



Master Builders Association

New South Wales

Established 1873

FACT SHEET A NATIONAL EMPLOYMENT STANDARD

NOTICE OF TERMINATION AND REDUNDANCY PAY

Revised Date – January 2020

Notice of termination and redundancy pay forms part of the National Employment Standards (NES). Since 1 January 2010, the NES has applied to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment.

Terms in awards, agreements and employment contracts (including those applying to professional and management positions), cannot exclude or provide for an entitlement less than the NES, and those that do, have no effect. An employer must not contravene a provision of the NES. A contravention of a provision of the NES may result in penalties of up to \$10,800 for an individual and \$54,000 for a Corporation.

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

Overview

The NES establish the minimum period of notice, or payment in lieu of notice, that an employer must give an employee to terminate their employment. The provisions about notice of termination apply to all employees (other than casuals) not just those covered by the national workplace relations system.

The NES also set out what redundancy pay may be applicable to an employee on the termination of their employment. The redundancy entitlement under the NES only applies to employees covered by the national workplace relations system.

Notice of termination

An employer must not terminate an employee's employment (subject to the exceptions set out below) unless they have given the employee **written notice** of the day of the termination.

An employer may give notice to the employee by:

- Delivering it personally or
- Leaving it at the employee's last known address or
- Sending it by pre-paid post to the employee's last known address.

What amount of notice must be given?

An employer must not terminate an employee unless they have:

- Given the minimum period of notice (see table below) or
- Paid the employee in lieu of notice at the full rate of pay for at least the hours the employee would have worked had the employment continued until the end of the minimum period of notice (see table below).

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An employee's full rate of pay (other than a pieceworker) is the rate of pay payable to an employee, including all the following:

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

Employee's period of continuous service with the employer at the end of the day the notice is given	Period
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

If the employee is over 45 years old, and has completed at least two years of service at the end of the day notice is given, the employee receives an additional one weeks' notice.

The minimum periods of notice apply to all employees employed in Australia (subject to the exceptions noted below).

An award or agreement may include terms specifying the period of notice an employee must give in order to terminate their employment.

Does notice of termination apply to all employees?

In the case of a daily hire employee working in the building and construction industry (including working in connection with the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures) – one days' notice of termination is required on either side or one days' pay will be paid (in lieu of notice) by the employer or forfeited by the employee.

An employer does not need to provide notice of termination (or payment in lieu of notice) to any of the following employees:

- An employee employed for a specified period of time, for a specified task, or for the duration of a specified season
- An employee whose employment is terminated because of serious misconduct (for example, an employee who has, in the course of their employment, engaged in theft, fraud or assault)
- A casual employee
- 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

Redundancy Pay

Building Industry Award Covered Employees

Employees covered by the Building and Construction General On-Site Award 2010 (On-Site Award) will be entitled to redundancy pay under the industry specific redundancy scheme specified in that award. For the purposes of the award, redundancy means a situation where an employee ceases to be employed by an employer to whom the award applies, other than because of misconduct or refusal of duty. This definition of redundancy is significantly wider than the definition used in the NES.

The rate of redundancy pay specified in the On-Site award is as follows:

Period of continuous service	Redundancy / Severance Pay	Maximum
Less than 12 months	1.75 hours pay per week of service only if the redundancy is not initiated by the employee	
1 year or more but less than 2 years	2.4 week's pay, plus 1.75 hours pay for each completed week of service in excess of 1 year	4.8 week's pay
2 years or more but less than 3 years	4.8 week's pay, plus 1.6 hours pay for each completed week of service in excess of 2 years	7 week's pay
3 years or more but less than 4 years	7 week's pay, plus 0.73 hours pay for each completed week of service in excess of 3 years	8 week's pay
4 years or more	8 week's pay	

Other Employees

Where an employee is not covered by the On-Site Award, the NES provide that redundancy pay must be paid to an employee if the employee's 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,(except where this is due to the ordinary and customary turnover of labour), or
- Because of the insolvency or bankruptcy of the employer

Based on the table below, the amount of redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out at their 'base rate of pay' for ordinary hours worked.

An employee's base rate of pay (other than a pieceworker) is the rate of pay payable to an employee for their ordinary hours of work, but not including any of the following:

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

Employee's period of continuous service with the 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 eeks*

***There is a reduction in redundancy pay from 16 weeks to 12 weeks for employees with at least 10 years continuous service. This is consistent with the 2004 Redundancy Case decision made by the Australian Industrial Relations Commission.**

NOTE: An employee's current entitlement to redundancy pay can be dependent on whether the employee had an entitlement to redundancy pay prior to the introduction of the NES. If an employee did not have an entitlement to redundancy prior to 1 January 2010, an employee's period of continuous service with the employer will only accrue from 1 January 2010.

It is possible for an employer to apply to the Fair Work Commission (FWC) for a determination reducing the liability to pay redundancy pay to a specified amount (that may be nil) if the FWC considers it appropriate. The employer may apply for the determination if an employee is entitled to redundancy pay, and the employer finds other acceptable alternative employment or cannot pay the amount.

Does redundancy pay apply to all employees?

An employer who is a small business employer is not required to provide redundancy pay on the termination of an employee's employment. A small business employer for the purpose of determining redundancy pay is an employer who, at a particular time, employs fewer than 15 employees.

When calculating the number of employees employed at a particular time, the following factors are to be taken into account:

- All employees employed by the employer at that time are to be counted
- A casual employee is not be counted unless, at that time, they have been employed by the employer on a regular and systematic basis
- Associated entities are taken to be one entity
- The employee being terminated and any other employees being terminated at that time are counted.

In addition, redundancy pay will not be payable to any of the following:

- An employee whose period of continuous service with the employer is less than 12 months
- An employee employed for a specified period of time, for a specified task, or for the duration of a specified season
- An employee whose employment is terminated because of serious misconduct
- A casual employee
- 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
- An apprentice
- An employee to whom a industry-specific redundancy scheme in a modern award applies
- An employee to whom a redundancy scheme in an enterprise agreement applies if:
 - the scheme is an industry-specific redundancy scheme that is incorporated by reference (and as in force from time to time) into the enterprise agreement from a modern award that is in operation
 - the employee is covered by the industry-specific redundancy scheme in the modern award.

An award that is in operation may include a term specifying other situations in which redundancy pay does not apply to the termination of an employee's employment.

Is redundancy pay payable on a transfer of employment?

The 'transfer of employment' provisions under the Fair Work Act (2009) (FW Act) apply when an employee moves from one employer (the old employer) to another employer (the new employer) within three months, and there is a transfer of business involved. This may occur through a number of connections between the two employers, including a transfer of assets, outsourcing and insourcing, or where the two employers are associated entities.

If these conditions are satisfied, the period of service with the old employer will generally count as service with the new employer for the purposes of entitlements under the FW Act. If this applies, an employee is not entitled to redundancy pay under the NES in relation to termination of their employment with the old employer.

However, there are exceptions to this general principle. A new employer that is not an associated entity of the old employer has the option to not recognise a transferring employee's previous service for the purposes of NES entitlements to redundancy pay. If the new employer does not recognise an employee's service in relation to redundancy pay, the old employer will be required to pay out the employee's redundancy pay.

Further, subject to an order from the FWC, an employee is not entitled to redundancy pay under the NES in relation to the termination of their employment with the old employer if:

- The employee rejects an offer of employment made by another employer that:
 - is on terms and conditions substantially similar to, and, on an overall basis, no less favourable than the employee's terms and conditions of employment with the old employer immediately before the termination
 - recognises the employee's service with the old employer for the purposes of redundancy pay
 - had the employee accepted the offer, there would have been a transfer of employment.

For more information on the transfer of business provisions and the impact on employee entitlements, please see the Master Builders NSW Fact Sheet – Transfer of Business.

Fair Entitlement Guarantees

When a business is bankrupt, also known as going into liquidation or insolvency, employees can get help through the Fair Entitlements guarantee (FEG).

The FEG is available to eligible employees to help them get their unpaid entitlements.

This can include:

- wages - up to 13 weeks unpaid wages (capped at the FEG maximum weekly wage)
- annual leave
- long service leave
- payment in lieu of notice of termination - maximum of 5 weeks
- redundancy pay - up to 4 weeks per full year of service.

It does not include:

- superannuation
- reimbursement payments
- one-off or irregular payments
- bonus payments
- non-ongoing or irregular commission.

Further information

The Master Builders Association has published a Fact Sheet on each NES entitlement. For further information on a specific NES entitlement, please see the relevant fact sheets at www.mbandsw.asn.au – login with your MBA member login – click on Industrial Relations and member downloads.

Should members have any additional enquiries regarding this Fact Sheet please do not hesitate to contact the Association's Industrial Relations Department – Sydney Office on (02) 8586 3555.

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