment entitlements, including rates of pay, leave and allowances. Failure to do so could result in lengthy and costly proceedings in the Magistrates Court.



Past and present employees may choose to pursue a claim for unpaid entitlements through the Department of Consumer and Employment Protection (DOCEP) Labour Relations Division.

DOCEP can assist employees engaged under the State labour relations system (eg a State award, agreement or the *Minimum Conditions of Employment Act 1993*).

Employees who have not received wages or other benefits due under an employment contract can make a 'Contractual Entitlements Claim' through the Western Australian Industrial Relations Commission.

Employees may also elect taking their own action to recover outstanding wages and entitlements, either independently or through their union. This is available to all employees covered by the State industrial relations system.

## Important note: Getting it right the first time

To avoid going through a sometimes lengthy and difficult investigation process, call Wageline on 1300 655 266 to determine the correct wages and conditions of employment you should be providing – before employing someone.

# Terminating employment

There are a range of issues that you need to consider when terminating employees.

## Entitlements on termination

### Is notice required when terminating an employee?

The employer must provide appropriate notice when terminating an employee for most reasons (except serious misconduct).

### What notice is required?

The amount of notice that is required will depend on the employee's relevant award, agreement, contract of employment.

It should be noted that a full time or part time employee must be provided with the following notice periods as outlined in the *Federal Workplace Relations Act 1996*. This provision overrides any lesser period provided in an award, agreement, contract of employment.

Employee's continuous service period	Period of notice
Not more than 1 year	At least 1 week
More than 1 year but not more than 3 years	At least 2 weeks
More than 3 years but not more than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

Employees over 45 years of age with two completed years of continuous service are entitled to one additional weeks' notice.

Casual employees must receive the amount of notice specified in their award or agreement, often one hour, or other reasonable notice.

### Does the employee have to work for the entire notice period?

No - you may choose to pay out the notice period in lieu of notice. The payment must equal or exceed the total amount of monies that should have been paid had the employment continued until the end of the required notice period.

### Do accrued leave entitlements have to be paid out on termination?

Any annual leave and long service leave entitlement that has not been taken by the employee must also be paid out on termination. Pro rata long service leave may also be payable on termination based on the number of years of service.

Accrued sick leave is generally not paid out, although you should check the provisions of the relevant award, agreement, contract of employment.

### What is serious misconduct for the purpose of summary dismissal?

Dismissal without notice is called a summary dismissal. You may not have to provide notice when terminating an employee for serious misconduct.

The misconduct must be so incompatible with an employee's obligations to an employer that complete disregard for the employment relationship has been demonstrated.

This could include conduct such as:

- causing an immediate serious safety or health risk, including being intoxicated or taking drugs in the workplace; or

- deliberate behaviour that is inconsistent with the continuation of the employment such as serious theft or fraud, or that causes imminent or serious risk to the reputation, viability or profitability of the business.

It is important to seek independent legal advice if you are unsure whether an employee's actions constitute serious misconduct.

## Redundancy

### What is redundancy?

Redundancy occurs when an employee is no longer required to do a job because the employer has decided that the job will not be done by anyone.

This often occurs as a result of economic difficulties for the business and the need to reduce staff. Redundancy is not related to the performance or behaviour of individual employees.

### What is an employee entitled to for redundancy?

If an employee is being made redundant, you must provide:

- any relevant standard termination entitlements; and
- severance payments if the employee is entitled to them.

If you are making employees redundant, there is also a requirement to notify Centrelink in writing, outlining the:

- reasons for the terminations;
- number and category of employees likely to be affected;
- number of employees normally employed; and
- period over which the terminations are likely to be carried out.

### Is a severance payment required?

An employee may be entitled to severance as outlined in the relevant award, agreement or contract of employment.

Under the Western Australian labour relations system, the right to severance is set by the Termination, Change and Redundancy Order (TCR order).

If awards and agreements contain redundancy provisions that provide more favourable entitlements than the TCR order, those provisions will apply instead.

The TCR order entitles an employee, who is employed by an employer with 15 or more employees, to the following severance payments:

Period of continuous service	Number of weeks' pay
Less than 1 year	Nil
1 year and less than 2 years	4
2 years and less than 3 years	6
3 years and less than 4 years	7
4 years and less than 5 years	8
5 years and less than 6 years	10
6 years and less than 7 years	11
7 years and less than 8 years	13
8 years and less than 9 years	14
9 years and less than 10 years	16
10 years and over	12

Some exclusions apply, and you should contact Wageline on 1300 655 266 for further information on redundancy and severance payments.

## Unfair dismissal

### What is unfair dismissal?

Unfair dismissal refers to when an employer terminates an employee in a manner that is harsh, oppressive or unfair.

Whether or not a particular dismissal was unfair can only be determined on the circumstances of an individual case.

An employee engaged in the State labour relations system can lodge a claim of unfair dismissal in the Western Australian Industrial Relations Commission.

### Are there exemptions from unfair dismissal?

It should be noted that not all employees are eligible to pursue unfair dismissal. For example, the *Federal Workplace Relations Act 1996* excludes all employees of organisations that are constitutional corporations from accessing unfair dismissal in the WAIRC.

For specific information on unfair dismissal call Wageline on 1300 655 266.

## Unlawful termination

### What is unlawful termination?

Unlawful termination occurs when an employer dismisses an employee:

- without proper notice;
- without notifying Centrelink (if 15 or more employees are terminated for reasons of economic, technological or structural change); or
- on the grounds of one or more of the prohibited reasons concerning alleged discrimination.

If an employee is terminated for a discriminatory reason or without adequate notice, they can make a claim for unlawful

termination at the Australian Industrial Relations Commission.

### What are prohibited reasons for dismissal?

The *Federal Workplace Relations Act 1996* provides that a dismissal is discriminatory and therefore unlawful if done for any of the following reasons:

- membership of a union or participation in union activities outside working hours or, with the employer's consent, during work hours;
- non membership of a union;
- acting or having acted as a representative for employees;
- filing a complaint or taking part in proceedings against an employer for alleged violation of laws or regulations or having recourse to competent administrative authorities;
- race, colour, gender, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- refusing to negotiate, sign, extend, vary or terminate an Australian Workplace Agreement;
- temporary absence from work because of illness or injury;
- absence from work during maternity leave or other parental leave; or
- temporary absence from work for voluntary emergency management activity.

### Are there exclusions for unlawful termination?

Certain types of employees are excluded from making a claim of unlawful termination based on failure to provide proper notice. For further information on these exclusions call Wageline on 1300 655 266.

# Buying and selling a business

When a business or part of a business is sold or transferred, both the buyer and seller have obligations towards the employees.

## Important note - Federal or State system?

The rules governing a transmission of business vary depending on whether the business is covered by the State or Federal industrial relations system.

It is important that both the buyer and seller of a business seek independent legal advice about jurisdiction and how this impacts on their obligations towards the employees.

## Status of employees

An employee's contract of employment with the seller of the business is terminated when a transmission of business occurs.

The buyer is not obligated to re-employ the staff of the previous owner.

Notice, severance pay and payment for outstanding entitlements such as leave are some of the entitlements that generally arise from a termination of employment. The seller is required to provide employees with these entitlements where relevant.

When a transmission of business occurs, the buyer may become the new employer by agreeing to take on the seller's employees. For the buyer, re-employing existing staff will involve a number of obligations. Buyers need to consult any relevant awards, agreements and legislation carefully for the full picture of the obligations they take on as the new employer.

Buyers should find out about accrued entitlements and costs arising from recognition of past service. These entitlements and costs can vary depending on the terms and conditions of employment of the employees. Assistance in these matters can be obtained through Wageline on 1300 655 266.

## When the seller terminates the employees

### Notice

The correct amount of notice, or pay in lieu of notice, should be given when terminating employees because of a transmission of business.

The length of notice to be given is based on the employee's length of service with the employer.

Even if the employees are being re-employed by the new owner, the former employer may still need to give notice to employees.

### Information requirements

An employer may also need to inform employees of any changes to the business.

For example, if the business is subject to the Termination Change and Redundancy Order (TCR Order), the employer must notify employees of any changes to the business that will have a significant effect on their jobs.

Employers are not required to disclose information to employees that may seriously harm the employer's business undertaking or interest in continuing or disposing of the business.

Further obligations may exist under a relevant award or agreement.

### Severance pay

If the business is subject to the TCR Order, an employer with 15 or more staff may be required to make severance payments.

Employers not covered by the TCR Order may still have obligations to provide severance pay under the relevant award or agreement.

### Other termination obligations

The TCR Order provides that a terminated employee can request a written statement from the employer, specifying the period of employment and the classification or type of work performed.

It also allows employees to take paid time off work to search for other employment. The entitlement is for one day of each week of the employee's notice period and is subject to certain conditions.

Employers not covered by the TCR order should check the relevant award or agreement to clarify their obligations.

### Paying out accrued entitlements

There are numerous entitlements that may need to be paid out during a transmission of business, including annual leave, leave loading and long service leave.

## When the buyer takes on existing employees

### Re-hiring existing staff

Buyers who want to take on the existing employees may decide to interview employees to determine their suitability.

The buyer should inform the seller's employees as soon as possible if they are required for employment, and clearly explain the proposed terms and conditions of employment.

Buyers should also ask the seller how the employees' employment has been regulated, and request copies of any existing agreements. Any information provided by the seller should be confirmed by seeking independent advice.

### Employee entitlements when re-employed

Leave obligations may carry over from the previous employer. Buyers should consider any additional costs when negotiating the final terms of sale. The employment obligations that a buyer is taking over should be specified in the agreement between the buyer and seller.

### Long service leave

Buyers need to be aware of the length of service of any staff they intend to re-employ from the existing business.

An employee's long service leave is based on continuous service with the business, not just one employer. When a buyer re-employs the existing staff, they also take on the obligation for the employee's future long service leave.

If there are long serving employees in the business who are going to be re-employed, it is common for an arrangement regarding long service leave to be made as part of the sale. Parties can agree to factor future potential long service leave payments into the sale price.

Another option is for the seller to place money into a trust fund to be used by the new owner when the employees accrue a long service leave entitlement. Whatever arrangements are made, the responsibility for future long service leave payments ultimately lies with the buyer.

## Where to go for further help

The Department of Consumer and Employment Protection is one of several agencies that can assist you in employing someone. The following provides a quick reference for key contacts.

Your first stop for all employment matters  
Wageline 1300 655 266  
[www.docep.wa.gov.au/wageline](http://www.docep.wa.gov.au/wageline)

Workplace safety  
WorkSafe 1300 307 877  
[www.docep.wa.gov.au/worksafe](http://www.docep.wa.gov.au/worksafe)

Registration of business names  
Consumer Protection  
Business Names 1300 30 40 54  
[www.docep.wa.gov.au/BusinessNames](http://www.docep.wa.gov.au/BusinessNames)

Copies of awards and agreements

Western Australian Industrial Relations Commission  
(08) 9420 4444  
[www.wairc.wa.gov.au](http://www.wairc.wa.gov.au)

Australian Industrial Relations Commission  
(08) 9464 5172  
[www.airc.gov.au](http://www.airc.gov.au)

Workers' compensation  
WorkCover WA 1300 794 744  
[www.workcover.wa.gov.au](http://www.workcover.wa.gov.au)

Superannuation  
Australian Tax Office -  
Superannuation Hotline  
13 10 20  
[www.ato.gov.au/super](http://www.ato.gov.au/super)

Income tax  
Australian Tax Office  
13 28 66  
[www.ato.gov.au](http://www.ato.gov.au)

Payroll tax  
Office of State Revenue  
(08) 9262 1300  
1300 368 364 (regional callers)  
[www.dtf.wa.gov.au/osr](http://www.dtf.wa.gov.au/osr)

Workplace discrimination  
Equal Opportunity Commission  
(08) 9216 3900  
1800 198 149 (regional callers)  
[www.equalopportunity.wa.gov.au](http://www.equalopportunity.wa.gov.au)

Apprenticeships and traineeships  
Department of Education and Training  
13 19 54  
[www.det.wa.edu.au/apprenticentre](http://www.det.wa.edu.au/apprenticentre)

Small business support  
Small Business Development Corporation  
131 BIZ  
[www.sbdc.com.au](http://www.sbdc.com.au)



Department of Consumer  
and Employment Protection  
Government of Western Australia

Labour Relations

## Wageline **1300 655 266**

8.30am - 5.00pm weekdays, except Wednesdays 9.00am - 5.00pm

3rd Floor Dumas House  
2 Havelock Street  
West Perth Western Australia 6005

PO Box 1218, West Perth, Western Australia 6872

Telephone: (08) 9222 7700  
Facsimile: (08) 9222 7777  
National Relay Service: 13 36 77

**[www.docep.wa.gov.au](http://www.docep.wa.gov.au)**

Email: [labourrelations@docep.wa.gov.au](mailto:labourrelations@docep.wa.gov.au)

### **Regional offices:**

Goldfields/Esperance - Kalgoorlie	(08) 9021 5966
Great Southern - Albany	(08) 9842 8366
Kimberley - Kununurra	(08) 9169 2811
Mid-West - Geraldton	(08) 9964 5644
North-West - Karratha	(08) 9185 0900
South-West - Bunbury	(08) 9722 2888

This document is available upon request in other formats  
for people with special needs.