

**employer’s**

**Manual**



**as at November 2021**

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# INTRODUCTION

## Purpose of Manual

The Employer’s Manual has been created specifically for the use of accounting practices, particularly small to medium sized accounting practices. The Manual is a practical, ready-to-use employment manual for the accounting practice and should be read in conjunction with APES 320 (Quality Control for Firms), which is included on the CPA Australia website. As an employer, it is essential to ensure that the appropriate policies and procedures as required by law are created, communicated to, accessible by and complied with by all employees, consultants and partners of the Practice.

This Manual is not intended to act as a replacement for accounting and auditing standards information available on the website. **It is important that the Employer’s Manual is accessible only by senior management who will be responsible for all aspects of policy development, quality assurance and human resources management. Unlike the Staff Manual, the Employer’s Manual should not be accessible to other staff.**

Throughout the Employer’s Manual, standard terms have been consistently used, which will be applicable to most accounting practices. However, where such terms are not applicable to your particular Practice, it may be necessary to make appropriate amendments, for example, if the Practice has a human resources manager who is responsible for staffing issues and not a Staff Partner, it would be appropriate to replace the reference throughout the document from ‘Staff Partner’ to ‘Human Resources Manager’.

## Different versions of each Manual

This manual can be used by all private sector employers except for non-constitutional corporations in Western Australia. ‘Constitutional corporations’, broadly, means trading or financial corporations. Members who are partnerships, sole traders and some associations are considered ‘non-constitutional corporations’.

## Non-constitutional corporation employers in Western Australia should refer to the Employer’s Manual for non-constitutional corporations also published on the CPA Australia website. Which version of the Manual is this?

This version of the Manual is only to be used by employers who are covered by the Federal industrial relations system, (see the FW ACT) being:

### employers who are constitutional corporations; and

### employers who are in States that have referred their industrial relations powers to the Commonwealth (i.e. all States excluding Western Australia), the Northern Territory or the ACT.

If you are uncertain as to whether the employing entity in your Practice is covered by the State system or the Federal system, you should refer to the below section headed ‘*How can you determine whether an entity is a constitutional corporation?’*. If you are still uncertain after reading that guide, you should seek legal advice.

Although all States (excluding Western Australia) have referred their industrial relations power to the Commonwealth, the distinction between a constitutional and non-constitutional corporation will still be important to determine whether transitional arrangements are applicable to your practice.

## How can you determine whether an entity is a constitutional corporation?

What is a constitutional corporation?

The FW Act establishes a national workplace relations regime that regulates constitutional corporations and their employees. To be a constitutional corporation, an employer must be either a foreign corporation or a trading or financial corporation formed within the limits of the Commonwealth.

What is trading or financial?

To be a trading or financial corporation, a substantial or significant proportion of the corporation's activities must be trading or financial. Trading activities are those involving buying or selling and which produce revenue for the corporation. Financial dealings include borrowing, lending, banking or insurance and the provision of management and advisory services in relation to financial matters. Whether such activities are substantial or significant is a question of degree and specific advice should be taken.

Which employers are constitutional corporations?

Generally speaking, if an employee is employed by a company, a partnership comprised of companies, or a trust where the trustee is a company, it is likely to be a constitutional corporation.

Many employers are uncertain as to whether they are a constitutional corporation covered by the Federal regime where their business structure includes a partnership. A partnership itself is not a separate legal entity, the legal entities being each of the partners that comprise the partnership. If there is a trading partnership between corporate entities or between corporate trustees, it is likely that you are a constitutional corporation because the employer is usually each member of the partnership jointly and severally.

Which employers are not constitutional corporations?

With the exception of a small number of non-constitutional corporations with pre-existing federal industrial instruments, if an employee is employed by an individual, a partnership comprised of individuals, a trust where the trustee is an individual, certain State government public sector employers and corporations whose predominant activity is neither trading nor financial, they will not be a constitutional corporation.

Conclusion

Ascertaining whether the Fair Work regime applies in a particular case can be a complex question depending on the business structure involved. It is therefore critical to take specific advice on the issue with reference to the individual workings of your Practice.

Given the referral of powers legislation, non-constitutional corporation employers in all State and Territories (excluding Western Australia) became covered by the Fair Work regime from 1 January 2010 (subject to certain transitional arrangements).

Non-constitutional corporations in Western Australia are not caught by the Fair Work regime and are regulated by State law only.

If an employer ignores the fact that it is caught by the Fair Work regime, there is potential exposure to financial claims by employees and to significant penalties which may be imposed for non-compliance, for example, in relation to failure to comply with the terms and conditions set out in the National Employment Standards (**NES**) or failure to comply with record keeping obligations set out in the *Fair Work Regulations 2009* (Cth) (**FW Regulations**).

**EMPLOYMENT**

**CONTRACTS**

# GENERAL GUIDE TO LETTERS OF APPOINTMENT

## Letters of appointment for use by your Practice

**Attached** to thisEmployer’s Manual is the letter of appointment for professional employees.

**Attached** to thisEmployer’s Manual is the letter of appointment for administrative employees.

## Letters of appointment - general information

Written employment contracts represent good practice regardless whether there are underpinning industrial instruments. Verbal agreements or one page letters of offer are not usually enough. Employment contracts such as the letters of appointment which form part of this Manual and are available for use by your Practice set out the expectations, rights and obligations of both the employer and employee, and must comply with the terms of relevant Federal and State legislation as well as the terms of any applicable award.

The letter of appointment sets out the terms and conditions of each employee’s employment with the Practice. There are two versions – a more detailed letter for professional staff and a simpler version for administrative staff that work in your Practice and are likely to be covered by an award.

Since 1 January 2010 modern awards, together with the NES have formed the safety net for all employees.

For all employees, the letter of appointment should be signed in duplicate with a signed copy retained by the employer and the other signed copy retained by the employee. The employer’s copy should be retained on the employee’s personnel file.

If the employee’s terms and conditions vary slightly, (e.g. in the event of an increase in pay), there is no need to have those parties sign an entirely fresh agreement. The new pay level can simply be confirmed in writing to the employee. However, if the change is more significant and goes to the nature of the employee’s duties or perhaps involves a demotion, the employee’s agreement to this change should be evidenced by both the employer and employee signing a fresh agreement. Equally, any change to a person’s employment (such as demotion) should be considered with respect to unfair dismissal provisions.

The letters of appointment:

### are suitable for both full-time and part-time employees. The letters of appointment are not intended for use with any casual employees that your Practice may engage; and

### include highlighted sections which should be completed so that the letter of appointment is tailored to your Practice and individual employees.

## Using letters of appointment for existing employees

It is not possible for an employer to unilaterally vary an employee’s existing terms and conditions without the employee’s agreement. The letters of appointment provided with this Manual may include additional matters which have not previously formed part of your existing employees’ terms and conditions. If any of your existing employees are not prepared to sign a new letter of appointment, then it would be inappropriate for you to force them to do so, hence their employment would continue to be governed by their existing terms and conditions of employment. One way to avoid this situation is to introduce the letters of appointment at the same time as another change to the employee’s terms and conditions, which they will agree to, such as a pay increase.

## Position description

The position description to be completed and attached to the letter of appointment does not have to be in the format provided. You may already have a format that you use for this purpose. The ideal position description should concisely define the employee’s duties and responsibilities and reporting requirements. A well drafted position description will often be of assistance during performance reviews or disciplinary proceedings as a guide to what is expected of the employee.

# GUIDE TO LETTER OF APPOINTMENT FOR PROFESSIONAL EMPLOYEES

This letter of appointment has been designed for salaried, award-free employees, such as accountants working in your Practice. It is more detailed than the letter of appointment designed for administrative employees who are usually subject to underpinning modern awards. However, there may still be circumstances where an accountant is award covered. Each practice will need to conduct its own analysis to determine if any accounting staff are captured by a modern award (such as the *Banking Finance and Insurance Award 2020*).

The NES applies to all employees, including professional award-free employees, to set minimum conditions, for example as to leave.

## Remuneration and benefits

Clause 6 of the letter of appointment outlines the employee’s remuneration and other benefits. Any profit sharing or incentive arrangements or any additional benefits enjoyed by the employee need to be detailed in Schedule 1.

If there are any particular conditions for use associated with the further benefits, these should also be included in Schedule 1. For example, if a mobile phone is to be provided to an employee, but your Practice will only cover the cost of the phone to a maximum of $100 per month, this condition should be stated in Schedule 1.

## Leave entitlements

Clause 7 of the letter of appointment deals with leave entitlements. The letter of appointment for professional employees reflects the minimum leave entitlements as per relevant legislation. If professional employees working in your Practice receive more favourable leave entitlements than the legislated minimums, then the more favourable entitlements should be inserted in the letter of appointment used by your Practice. For example, if the minimum entitlement to personal/carer’s leave is ten days leave per annum, but you allow employees to accrue 15 days personal/carer’s leave per annum, this greater entitlement should be included.

Ideally, you should ensure professional and administrative employees working in your Practice receive consistent leave entitlements even though the relevant minimum leave entitlements required to be provided may differ. Leave entitlements can differ slightly depending on whether an employee is entitled to the benefit of an award or whether they are award-free, in which case their minimum leave entitlements will be set only by legislation.

## Confidential information

You should carefully read the definition of ‘[confidential information](#Confidential_Information_means)’ in clause 11.5 of the letter of appointment for professional employees to ensure that it covers all information that is confidential to your Practice, including any information specific to your clients and the services that you provide.

## Working environment

Clause 12 of the letter of appointment imposes an obligation on the employee to uphold the Practice’s health and safety, discrimination, harassment and other policies. Compliance with the Practice’s policies and procedures is a mutual obligation, notwithstanding the Practice’s prerogative to amend its policies from time to time.

## Termination

Clause 15.1 of the letter of appointment provides that either party may terminate an employee’s employment by giving to the other 4 weeks’ notice in writing. Alternatively a payment of salary in lieu can be made in accordance with clause 15.3.

If you think that a longer notice period is necessary in light of the employee’s length of service, seniority or prospect of obtaining other work, this period should be agreed upon and inserted into the employee’s letter of appointment at clause 15.1.

The notice period must not be less than the following legislated minimum notice periods:

| Period of continuous service | Period of notice |
| --- | --- |
| Not more than one year | one week |
| More than one year but not more than three years | two weeks |
| More than three years but not more than five years | three weeks |
| More than five years | four weeks |
| If employee is over 45 years old and has completed at least two years continuous service with the Practice | one extra week |

## [Restraint of Trade](#RESTRAINT_OF_TRADE)

Clause 17 of the letter of appointment for professional employees contains restraint of trade and non-solicitation obligations.

There is a presumption at common law that all restraints of trade are contrary to public policy, on the basis that it is unreasonable to restrain an employee from working elsewhere to earn a living, and therefore restraints of trade are unenforceable. An employer seeking to enforce the restraint must rebut that presumption to be successful, and the employer will need to show that each restraint is necessary to protect its legitimate goodwill and interests and that each restraint is reasonable in the circumstances. The restraint must be framed so as to afford no more than adequate protection to the party seeking to rely on it.

The onus of proof as to reasonableness is on the party wishing to rely on the restraint. Relevant factors include:

### the scope of the restraint in terms of subject matter and geographical area;

### the impact of the restraint on the employee’s ability to earn a living;

### the duration of the period in which the restraint operates; and

### whether the restraint protects a legitimate interest, such as:

#### intellectual property or confidential information; and

#### the employer’s goodwill.

Where a restraint is held to be unreasonable it will be declared unenforceable. This is the case even if the legitimate interest protected could have been the subject of a valid restraint, but for the unreasonableness of the actual terms of the restraint.

In New South Wales only, the *Restraints of Trade Act 1976* (NSW) can operate to save post-employment restrictions that would otherwise be unenforceable on the grounds described above. Under this Act, a court may effectively rewrite the terms of a restraint to make it reasonable, for example, by reducing the time period or geographical area over which the restraint purports to apply or the nature of the conduct restrained. However, employers in New South Wales should not rely on the intervention of the courts to read down otherwise unenforceable restrictions and must attempt to prepare a reasonable restraint at first instance. Even in New South Wales, the Court may, on application of an employee, wholly invalidate a restraint if the restraint was obviously unreasonable when prepared.

Clause 17.3 in the letter of appointment for professional employees is designed to prevent employees from:

### soliciting key employees. When preparing a letter of appointment for an employee, you need to clearly define in the highlighted section of clause 17.3(a) who the key employees are for the purposes of the restraint. For example: accountants, financial planners, supervisors or the practice manager. In most cases it is unreasonable to seek to restrain an employee from soliciting all employees working in your Practice, as this may extend to cover employees with whom the departed employee has not worked closely or employees who, if they left, would not cause significant loss to the business (e.g. a junior receptionist). Therefore, it is important to define the key employees who the departed employee will be contractually restrained from encouraging to leave the Practice;

### soliciting clients that employees have dealt with in the 12 months preceding termination of their employment. In most cases it is unreasonable to seek to restrain a departed employee from soliciting any client of the Practice, as this would even include clients with whom the departed employee would not have an established connection. For this reason, the client related restraint only applies to those clients with whom the departed employee has had contact in the preceding 12 months;

### becoming an employee of a client of the Practice in order to perform work which the Practice might reasonably expect to otherwise perform. This scenario arises less often but is still an important restraint to include in clause 17.3 for many practices; and

### being associated with or engaged or interested in a business whose offices are located in the Restraint Area (as defined in clause 17.8 of the letter of appointment) which competes with the Practice’s business where the purpose of the departed employee’s engagement or interest is to compete with the Practice.

A ‘sliding scale’ of restraint periods which apply to all of the restraints in clause 17.3 has been included.

The Court will uphold and enforce those combinations (if any) it considers reasonable to protect your Practice’s goodwill and confidential information.

When preparing a letter of appointment for an employee, you will need to carefully tailor the restraint area to accurately reflect the Practice’s market and the area in which the employee seeking to be restrained has provided professional services. For example, for a Practice based in Mackay, Queensland, it would be unreasonable to restrain an employee who has only ever worked in Mackay for Mackay-based clients of the Practice to be restrained from carrying on the same type of work in any area outside of Mackay.

Care should be taken to make sure that the shortest period and the smallest areas of the restraint are reasonable and no more than what is necessary to protect the Practice’s legitimate business interests including its goodwill and confidential information. Where there is any doubt as to what would be reasonable in the circumstances, it is recommended that legal advice be obtained.

# GUIDE TO LETTER OF APPOINTMENT FOR ADMINISTRATIVE EMPLOYEES

## Use of the [letter of appointment](#Letter_of_Appointment) for administrative employees

This letter of appointment has been designed for administrative employees who will be subject to the *Clerks – Private Sector Award 2020.* It is much simpler in its terms than the letter of appointment for professional employees, and does not impose restraints of trade, non-solicitation clauses and extensive confidentiality obligations on administrative employees, as they are not usually involved directly with clients of the Practice. It is expected, however, that in the course of the performance of their duties, they will have access to confidential information of clients, which makes it necessary to impose an obligation of confidentiality upon them.

Other essential features of this letter of appointment include:

### the obligation to work exclusively for the Practice and to avoid conflicts of interest;

### the protection of the intellectual property rights that may be created by the employee in the course of their employment; and

### the obligation to comply with the Practice’s policies.

## Modern award

The modern award of relevance to your Practice will be the *Clerks – Private Sector Award 2020* (**Clerks Award**).

Each year after a minimum wage review has taken place, a national minimum wage order will be made which will apply from the first full pay period on or after 1 July each year. This national minimum wage order outlines the minimum wage for award (and agreement-free employees).

## Annualised wage arrangements

On 1 March 2020, the Clerks Award and the *Banking, Finance and Insurance Award 2020* (**Banking and Finance Award**) were amended to include changes to the annualised salary provisions. The annualised salary provisions are now called Annualised Wage Arrangements.

The Annualised Wage Arrangements vary slightly in their terms from award to award. Employers must therefore ensure they are applying the correct terms to employees if they are covered by different annualised wage arrangements.

A list of amended Awards and the date they were amended can be accessed [here](https://www.fairwork.gov.au/employment-conditions/awards/changes-to-awards-in-2020).

If an employer chooses to pay an employee under an annualised wage arrangement, they must understand and keep records of:

### how much of the employee’s salary is paid in satisfaction of their base hours worked;

### how much is paid in lieu of allowances, leave loading, penalty rates and overtime;

### the hours an employee is working in each pay cycle (i.e. each fortnight) and keep records of this;

### what the “outer-limit” number of hours the employee can work before there would be an underpayment. (The “outer-limit” number of hours is an estimated number of overtime hours that you envision an employee will not reach in each pay period i.e. 15 hours of overtime each fortnight. Alternatively, if an employer sets the outer-limit at 10 hours of overtime per fortnight, and the employee works 11 hours, they are entitled to be paid 1 hour of overtime including penalty rates and allowances, even if the annual salary ensures that over the year they’re better off).

The record keeping obligations under the Annualised Wage Arrangements are onerous and compulsory. A failure to comply with them will result in a breach of the FW Act.

Additionally, if an employer annualises an employee’s wage under an annualised wage arrangement, they are also required to calculate the amount that would have been payable as a weekly or hourly rate under the relevant award and compare it to the annualised wage paid.

Under the relevant Award, an employer must undertake this assessment:

### annually from the commencement of the annualised wage arrangement; or

### on the termination of employment of the employee.

However, Annualised Wage Arrangements contained within awards are not the only way an employer can provide employees with a salary or ‘rolled up’ rate of pay.

Common law ‘off-set’ arrangements where the employer agrees with the employee to pay an enhanced rate of pay instead of the anticipated award entitlements, are unaffected by the changes.

However, if you use a common-law offset, you must ensure the employees are no worse off than if they were paid the minimum rates (plus overtime, allowances and penalties) under the relevant Award every pay cycle. Therefore, if an employee works overtime and becomes entitled to earn $1,200 per week under the Award rates, but is only paid $1,000 for the work, the additional amount must be paid to the employee in that pay cycle.

This audit and compliance with the relevant Award must be completed every pay cycle.

This contrasts with the Annualised Wage Arrangements where an employer must just ensure an employee works under their outer limit number of hours each pay cycle (and must only conduct an audit annually).

However, even if an employer choose to pay using a common-law offset, you cannot avoid an obligation to keep records of:

### payments for bonuses, loadings, penalty rates and allowances or other identifiable entitlement (if the employee is entitled to such a payment);

### the number of overtime hours worked by the employee during each day, or when the employee started and ceased working overtime hours (if the employee is entitled to overtime).

## Leave entitlements

The leave entitlements in the letter of appointment reflect the minimum applicable leave entitlements. If the Practice already offers more generous leave entitlements, these should be reflected in the letter of appointment.

**EMPLOYMENT**

**TERMS AND**

**CONDITIONS**

# GUIDE TO TERMS AND CONDITIONS

## Introduction to terms and conditions

The following tables are a national snapshot of the relevant sources of terms and conditions of employment for accounting practices.

Accountants are generally award-free, whereas clerical and administrative employees are generally covered by award conditions.

Whilst the national snapshot identifies the industrial instruments that are generally applicable, it is important to take legal advice to determine the relevant source of terms and conditions of employment in the event that:

### there has been a transfer of business of your Practice. For example, has your Practice been the subject of a business sale? Or has there been a restructure and employees previously employed by a particular employer are now employed by another employer but still work in the Practice? This can affect the employment entitlements of employees of the Practice (e.g. they may carry over entitlements with them); or

### you have employees working in roles in your Practice that do not neatly fit within the job classifications contained in the award, as a different award may apply or the position might be award-free.

## Guide to abbreviations used in the national snapshot

|  |  |
| --- | --- |
| Abbreviation | Meaning |
| **NMW** | National Minimum Wage for adults (currently $20.33 per hour or $772.60 per week) |
| **NES** | National Employment Standards |
| **SMW** | State minimum wage (for employees of non-constitutional corporations in WA, where there is no award which sets the minimum wage rate) |

## National snapshot of employment terms and conditions

|  | ACT | NSW | NT | Qld | SA | TAS | VIC | WA |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Accountants (constitutional corporations)** | NMW  NES  *Long Service Leave Act 1976* (ACT)  *Paid Parental Leave Act 2010* (Cth) | NMW  NES  *Long Service Leave Act 1955* (NSW)  *Paid Parental Leave Act 2010* (Cth) | NMW  NES  *Long Service Leave Act 1981* (NT)  *Annual Leave Act 1981* (NT)  *Paid Parental Leave Act 2010* (Cth) | NMW  NES  *Industrial Relations Act 2016* (long service leave) (QLD)  *Paid Parental Leave Act 2010* (Cth) | NMW  NES  Long Service Leave Act 1987 (SA)  *Paid Parental Leave Act 2010* (Cth) | NMW  NES  *Long Service Leave Act 1976* (TAS)  *Paid Parental Leave Act 2010* (Cth) | NMW  NES  *Long Service Leave Act 2018* (VIC)  *Paid Parental Leave Act 2010* (Cth) | NMW  NES  *Long Service Leave Act 1958* (WA)  *Paid Parental Leave Act 2010* (Cth) |
| **Administrative employees (constitutional corporations)** | *Clerks – Private Sector Award 2020*  *Long Service Leave Act 1976* (ACT)  *Paid Parental Leave Act 2010* (Cth) | *Clerks – Private Sector Award 2020*  *Long Service Leave Act 1955* (NSW)  *Paid Parental Leave Act 2010* (Cth) | *Clerks – Private Sector Award 2020*  *Long Service Leave Act 1981* (NT) | *Clerks – Private Sector Award 2020*  *Industrial Relations Act 2016* (QLD) (long service leave) | *Clerks – Private Sector Award 2020*  Long Service Leave Act 1987 (SA)  *Paid Parental Leave Act 2010* (Cth) | *Clerks – Private Sector Award 2020*  *Long Service Leave Act 1976* (TAS)  *Paid Parental Leave Act 2010* (Cth) | *Clerks – Private Sector Award 2020*  *Long Service Leave Act 2018* (VIC)  *Paid Parental Leave Act 2010* (Cth) | *Clerks – Private Sector Award 2020*  *Long Service Leave Act 1958* (WA)  *Paid Parental Leave Act 2010* (Cth) |

## State and Territory laws

State industrial relations laws no longer apply to employees in the Federal system, with the only exceptions being those laws the Federal Government expressly permits to operate such as:

### laws that deal with discrimination or the promotion of equal employment opportunity;

### workers compensation laws;

### occupational health and safety laws;

### child labour;

### long service leave;

### observance of public holidays (but not rates of payment for public holiday work);

### payment of wages and wage administration matters (i.e. method and frequency of payment of wages and deductions from wages); and

### jury service.

## The National Employment Standards

The NES, which are contained in the FW Act, are 11 minimum conditions of employment that cannot be undermined. All national system employers must meet them. The minimum entitlements under the NES relate to:

### maximum weekly hours (hours of work);

### requests for flexible work arrangements;

### offers and requests to convert from casual to permanent employment;

### parental leave and related entitlements;

### annual leave;

### personal/carer’s leave and compassionate leave;

### community service leave;

### unpaid family and domestic violence leave

### public holidays;

### long service leave;

### notice of termination and redundancy; and

### the provision of a ‘Fair Work Information Statement’ and ‘Casual Employment Information Statement’.

Casual employees only get NES entitlements relating to:

### offers and requests to convert from casual to permanent employment;

### unpaid carer’s leave;

### unpaid compassionate leave;

### unpaid family and domestic violence leave

### community service leave; and

### the provision of a ‘Fair Work Information Statement’ and ‘Casual Employment Information Statement’.

In some states and territories long serving casuals are eligible for long service leave. Also where there is an expectation of ongoing work for a casual and the casual has been employed regularly and systematically for at least 12 months, they have extra entitlements under the NES. These include: the right to request for flexible working arrangements and access to parental leave.

On 27 March 2021 the FW Act was amended to include a Casual Employment Information Statement, a definition of casual employment and a pathway for casual employees to become permanent employees (either full-time or part-time).

Casual Conversion

The NES now provides that casual employees who have worked for their employer for more than 12 months must be offered the option to convert their employment to full-time or part-time.

To convert a casual employee, employers need to:

### make a written offer to convert their casual employee to permanent employment (this must be done within 21 days after making the assessment), or

### write to their employee explaining why they won’t be making an offer (this needs to be done within 21 days of making the assessment).

If employers (except a small business employer) decide not to offer casual conversion, they need to write to the employee within 21 days after the employee’s 12 month anniversary, telling them:

### that they will not be offered casual conversion; and

### the reasons for not making the offer.

The only reasons for not making an offer of casual conversion are:

### the employee hasn’t worked a regular pattern of hours:

#### on an ongoing basis for at least the last 6 months

#### which they could continue working as a full-time or part-time employee without significant changes;

### the business has reasonable grounds for not making an offer.

Reasonable grounds for not making an offer of casual conversion can include that in the next 12 months:

### the employee’s position won’t exist;

### the employee’s hours of work will significantly reduce; and

### the employee’s days or times of work will significantly change, and that can’t be accommodated within the employee’s available days or times for work.

Reasonable grounds for not making an offer can also include circumstances where:

### making the offer would not comply with a recruitment or selection process required by or under a Commonwealth, State or Territory law

### the employer would have to make a significant adjustment to the employee’s work hours for them to be employed full-time or part-time.

If employers decide to not make an offer of casual conversation, or refuses to accept a request for a casual employee to convert to permanent on ‘reasonable grounds’, the reasonable grounds relied on have to be based on facts that are known or reasonably foreseeable.

Small business employers are not required to offer casual conversion to their casual employees however casual employees who have been working for a small business employer can request a conversion to permanent employment at any time on or after their 12 month anniversary.

It is unlawful for employers to reduce or change an employee’s hours of work or dismiss them in order to avoid the casual conversion process.

Before a casual employee converts to permanent employment, employers need to discuss their:

### type of employment (full-time or part-time);

### hours of work as a permanent employee; and

### start date as a permanent employee.

This information must be confirmed in writing to the employee within 21 days of them accepting the offer of casual conversion.

If an employer accepts a casual employee’s request to convert, the employer needs to then confirm this information in writing to their employee within 21 days after the employee has requested to convert.

Hours of work

The NES includes a guarantee that an award/agreement free employee must not be required or requested by an employer to work more than the following hours (unless the additional hours are reasonable):

### for a full-time employee, 38 hours per week (or, if agreed in writing, an average of 38 hours per week over a period of up to 26 weeks); or

### for an employee other than a full-time employee - the lesser of: 38 hours; and the employee’s ordinary hours of work in a week.

In assessing whether additional hours are reasonable, ‘all relevant factors’ must be taken into account. Those factors may include, but are not limited to, the following:

### any risk to the employee’s health and safety that might reasonably be expected to arise if the employee worked the additional hours;

### the employee’s personal circumstances (including family responsibilities);

### the needs of the workplace, or enterprise, in relation to which the employee is required or requested to work the additional hours;

### whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

### any notice given by the employer of the requirement or the request that the employee work the additional hours;

### any notice given by the employee of the employee’s intention to refuse the additional hours;

### the usual patterns of work in the industry or the part of an industry in which the employee works;

### the nature of the employee's role and the employee's level of responsibility;

### whether the additional hours are in accordance with averaging terms that apply in a modern award or enterprise agreement that applies to an employee or an averaging arrangement agreed to by the employer and employee as specified under the FW Act; and

### any other relevant matter such as whether any of the additional hours are on a public holiday.

The ‘hours of work’ clause in the letters of appointment provided with this Employer Manual has been drafted in such a way as to inform employees that they may be required to work hours outside and in addition to the normal working or office hours, including on weekends and public holidays. This may not be the case for every employee, but this may assist your Practice in showing that its employees are on notice that additional hours may be required. Of course, merely having this term in a letter of appointment does not mean that all hours in excess of 38 will be reasonable, and your Practice will need to consider the other relevant factors listed above.

If an employer requires an employee to work hours in excess of 38 per week, and the excess hours are not reasonable, the employee, a union or a workplace inspector may apply to the Federal Court or the Federal Magistrates Court for a remedy. The Court may make:

### an order requiring the employer to pay a sum of money to ‘another person’ as compensation for damage suffered by the other person as a result of the contravention; or

### any other order (including an injunction) that the Court considers necessary to stop the contravention or rectify its effects.

Annual Leave

Full-time employees are entitled to four weeks of paid annual leave with part-time employees entitled to annual leave on a pro-rata basis. Casual employees do not receive paid annual leave.

This entitlement to paid annual leave accrues progressively during a year of service according to the employee’s ordinary hours of work, and accumulates from year to year.

Award-covered employees may only cash out annual leave in accordance with the relevant award or an enterprise agreement (not just a common law contract). Award covered employees may be required or may require annual leave to be taken in accordance with the relevant award.

An award-free employee (such as an accountant) may agree with the Practice in writing to cash out some of their annual leave, as long as they retain a credit of at least four weeks accrued annual leave.

Award-free employees may be directed to take annual leave in accordance with the FW Act*.*

Personal/carer’s and compassionate leave

A full-time employee is entitled to 10 days of personal/carer’s leave for each year of service with their employer. Part-time employees are entitled to personal/carer’s leave on a pro-rata basis. Casual employees do not receive paid personal/carer’s leave. An employee’s entitlement to personal/carer’s leave accrues progressively during a year of service according to the employee’s ordinary hours of work, and accumulates from year to year. An employee can take personal/carer’s leave either because they are not fit for work because of personal illness or injury or to provide care or support to a member of the employee’s immediate family or household who requires support because of personal illness or injury or an unexpected emergency.

An employee is also entitled to two days unpaid carer’s leave for each occasion when a member of the employee’s immediate family or household requires such care or support.

Employees are also entitled to two days of compassionate leave for each occasion when a member of the employee’s immediate family, or a member of the employee’s household:

### contracts or develops an illness that poses a serious threat to their life;

### sustains a personal injury that poses a serious threat to their life; or

### dies.

Family and Domestic Violence Leave

All employees are entitled to five (5) days unpaid family and domestic violence leave per year. The employee’s entitlement to unpaid family and domestic violence leave crystallises from the day they commence employment, rather than accruing like annual leave or personal/carer’s leave.

Family and domestic violence leave does not accumulate from year to year.

An employee can take family or domestic violence leave if they need to do something to deal with the impact of family and domestic violence and it’s impractical to do so outside of their ordinary hours of work.

Family and domestic violence means violent, threatening or other abusive behaviour by an employee’s close relative that seeks to coerce or control the employee or causes them harm or fear.

A close relative is an employee's:

### spouse or former spouse

### de facto partner or former de facto partner

### child

### parent

### grandparent

### grandchild

### sibling

### an employee's current or former spouse or de facto partner's child, parent, grandparent, grandchild or sibling, or

### a person related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

Public holidays

A full-time or part-time employee is entitled to be absent from their employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes. For part-time employees, they are entitled to be absent from work and paid their base rate for the hours of work they would have performed if the day was not a public holiday. An employer may only request an employee to work on a public holiday if the request is reasonable.

Long service leave

If an employee is employed under an instrument such as a modern award or an enterprise agreement, which contains terms relating to long service leave, then an employee is entitled to long service leave in accordance with those terms. Otherwise, generally, an employee will be entitled to long service leave in accordance with long service leave legislation in their State or Territory.

Notice of termination and redundancy

The NES provides that each employee is entitled to a minimum period of notice where their employment is to be terminated (or payment in lieu). The relevant notice period is set out in Table 20.14.

Where employees are made redundant, they will be entitled to redundancy pay as set out in Table 20.11.

Employees are entitled to up to 16 weeks redundancy pay dependent on length of service. This will apply to all employees, including non-award employees (e.g. professional staff).

There are some exemptions, where employees are not entitled to redundancy pay. For example, employees engaged for fewer than 12 months, casual employees and employees employed in small business employers (fewer than 15 employees).

Unless the redundant employee had a pre-existing entitlement to redundancy pay prior to 1 January 2010 (for example as a result of the application of a state award), service prior to 1 January 2010 does not count for the purposes of calculating an employee’s entitlement to redundancy pay.

Community service leave

The NES requires employers to allow an employee to take unpaid leave to perform jury service or to engage in a voluntary emergency management activity (provided the absence is reasonable). Employers must also provide up to 10 days make-up pay to an employee performing jury duty. See the staff manual for further detail in relation to community service leave.

Unpaid parental leave

Employees are entitled to up to 12 months unpaid parental leave with a right to request an extension of unpaid parental leave up to a total of 24 months. An employee’s request for an extension of parental leave beyond the 12 month entitlement must be made in writing at least four weeks before the end of the employee’s available parental leave period.

A pregnant employee is able to commence unpaid parental leave more than six weeks before the expected date of birth, with her employer’s agreement.

The Practice must give consideration to the request. Under amendments to the FW Act, passed by the Federal Government in November 2015, where an employee requests an extension to their period of unpaid parental leave, the employer now must not refuse the request unless the employer:

### has given the employee a reasonable opportunity to discuss the request; and

### has ‘reasonable business grounds’ for refusing the request (see below for an explanation of this term).

The Practice must provide written reasons of its decision to either approve or refuse an employee’s request for an extension of parental leave. The response must be given as soon as practicable and no later than 21 days after the request is made.

In 2020 the FW Act was amended to include still birth, premature birth, infant death and reasons to access unpaid parental leave. In 2021, the FW Act was amended to include miscarriage as a reason to access compassionate leave.

Employees can take up to 12 months’ unpaid parental leave if they experience a stillbirth or the death of a child during the first 24 months of life. During their unpaid parental leave after the still birth or death of a child, an employee cannot be recalled to work or have their unpaid parental leave cancelled by their employer. To return to work while on unpaid parental leave, employees are required to give their employer at least four weeks’ written notice before returning to work.

Requests for flexible work arrangements

Some employees are entitled to request flexible working arrangements. They are employees who:

### are the parent, or have responsibility for the care of, a child of school age or younger;

### are a carer;

### have a disability;

### are 55 years of age, or older;

### are experiencing violence from a member of their family, or provide care or support for a member of their immediate family or household because the member is experiencing such violence.

The employee must have worked for the Practice continuously for 12 months or be a long-term casual employee to be entitled to request flexible working arrangements. All requests for flexible working arrangements must be made in writing, stating the nature of the flexibility sought and the reasons for the request. The Practice must give consideration to an employee’s request and the Practice may only refuse the request on ‘reasonable business grounds’. The Practice must provide written reasons of its decision to either approve or refuse an employee’s request for flexible working arrangements. The response must be given as soon as practicable and no later than 21 days after the request is made.

There is no exhaustive definition of what constitutes ‘reasonable business grounds’, however the FW Act, provides that the following are reasonable business grounds (and, therefore, may justify refusing the request):

### the new working arrangements requested by the employee would be too costly for the employer;

### there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;

### it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;

### the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity; and

### the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

Some minor inconvenience on the part of the employer will be insufficient. If none of the above grounds apply to the Practice, then it may be that the Practice will have to accommodate the flexible working arrangements requested by the employee.

Fair Work Information Statement

The NES requires employers to give each new employee a Fair Work Information Statement before or as soon as practicable after the employee starts employment. A copy of the Fair Work Information Statement is available to download at: https://www.fairwork.gov.au/employment-conditions/national-employment-standards/fair-work-information-statement.

Resources on the NES can be downloaded from: https://www.fairwork.gov.au/employment-conditions/national-employment-standards

Casual Employment Information Statement

The NES requires employers to also give each new casual employee a copy of the Casual Employment Information Statement before or as soon as possible after they commence employment. A copy of the Casual Employment Information Statement is available to download at: https://www.fairwork.gov.au/employment-conditions/national-employment-standards/casual-employment-information-statement

## Paid parental leave

In addition to unpaid leave under Fair Work, employees are entitled to paid parental leave under the *Paid Parental Leave Act 2010* (Cth) (**the PPL Act**). The PPL Act provides for financial support to primary carers of newborn and newly adopted children. Under the PPL Act, paid parental leave is not limited to full-time employees and can include casual workers, contractors and the self employed.

To be eligible for Parental Leave Pay, employees need to:

### be the primary carer of a newborn or recently adopted child and be:

#### the birth mother of a new born child;

#### the initial primary carer of an adopted child; or

#### another person caring for a child in exceptional circumstances where the child came into the care of the employee within 52 weeks of their birth or adoption, the employee will care for the child for at least 26 weeks and they aren’t in the employee’s care as part of a decision made by a state or territory child protection agency;

### have met the Paid Parental Leave ‘work test’;

### be an Australian resident;

### have received an individual adjusted taxable income of $151,350 or less in the 2020-21 financial year either before the date of birth or adoption, or the date of claim (whichever is earlier); and

### be on leave or not working, from when the employee becomes the child’s primary carer until the end of the Paid Parental Leave period.

To meet the Paid Parental Leave ‘work test’ employees must have:

### worked for at least 10 of the 13 months before the birth or adoption of the child, and

### worked for at least 330 hours in that 10 month period (just over one day a week), with no more than an eight week gap between two consecutive working days

The PPL Act prescribes that only one parent at a time (i.e. the primary carer) can receive paid parental leave entitlements. However, ‘fathers and ‘partners’ who are not the primary carer of a child are also entitled to a payment of up to two weeks if they take leave to care of a child (born or adopted). The leave must be taken during the first 12 months of the child’s life (or placement for adoption). The payment, known as ‘dad and partner pay’ is calculated at the National Minimum Wage (currently $772.60 per week gross).

In order to be eligible for ‘dad or partner’ pay, an employee must:

### care for a newborn or newly adopted child;

### have received an individual adjusted taxable income of $151,350 or less in the financial year either before the date of birth or adoption, or the date of claim (whichever is earlier); and

### satisfy the work test (above);

### be an Australian resident;

### use the leave to provide care for the child, whether as primary carer or jointly; and

### not be working (or taking another form of paid leave, for example annual leave) at the time they receive the payment.

Generally, an employee is entitled to apply for paid parental leave up to three months before the child’s birth or adoption. After applying for paid parental leave an employee can nominate the date on which payments begin as long as it is within 40 weeks of the birth or adoption of the child. If an employee nominates to receive payments outside of this 40 week period the number of weeks that an employee will be eligible to receive paid parental leave payments will reduce. Regardless of the elected start date of payments, parental leave pay must be fully paid within 52 weeks following the child’s birth or adoption.

Once it is determined that an employee is eligible for paid parental leave payments, the primary carer will receive payments at the level of the National Minimum Wage for a maximum period of 18 weeks.

Paid parental leave payments are counted as an employee’s taxable income. An employee may be able to transfer their payments to their partner, if they return to work before they have received all their payments. The person the payment is being transferred to must lodge a claim and meet the eligibility criteria.

Any provision for payment of parental leave under the PPL Act does not alter existing employee entitlements to paid parental leave under the employment contract. If an employee is eligible for paid parental leave under the PPL Act they can take their payments before, during or after any employer funded parental leave or leave entitlements.

Currently, paid parental leave payments are paid to employees by their employer or directly paid by the Department of Human Services. Employers do not play a role in providing dad and partner pay, which is provided directly through the Department of Human Services.

## National Minimum Wage

Qualified accounting professionals working in your Practice are entitled to receive, as a minimum, at least the National Minimum Wage for each hour worked. This is currently $20.33 per hour or $772.60 per week before tax.

The National Minimum Wage may be adjusted by the Fair Work Commission annually.

## Responsible bodies

The Fair Work legislation has seen the establishment of the following bodies:

1. Fair Work Commission – the national workplace relations tribunal, responsible for setting and adjusting minimum wages, facilitating good faith bargaining and the making of enterprise agreements, regulating the taking of industrial action, assisting with dispute resolution and granting remedies for unfair dismissals;
2. Fair Work Ombudsman – enforcing industrial relations legislation e.g. underpayment of wages claims; and
3. Fair Work Divisions of Federal Court and Federal Magistrates Court – court actions under the Fair Work legislation e.g. unlawful dismissals, general protections, freedom of association breaches.

## Links to useful websites

The following table sets out links to useful websites for more information regarding employment terms and conditions:

|  |  |
| --- | --- |
| Name | Hyperlink |
| Fair Work Ombudsman – includes various fact sheets on workplace rights and rules | [http://www.fairwork.gov.au](http://www.fairwork.gov.au/) |
| Fair Work Commission website | <http://www.fwc.gov.au/> |
| Clerks – Private Sector Award 2020 | <http://www.fwc.gov.au/documents/modern_awards/award/ma000002/default.htm> |

**PROCEDURES**

# PRIVACY OBLIGATIONS

**PRIVACY OBLIGATIONS IN RESPECT OF EMPLOYEES, CONTRACTORS, WORK EXPERIENCE STAFF, VOLUNTEERS AND JOB APPLICANTS ONLY**

## General

The *Privacy Act 1988* (Cth) requires organisations to protect personal information handled by them. The Privacy Act contains 13 Australian Privacy Principles (**APPs**) which require organisations to ‘design for privacy’ and cover open and transparent management of personal information (APP1), collection of information (APP3 to APP5), use and disclosure (APP6), quality of personal information (APP10), data security (APP11), access and correction (APP12 and 13), government identifiers (APP9), anonymity (APP2), direct marketing (APP7) and cross border disclosure of information (APP8). The Privacy Act also contains provisions for credit reporting bodies and credit providers, and provisions for a mandatory data breach notification scheme.

The Privacy Act **does not** apply to small businesses who have not had a turnover $3 million or more in any year since 2002, unless the business provides a health service, engages in certain business types (for example, operates a residential tenancy database), discloses personal information for a benefit, service, or advantage, provides a benefit, service, or advantage to collect personal information from a third party, is a contracted service provider with the Australian Government, is a credit reporting body or credit provider, or is a related body corporate to an entity who is bound to comply with the Privacy Act.

The Privacy Act exempts acts done or practices engaged in relation to ‘employee records’ in some circumstances. Acts done, or practices engaged in by the employer, which are directly related to:

### a current or former employment relationship between the employer and the employee; and

### an employee record held by the employer and relating to the employee,

are exempt from compliance with the *Privacy Act*, including the APPs.

The exemption only relates to acts (such as disclosure of personal information) for purposes that are directly related to the employment of the individual and directly related to an employee record. Accordingly, acts such as giving a list of employee names to a telemarketing firm are not directly related to the employment relationship and are therefore not exempted. Not all information held about an employee will amount to an employee record for the purposes of the exemption. An employee record is any personal information relating to the employment of the employee. If personal information held by an employer does not relate to the employee’s employment, the exemption will not apply. Whether personal information relates to the employee’s employment will depend on the circumstances.

The exemption does not cover personal information of any non-employee, such as unsuccessful job applicants, contractors, consultants or volunteers. Accordingly, any acts or practices in relation to information collected from these individuals will be governed by the Act and the APPs. Additionally, any act done or practice engaged in by a contractor, consultant, or volunteer in relation to an employee record will not fall under the exemption—the act done or practice engaged in must be by the employer themselves.

The exemption only applies once an organisation holds the employee record. An organisation must still comply with its obligations under the Privacy Act in relation to collection of the information, including notifying employees of the APP 5 matters (discussed below).

Personal Information is defined by the *Privacy Act* to mean information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not and whether recorded in material form or not.

The APPs are administered by the Office of the Australian Information Commissioner. The Commissioner has the power under the Privacy Act to:

### investigate a complaint an individual has made to the Commissioner;

### investigate, on the Commissioner’s initiative, an act or practice that may be a breach of privacy (even if no complaint has been made);

### conduct a privacy assessment of whether an entity is maintaining and handling personal information in accordance with the Privacy Act;

### ask an entity to develop an enforceable code, and register codes that have been voluntarily developed;

### direct a government agency to undertake a privacy impact assessment about a proposed activity or function;

### make a determination after investigating or complaint or conducting an investigation, including that an organisation compensate affected individuals;

### accept a court-enforceable undertaking from an organisation;

### seek an order (injunction) from the Court to stop conduct that does or would breach the *Privacy Act*; and

### seek a penalty for up to $2.22 million for a serious or repeated interference with privacy (that is, a breach of the Privacy Act).

The Commissioner also has a range of responsibilities and powers under other laws relating to data matching, eHealth, spent criminal convictions, and tax file numbers.

A breach of the Privacy Act may also be a breach of the *Competition and Consumer Act 2010* (Cth) (**CCA**) if the organisation has misled or deceived people about how it handles personal information. Penalties under the CCA can be significantly higher than under the Privacy Act.

During the course of your business, you may collect personal information from the following people (amongst others, such as clients):

### contractors and prospective contractors;

### employees and prospective employees;

### medical providers with the consent of the individuals; and

### from referees provided by individuals or previous employers.

### The kinds of personal information that may be collected include the following personal information:

### names, addresses and contact numbers;

### educational qualifications;

### residency status;

### health information directly related to the inherent requirements of the position performed or being applied for;

### tax file numbers (note that employers must also comply with the Privacy (Tax File Number) Rule 2015 (along with other legislation) in relation to collection, use, and disclosure of tax file numbers, regardless of whether they’re a small business);

### contact details for next-of-kin or emergency contacts;

### employment or work history;

### interview notes; and

### names of referees and previous employers.

The purposes for which the information is collected include the following:

### to make contact with the individual;

### to enable you to properly assess whether an individual is suitable for employment or contract work;

### to maintain, manage, and terminate the employment relationship;

### to ensure that information collected is accurate, complete and up to date;

### to ensure that you are complying with your workplace health and safety obligations; and

### internal accounting and administration purposes.

A brief summary of the how the APPs relate to the above practices is set out below.

APP1 – Open and transparent management of personal information

APP1 requires that you take reasonable steps to implement practices, procedures and systems that will ensure you comply with the APPs and any binding registered APP code, and are able to deal with related inquiries and complaints. You must readily provide information about the way you handle personal information.

In essence, this means that you are required to have a readily available privacy policy setting out how you handle personal information. APP 1 sets out the minimum information required in a privacy policy. The policy should be given out on request and best practice is to publish it in areas such as reception, and also on your website. If requested, you should take reasonable steps to provide a copy in the form requested. A template privacy policy specific to information collected from prospective employees, consultants and contractors only is included in the Staff Manual. It does not cover external activities involving clients, however, and a more comprehensive document would be required to cover that aspect of your business. **The template needs to be tailored to your specific circumstances, and must not be used without amendment. If the privacy policy is not accurate, then it may be misleading and deceptive and constitute a breach of the CCA as well as the Privacy Act.** In tailoring the template, you should consider the following, as well as any other factor that affects how you handle personal information:

### What information are you collecting? Are you collecting sensitive information?

### Do you collect the same information from all people, or different information from subsets of people?

### How do you collect the information?

### Do you collect information about people from third parties?

### Why do you collect the information?

### What do you do with the information?

### Do you anonymise it and use it for research purposes?

### How do you store it? Where do you store it?

### Who do you disclose it to? Do you disclose it to related bodies corporate? Are any of those related bodies corporate based overseas?

### Is the information transferred overseas at any stage, including via use of a third party service provider (eg Xero based in New Zealand, Amazon AWS based in the US - even if the data servers are located in Australia, the US parent company and US government could still gain access to the data)? To which countries?

### Do you have a privacy complaints procedure?

### Can people interact with you anonymously or are they required to provide information?

### What are the consequences if an individual refuses to give information?

### Do you use information for direct marketing purposes?

### Do you sell information to anyone else?

### Are you required by law to collect certain information (eg financial services are required to verify individuals under Know Your Client legislation)? Which laws?

### When do you de-identify or destroy information?

### How do you handle requests for access to or correction of information, and verification of the identity of individuals making those requests?

APPs 2, 3, 4 and 5 – Collection of personal information, anonymity and pseudonymity and rule for sensitive information

The main obligations required by APPs 2, 3, 4 and 5 are to:

### collect only information that is reasonably necessary for, or directly related to, your functions and activities;

### collect personal information fairly and by lawful means (i.e., do not trick individuals into giving information to you);

### collect personal information about an individual only from the individual, unless it is unreasonable or impracticable to collect it from the individual;

### assess any unsolicited personal information that you receive to determine if you could have collected it in accordance with the APPs, and if so, the APPs apply (so you must issue privacy collection statements and hold the information as you would any other), and if not, you must destroy or de-identify the information (unsolicited personal information is personal information received by an entity that has not been requested by that entity);

### take reasonable steps at the time of, or as soon as reasonably possible after the time of collection, to inform the person of certain matters (the APP 5 matters), including the identity and contact details of the entity, the purposes for the collection (i.e. how the information will be used), whether the information has been collected from a third party and the facts and circumstances of the collection, whether the collection is required or authorised by law (and if so, which one/s), the usual disclosures of the information, any consequences that will apply for not providing the information, whether the information is likely to be disclosed overseas, and referencing certain provisions of the entity’s privacy policy (through the use of a privacy collection statement such as the one contained in the attached ‘letter to job applicant’ in 23.2);

### allow individuals to deal with your organisation on an anonymous basis or under a pseudonym wherever possible; and

### obtain the individual’s consent to collect use, and disclose each specific item of sensitive personal information, the collection of which must be reasonably necessary for one or more of the entity’s functions or activities.

Sensitive information is a subset of personal information. It is information or opinion about a person and includes:

### racial or ethnic origin;

### political opinions;

### membership of a political association;

### religious beliefs or affiliation;

### philosophical beliefs;

### membership of a professional or trade association;

### membership of a trade union;

### sexual preferences or practices;

### criminal record or health information about an individual;

### genetic information (that is not otherwise health information);

### biometric information that is to be used for the purpose of automated biometric verification or biometric identification; or

### biometric templates.

In practice, this means that:

### you should know precisely what personal information your business collects and why;

### as far as possible, collect personal information directly from the individual and inform that individual, in writing, at the time of, or as reasonably practical after the time of collection, of the proposed uses and disclosures of their personal information; and

### you should not use deceptive means to obtain information from individuals or require more information than you need from individuals.

A draft letter to job applicants dealing with APP5 and APP1 is set out in the Management Forms section of this Employer’s Manual in section 23.

APP6 – Use and disclosure of personal information

APP6 requires that you only use or disclose personal information for the purposes for which it was collected, and also for related secondary purposes that are within the reasonable expectations of the individual (or directly related for sensitive information). Otherwise, the consent of the individual to the particular use or disclosure must be obtained.

In practice, this means that:

### you should obtain the consent of the individual if you intend to use the personal information other than for the purpose for which it was provided to you by the individual; and

### you should not disclose personal information to any other entity than you have advised in the privacy policy and privacy collection statement, other than with the clear consent of the individual or where another exception applies.

APP7 – Direct marketing

APP7 provides that an organisation must not use or disclose personal information it holds for the purposes of direct marketing (i.e. communicating directly with an individual to promote goods or services) unless an exception applies. Where an organisation is permitted by an exception under APP7 to use or disclose personal information for the purposes of direct marketing, it must provide a simple means by which an individual can opt out of receiving direct marketing (e.g. an “unsubscribe” button), and comply with any such request received from an individual within a reasonable time. An individual may also request an organisation to provide its source of the individual’s personal information (e.g. a third party data list provider) and the organisation must comply any such request within a reasonable time unless impracticable or unreasonable to do so.

APP8 – Cross border disclosure of personal information

Before you disclose personal information overseas, APP8 requires you to take such steps as are reasonable in the circumstances to ensure that the overseas recipient does not breach the APPs in relation to the information. In practice, this means you need to have at least a contractual obligation that requires the recipient to comply with the APPs. The obligation to take reasonable steps does not apply if the recipient is located in a country with equivalent privacy protections and which gives the individual enforcement mechanisms. This will require you to (with the assistance of legal counsel) conduct a privacy assessment of that jurisdiction to satisfy yourself that the jurisdiction has equivalent privacy protections. Alternatively, the obligation will not apply if you obtain the individual’s consent to the disclosure after explaining that their consent means you are no longer required to take reasonable steps to ensure the information is treated in accordance with the APPs. Consent must be informed and genuine.

APP9 – Government Identifiers

APP9 provides that Commonwealth identifiers such as Medicare, Veterans’ Affairs, passport numbers and tax file numbers may only be used in limited circumstances and must not be used to identify an individual, for example, as a filter in a database. However, an individual’s name or ABN is not an identifier.

APP10 – Quality of Information

APP10 requires that you take reasonable steps to ensure that personal information collected is accurate, complete and up to date. You must also take reasonable steps to ensure personal information used or disclosed is, having regard to the purposes of use or disclosure, accurate, up-to-date, complete, and relevant.

For example, this means that before using a job applicant’s résumé that may have been retained for some time (because the job applicant may have been unsuccessful in respect of the particular job application), you should ask the particular applicant whether you can rely on the résumé and if so, whether the job applicant wishes to update it.

APP11 – Security

APP11 requires you, as an entity that holds personal information, to take reasonable steps to protect the information from misuse, interference and loss, as well as unauthorised access, modification or disclosure. The particular steps required will depend on the type of information being held.

At a minimum, you should:

### implement secure computer passwords and lockable filing cabinets containing job applicant files;

### ensure computer systems are secure, and conduct regular vulnerability tests on them;

### check an individual’s identity when they ask for access to the personal information you hold about them;

### keep personal information away from those who do not need to see it (including employees);

### destroy personal information when it is no longer needed in an appropriate secure way, such as using a document disposal company, rather than by say, merely disposing of files in a bin in the street; and

### ensure employees and others who handle personal information receive regular training on how to keep personal information secure.

APP12 – Access to information and APP 13 – correction of information

APP12 requires that you give individuals access to all personal information you hold about them, unless an exception applies. Available exceptions include:

### where providing access would have an unreasonable impact on the privacy of other individuals;

### where there is a reasonable belief that providing access would pose a serious threat to someone’s life, health, or safety;

### where the request for access is frivolous or vexatious;

### where the request relates to existing or anticipated legal proceedings and the information can be discovered during those proceedings

### where providing access would prejudice negotiations with the individual

### where there is a reason to suspect unlawful activity or serious misconduct and there’s a reasonable belief that providing access would prejudice appropriate action

### where there is a reasonable belief that providing access would prejudice enforcement related activities by an enforcement body; or

### where providing access would reveal evaluative information generated within your organisation, in connection with a commercially sensitive decision making process. In those circumstances, the organisation may give the individual an explanation for the commercially sensitive decision, rather than access to the information. A commercially sensitive decision is one which, if a rival in the marketplace where to learn about the decision, may turn it to their advantage in a way that disadvantages you. Decisions as to whether or not to employ an individual, or the circumstances leading to the payment or non payment of bonuses for particular individuals are unlikely to be commercially sensitive decisions.

Notably, the employee records exemption does not operate to allow an employer to refuse to provide an employee access to their personal information. Additionally, employee records prescribed by the *Fair Work Act 2009* (Cth) must be made available to an employee or their representative on request.

If access is granted to material (and you should verify the identity of the person making the request prior to giving it), then it must be within a reasonable period of time from the request, and be provided in the manner requested by the individual if that is reasonable and practicable. If you are unable to provide full access (for example, because the records contain information about another individual), you may be able to provide partial access, access through an agreed intermediary, or a limited form of access (for example, inspection in a secure room, rather than providing copies of the information).

In circumstances where you have refused access, you must provide, within a reasonable period of time, a written notice setting out your reasons for refusal (except where it would be unreasonable to provide the reasons), along with the mechanisms available to the individual to complain about the refusal.

You cannot charge a fee for making an access request, but you may charge reasonable fee for providing access in order to recoup your expenses. You must inform the individual ahead of time that there will be a fee for providing access, and what the fee will be.

APP13 requires that you correct personal information where you are satisfied the personal information is inaccurate, out-of-date, incomplete, irrelevant or misleading, having regard to a purpose for which it is held, or where the individual requests you to correct the personal information and you are satisfied that it needs correcting having regard to the purpose for which it is held. You may refuse to correct if you are not satisfied of those matters, and if you do so, you are required to give the individual reasons why you cannot take steps to correct the information (except where providing reasons would be unreasonable), along with the mechanisms available to the individual to complain about the refusal. If you refuse, the individual can ask you to associate a statement with the uncorrected information that they believe it is inaccurate, out-of-date, incomplete, irrelevant or misleading. You must then take reasonable steps to attach the statement in a way that will make the statement apparent to users of the information.

You cannot charge a fee for making a correction request, for correcting the information, or for associating a statement with the information.

In practice, this may mean that you:

### check the identity of the individual asking for access to personal information;

### you only charge individuals when giving access and do not charge for making a request for access. However, you should only charge an individual the amount that it actually costs you to give access to the material which should not be excessive. This would for example mean charging ‘reasonable administrative costs’ such as staff costs involved in locating and collating information, reproduction costs and costs involved in having someone explain information to an individual;

### provide access in a number of ways including by providing an opportunity to inspect the information, providing photocopies, or providing digital copies; and

### correct poor quality information as soon as possible, taking into account the purposes for which the information is held.

Your obligations under the *Privacy Act 1998* (Cth) in relation to employees, contractors, volunteers, work experience staff and job applicants have only been briefly canvassed here. More information about your broader obligations under the *Privacy Act*, particularly in relation to client and other personal information can be found at the Office of the Australian Information Commissioner’s website at [www.privacy.gov.au](http://www.privacy.gov.au).

# RECRUITMENT AND SELECTION OF EMPLOYEES

## Overview

Before deciding to engage any employee, you should give very careful thought to the knowledge, skills and abilities a person will need to adequately perform the vacant position. The recruitment and selection process involves defining the right balance of these requirements, carrying out a fair and equitable process to enable you to source and select a candidate with this balance of attributes.

It is recommended that you always prepare an analysis of the tasks, duties and responsibilities of a job, as well as the necessary knowledge, skills and abilities a person will need to perform a job adequately. It is important to undertake such an analysis before a person accepts a position as it can be difficult to change it once they are in that position.

The job analysis should include the tasks, duties and responsibilities of a job, as well as the necessary knowledge, skills and abilities a person needs to perform the job adequately. It should include any physical or manual labour required (for example, an office services position may require a person to lift archive boxes of up to 15kg) and any travel that may be required within certain geographical distances (whether intra-state, inter-state or overseas). You could also list the types of equipment, software or training that a person could expect to experience as part of the job. You have no obligation to circulate this job analysis publicly. You have no legal obligation to set any particular selection criteria for a position, provided that the criteria that you do use are not discriminatory.

However, it is also recommended that you prepare a further list of the tasks, duties and responsibilities, knowledge, skills and abilities that are ‘inherent requirements’ of a position, that is, the essential or fundamental aspects of a position that a person must be able to perform in order to meet the needs of the position. In turn, when advertising a position, you should list these ‘inherent requirements’, with a view to attracting applicants that possess those abilities.

Anti-discrimination and equal opportunity legislation and requirements are discussed below in this Employer’s Manual at section 12. Employers should review that section for a full explanation of the concepts and legal obligations they impose on employers, including in the recruitment and selection process. Job applicants must not be discriminated against on the basis of their race, sex, religion, age, nationality or other non-work-related factors, which are discussed in detail in section 12 of this Employer’s Manual.

This means that you must take care not to place emphasis on any of these features that an applicant may or may not have. For example, you should not ask in a job interview whether an applicant has children and, if so, how those children will be cared for while the applicant is at work.

Despite all of the above, employers can discriminate in limited circumstances where, because of a particular attribute, a person is unable to perform the inherent requirements of a position. This is why it is important to undertake a proper job analysis before embarking on the recruitment and selection process, including undertaking an analysis of the ‘inherent’ requirements of a job. Again, these are the fundamental aspects of a position that a person must be able to perform in order to meet the needs of the position, not simply the way in which you prefer a job to be done. For example, it would be an inherent requirement for an applicant to be able to speak English, to allow them to communicate with your clients and other employees. It would not be an inherent requirement for an applicant to be either male or female.

When considering applicants for positions, you should focus on the inherent requirements of the position that the successful applicant will have to carry out, and the applicant’s ability to carry out these inherent requirements.

If you do propose taking any of the prohibited grounds of discrimination into account in selecting an applicant for a position, it is recommended that you obtain legal advice before doing so. This is because discrimination laws are strict and a range of remedies may be available to unsuccessful applicants in the event they are found to have been unlawfully discriminated against in a recruitment or selection process.

An example employment application form is provided in the management forms section of this Employer’s Manual at section 23.

## Type of employment relationship

Another part of the recruitment and selection process, will be determining whether you wish to employ a person on a full time, part time or casual basis, or whether the position lends itself to being suitable for a fixed term contract. You will need to make it clear to prospective employees during the recruitment and selection process, what the Practice’s expectations are with respect to the type of employment being offered, and the likely hours of work of that position.

Set out below is an overview of the common forms an employment relationship may take. It is also important to review the specific terms of any applicable award, to assess any particular requirements with respect to the contract of employment. For example, the Clerks – Private Sector Award 2020 provides specific conditions for part-time work. Under the Award, an employer and employee must agree at the commencement of employment on the hours that the part-time employee will work, and if the employee works additional hours these may attract overtime rates.

Being aware of the terms of any relevant award is essential, because awards contain maximum and minimum working hours, minimum rates of pay, requirements about changing hours of work and penalty rates.

## Full time employees

Full time employees are employees who, on average, work 38 hours per week. Such employees must devote their full time and attention during normal business hours, to the employer’s business.

## Part time employees

Part time employees work fewer hours than full time employees. Part time employees are generally entitled to the same service-related entitlements as full time employees, but on a proportional basis based on their hours of work.

Specific conditions relating to the employment of part time employees, and the basis upon which they may be engaged, may be set out in an applicable award.

## Casual employees

Under changes to the FW Act, a definition of a casual employee was inserted. Now, under the FW Act, a person is a casual employee if:

### they are offered a job;

### the offer does not include a firm advance commitment that the work will continue indefinitely with an agreed pattern of work; and

### they accept the offer knowing that there is no firm advance commitment and become an employee.

It is again important to review the terms of any applicable awards for the definition of ‘casual’ employee, to ensure that any provisions regulating casual employment are observed.

True casual employees do not accrue continuous service and are usually paid a casual loading as compensation for this.

In an office environment such as an accounting practice, there are generally few employees who are truly casual, as most employees tend to work fairly regular hours and are not in a position where they do not know whether there will be any work for them from week to week.

It is recommended that you regularly review your working relationship with any casual employees, to see if a degree of permanency has developed about the relationship, such that it is more appropriate to engage that person as a part time employee.

## Fixed term or temporary employees

It is possible to offer employees an employment contract that specifies the time at which employment will end. This means that employees are not engaged indefinitely. You may engage the employee:

### for a fixed term – where the start and end dates are specified, and the employment cannot be terminated in the meantime, unless for serious misconduct; or

### for a temporary period – where the start and end dates are specified, but either party may terminate the employment during the period either by giving notice or for serious misconduct.

Employees engaged for a fixed term may be excluded from bringing unfair dismissal claims. These laws are explained in more detail in the Counselling and Dismissal Procedure in this Employer’s Manual at section 20.

You should not decide to offer someone employment for a fixed term purely because you think that this will prevent the employee from bringing an unfair dismissal claim. It is not lawful to engage someone as a fixed term employee for the purpose of avoiding the unfair dismissal laws.

The only circumstances in which an employee should be engaged as a fixed term or temporary employee is where you have a genuine need to employ someone for a pre-determined amount of time. For example, if you had an employee absent on a 6 month leave of absence, or an employee on parental leave for 6 months, in both cases it would be appropriate to engage a replacement employee for a term of 6 months.

If you employ an employee for a fixed term, without the ability to give notice to terminate during the term, then you will be required to employ the employee for the duration of the fixed term, or if you want to terminate their employment, pay them the remuneration which would otherwise have been due under the employment contract for the remainder of the fixed term, even if they have proved to be unsuitable for the position. For this reason, it is usually preferable to consider temporary employment, rather than true ‘fixed term’ employment.

Given the many risks involved in engaging employees under fixed term employment arrangements, it is recommended that you seek specific legal advice before engaging any employees under fixed term employment contracts.

# SELECTION PROCESS – THE EMPLOYMENT INTERVIEW

## Overview

Selection is a process of evaluation and decision-making, in which employers need to make a judgment call about which candidate, across a range of candidates, is the most suitable for an advertised position. A good selection process should be fair to all applicants and take into consideration ethical and legal requirements.

Interviews are one of the most common selection methods utilised by employers.

The goal of an employment interview is to find out as much as possible about a candidate’s ability to perform an advertised position, and to ensure that you have enough information to select the best person for the job amongst a range of candidates.

Because interviews involve judgements about people that can stir up perceptions of fairness/unfairness, it is important that the interview process is conducted in such a way across all candidates, so as to increase the perceived fairness amongst candidates. This means ensuring that all interviews are conducted similarly across all candidates. For example, you should consider asking candidates the same pre-determined questions, and having more than one organisational member interviewing candidates at the same time, so that a variety of opinions can be obtained in relation to the suitability of a particular candidate.

Organisations also tend to avoid legal challenge if the selection/interviewing process has the following four characteristics:

### job relatedness;

### an opportunity for the candidate to demonstrate ability;

### considerate, inter-personal treatment; and

### questions that are not perceived as improper.

The following is a list of sample questions that may be considered relevant in assessing an interviewee’s ability to adequately perform an advertised position, and may provide guidance for you when conducting employment interviews.

## Questions suitable for management positions

When hiring someone for a management role, it is important to assess not only their past experience but their ability to expand on what is already being achieved at your Practice, to think creatively, work well in a supervisory capacity and manage and delegate tasks.

Some questions that you may like to ask are:

### Describe your experiences at other accounting practices.

### Use a hypothetical accounting/taxation problem and ask the applicant ways to best resolve it or the options open to a client faced with such a problem.

### What skills do you consider necessary to effectively service the clients of our Practice?

### How do you develop and maintain professional working relationships with clients?

### Have you ever had to deal with a difficult client? Give an example and explain how you did or would deal with this situation.

### Give examples of the types of work and transactions you have been involved with.

### What would be the most important skill that you have learnt in your previous employment?

### What special qualities can you bring to our Practice?

### What do you believe to be your weaknesses and your strengths?

### What are your career goals?

### What other interests do you have outside of work?

It is most important that an applicant is not discriminated against on the basis of any answers given to these questions, for example, eliminating an otherwise appropriately qualified applicant because he or she states that their out of hours interests include performing voluntary work for and attending political rallies in support of the trade union that their partner belongs to.

## Questions for non-managerial positions

Many of the above questions can also be used or tailored when interviewing applicants for non-managerial positions.

When interviewing for non-managerial and administrative-related positions, it is important that applicants are able to demonstrate the following personal characteristics:

### good communication and interpersonal skills with employees, clients and other professionals;

### a willingness to follow reasonable directions;

### a need to be mature, reliable and respect confidential information that may be imparted to them;

### good organisational skills, prioritisation and time management skills;

### a well groomed appearance appropriate for a professional practice; and

### an ability to work in a team or for more than one professional.

With these objectives in mind, you may like to ask the following questions:

### Why would you like to work at our Practice?

### Can you give some examples of a situation in previous employment where you have had to delegate responsibility to others? What type of instructions did you give to achieve your objectives and how did you ensure that it was successful?

### What career goals have you set for yourself?

### What do you perceive to be your weaknesses and how can these be improved upon?

It is also important to ask general questions about interests, hobbies and outside activities.

As noted above, anti-discrimination and equal opportunity legislation and requirements are discussed below in this Employer’s Manual at section 12. Employers should review that section for a full explanation of the concepts and legal obligations they impose on employers, including in the recruitment and selection process. Amongst these requirements, you are not entitled to ask questions about the prohibited grounds or ‘attributes’ listed in that section, including personal details such as a candidate’s:

### age;

### relationship status;

### family responsibilities;

### religion;

### trade union membership; and

### political beliefs or convictions.

At the conclusion of the interview, be sure to ask applicants if they have any questions about your Practice. The answer to this final question can reveal a lot about the applicant’s understanding of the type of work carried out by your Practice and what the applicant believes the job will entail.

In summary, a structured approach to interviewing should ensure that all applicants are treated equally and on the basis of merit, and that the best applicant for the job will be found.

## Questions for referees

You may wish to undertake reference checks with the previous employers of job candidates.

It is also recommended that you verify any references provided by an applicant with the source of the reference and contact any nominated referees.

In all cases, before doing so, it is recommended that you obtain consent from the applicant to do so.

In all cases, reference enquiries should be relevant to the position applied for and should not be related to any potentially discriminatory matter, except where the question relates to an inherent requirement of the job applied for.

A reference checklist appears in the Management Forms section of this Employer’s Manual at section 23.

# CRIMINAL HISTORY AND CREDIT CHECKS

## Criminal history checks

Police services in each Australian jurisdiction keep criminal records. An individual can obtain a copy of his or her criminal record, and an employer can request a police check with that individual’s consent. It is preferable to obtain consent in writing.

‘Spent conviction’ legislation operates in all states and territories. Under the Federal *Crimes Act 1914* and the spent conviction legislation in each state or territory, a person is not required to disclose for any purpose, the fact he or she has been charged with a ‘spent’ offence. The premise behind this legislation is to allow the criminal records of certain offenders to be amended, removing some offences after a specified period of time, to allow that individual to start with a ‘clean slate’.

Generally, an offence is ‘spent’ if a specified period has elapsed since the conviction, and the person has completed a period free from criminal behaviour. These periods vary from jurisdiction to jurisdiction, and depending on the nature of the crime, as set out in the summary table on the following page of the Employer’s Manual.

As a result of spent conviction legislation, job candidates are entitled to treat any questions from a prospective employer about convictions, as referring only to offences which are not spent. As set out in the table on the following page, however, not all convictions are considered to be spent. For example, in most states, sexual offences and offences involving lengthy prison sentences are excluded.

## Spent conviction legislation summary table

|  | Cth | ACT | NSW | NT | Qld | SA | TAS | VIC | WA |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Legislation** | *Crimes Act 1914* | *Spent Convictions Act 2000* | *Criminal Records Act 1991* | *Criminal Records (Spent Convictions) Act 1992* | *Criminal Law (Rehabilitation of Offenders) Act 1986* | *Spent Convictions Act 2003* | *Annulled Convictions Act 2003* | *Spent Convictions Act 2021* | *Spent Convictions Act 1988* |
| **Definition of conviction** | * Conviction summary or indictment * Finding of guilt * No finding of guilt but matter taken into account in another offence | * Conviction summary or indictment * Finding of guilt but disposed without conviction | * Conviction summary or indictment * Finding of guilt/offence proved * Order to be of good behaviour * an order under section 33 of the *Children’s* *(Criminal Proceedings) Act 1987,* other than an order dismissing a charge | * Any conviction * Offence proved * Order made without proceeding to conviction but constitutes criminal record under the Act * quashed conviction * pardon * certain orders made under other criminal legislation | * Conviction by or before any court | * Conviction summary or indictment * Finding of guilt/offence proved * No finding of guilt but matter taken into account in sentencing for another offence | * Conviction recorded, summary or indictment * Conviction under the *Monetary Penalties Enforcement Act 2005* * Finding of guilt | * Finding of guilt with or without conviction * Infringment conviction or offence | * Any conviction for offence against law of WA or foreign country * Charge disposed without conviction * Does not include: life sentence; certain children’s convictions |
| **Conviction capable of becoming spent** | * Sentence with no imprisonment * 30-month sentence or less * Pardon other than wrongly convicted | * 6-month imprisonment sentence or less (except for sexual offence, body corporate and prescribed convictions) * Conviction is quashed * Pardon granted for the offence | * 6-month imprisonment sentence or less (except for sexual offence, body corporate and prescribed convictions) | * 6-month imprisonment sentence or less (except for sexual offence, body corporate and prescribed criminal records) | * Sentence with no imprisonment * 30-month imprisonment sentence or less * NB: A conviction that is set aside, or quashed and a charge are not part of a person’s criminal history | * Conviction other than for a sex offence, body corporate and prescribed convictions * Certain sex offences eligible subject to conditions * conviction is quashed * person is granted a pardon for the offence | * 6 month imprisonment sentence or less (except for sexual offence and prescribed convictions) | * Any conviction * Serious convictions (imprisonment sentence of more than 30 months, sexual offence or serious violence offence) | * Serious conviction:   - Sentence of more than one year  - Fine of $15,000 or more   * Lesser conviction which is not a serious conviction or life imprisonment sentence |
| **Waiting period** | * 10 years (adult) 5 years (child) | * 10 years (adult) 5 years (child) | * 10 years (adult) 3 years (child) | * 10 years (adult) 5 years (child) | * 10 years (indictable adult) 5 years (other offences/offenders) | * 10 years (adult) 5 years (child) | * 10 years (adult) 5 years (child) | * 10 years (adult) 5 years (child) | * 10 years or 3 years (for certain offences involving cannabis) |
| **Means by which conviction becomes spent** | Automatic upon expiration of waiting period (subject to no further conviction) or grant of relevant pardon | Automatic upon expiration of waiting period (subject to no further conviction)  Upon the making of certain orders in relation to youth offences | * Automatic upon expiration of waiting period * Satisfactory completion of certain programs * Immediately upon finding that offence is proven without proceeding to conviction | * Automatic upon expiration of waiting period (subject to no further conviction) * Convictions of juvenile offenders convicted in an adult court become spent on application to the Police Commissioner. * Offence proved and no conviction, conviction spent upon discharge or finding, or subject to completion of conditions | Automatic upon expiration of waiting period (‘rehabilitation period’) (subject to no further conviction) | * Automatic upon expiration of waiting period (subject to no further conviction) * Immediately spent upon finding of guilt/proven offence if no conviction * Upon order from magistrate for certain sex offences | Automatic upon expiration of waiting period (subject to no further conviction) | * Immediately spent on day of conviction if conviction not recorded, qualified finding of guilt, or other certain types of convictions * Automatic upon expiration of waiting period (subject to any subsequent convictions) * Upon application to Magistrates Court (for serious convictions – only applicable from 1 July 2022) | Upon application to District Court Judge and making of an order (serious conviction)  Upon application to Commissioner of Police and issue of certificate (lesser offence) |
| **Commence-ment of waiting period** | From the date of conviction | At the end of the period of imprisonment served or subject to a control order | From the date of conviction or control order | From the date of conviction | From the date of conviction | From the date of conviction | From the date of conviction | From the date of conviction | On the day person is discharged from sentence of imprisonment for indeterminate period  On the day a conviction is imposed (for all other sentences of imprisonment) |

## Privacy Commissioner

The Federal Privacy Commissioner may investigate complaints about a breach of the spent convictions provisions in the *Crimes Act 1914* (Cth). The Commissioner can provide a range of remedies including compensation.

## Discrimination on the basis of criminal record

The only jurisdictions to specifically address discrimination on the basis of a criminal record are federal (under the *Australian* *Human Rights Commission Act 1986* (Cth) (**HRC Act**)), the Australian Capital Territory, the Northern Territory, Tasmania and to a lesser extent Western Australia.

Relevantly to all Practices, while certain conduct may be found to constitute discrimination, it is not unlawful to discriminate against someone based on their criminal record under the HRC Act.

The HRC Act gives the HRC the power to conciliate a claim of discrimination. However, no specific remedies are available to job candidates in circumstances where a prospective employer is found to have breached the HRC Act. This means that if the conciliation of a complaint of discrimination based on a criminal record is unsuccessful, no further action (such as recourse to the Federal Court) is available to the complainant under the HRC Act. The only power HRC has in the circumstances is limited to preparing a report with recommendations to the Attorney-General for tabling in Parliament. HRC cannot compel a person to comply with its recommendations.

However, employees may make other claims on the basis of irrelevant criminal records such as unfair dismissal claims. Employers must comply with relevant privacy laws in relation to criminal record information.

## Credit checks

With respect to performing credit checks, there is no ‘attribute’ that could form the basis of a discrimination claim.

However, it is generally recommended that any background checks on a person, including credit checks, are directly relevant to the inherent requirements of a position. It is further recommended that prospective employers obtain a job applicant’s consent prior to undertaking any credit check.

# EMPLOYING STAFF

## Offer of employment

Once you have selected a preferred applicant for a position and have obtained proof of their qualifications, you should give that person a written offer of employment.

Standard written offers of employment (in the form of letters of appointment) **attached** to this Employer’s Manual – see section 2 and the Schedules. There are different options within the standard letters of appointment which can be tailored to individual employees, including which take into account whether the employee’s employment will be covered by an award.

You should select appropriate alternatives throughout the standard documents to tailor the letters of appointment to the particular circumstances. It is very important that you have a record that the employee agreed to the terms. This is why the letter contains an acknowledgment to be signed by the employee at the bottom of the last page, stating that they agree to all of the terms and conditions contained in the offer.

When you give the letter to the applicant, you should provide two copies and ask the employee to sign one copy and return it to you. The other copy can be retained by the employee for their records. If you have not received the copy of the letter back from the employee within a short time of your offer being made (for example, between three to five working days), you may wish to contact the applicant and advise them that they will not be able to start employment until they have signed and returned the letter to you. You should explain to them that the letter sets out the basis on which they will be employed and that it is just as important to them as it is to you, to have a written record of those terms and conditions.

## Use of a probation period

The term ‘probation period’ refers to an agreed period during which an employer and an employee may determine the suitability of the employee for the position in question.

Probation periods allow employees and employers to terminate employment with shorter notice periods than if the employment continued past the probation period.

You should also understand the concept of a ‘minimum employment period’ under the *Fair Work Act 2009* (Cth).  If an employee’s employment is terminated, they cannot make an unfair dismissal claim if they have not completed the ‘minimum employment period’, which is:

### for small business employers (employers with fewer than 15 employees) – twelve months; or

### for other employers – 6 months.

This has the same purpose as a probation period, that is, to allow the employer to assess the employee’s suitability for the position and terminate their employment without fear of an unfair dismissal claim, as long as the termination occurs before the expiration of the minimum employment period.

Whether or not you include a probation period in the employee’s employment contract, the minimum employment period, being six (6) months under the *Fair Work Act 2009* (Cth) will apply.

## Payment of wages

A Bank Account Details Form is included in the Staff Manual. It is vital that this form is completed and returned by an employee as soon as possible after they accept your offer of employment. Without this form being completed, you have no authorisation to deposit funds into any bank account and it will be necessary for you to make alternative pay arrangements with the employee.

## Other documents

When an employee accepts your offer of employment, you should also have them complete and sign an Employment Declaration Form and return it to you. This form must be completed to allow you to deduct the appropriate amount of taxation from the employee’s wages. The employee should be made aware that you will not be able to pay wages until that form has been completed and returned.

All employers have an obligation to withhold the appropriate amount of pay as you go (**PAYG**) tax from each employee’s salary/wages. If you fail to do this, you could be legally liable for any additional tax which should have been deducted.

## Employee induction

A positive start to a new job is essential for any new employee. As such, an informative, well-planned and conducted induction is an effective way to transition new starters into productive employees.

Induction involves providing information, guidance and support to new employees about their new working environment, the operation of the Practice and the tasks that they will be performing, to enable them to adjust to their new working environment and begin productive work as soon as possible.

It is recommended that induction be conducted as a two-way process, so that as well as providing new employees with information about the Practice, employees are encouraged to ask questions and to engage in the induction process.

As a minimum, it is recommended that employers cover the terms of key workplace policies and procedures (including appropriate computer usage, work health and safety and the Practice’s appropriate workplace behaviour policy, i.e. its discrimination and harassment policies, and the complaints mechanisms available to employees). It is also advisable to discuss the conventions and customs of the Practice, for example, can you eat at your desk, or can you only eat in a designated staffroom or outside the Practice’s premises.

Beyond these matters, different groups of employees will have different needs in terms of induction processes relating to the actual tasks and duties they will be performing. Administrative employees, for example, will need to be shown how to operate equipment such as photocopiers and fax machines and be advised about relevant aspects of the Practice’s operation, such as when mail is collected/delivered. Thought will also need to be given to appropriate induction processes for, for example, graduate accountants, for whom this may be their first professional position. They will need to learn about the operation of the Practice, as well as being given support and guidance to enable them to undertake their technical/professional work.

The Practice should give thought to assigning new employees a buddy or mentor to assist with the above matters, and in relation to their transition into the workplace generally.

By ensuring that all new starters are properly inducted, you will provide new employees with the information and tools to be able to perform their role effectively.

A comprehensive employee induction program may also assist the Practice to mount a legal defence to show that the employee was aware of the policies and procedures of the Practice and may therefore negate the liability of the Practice for the employee’s personal actions, for example, a claim of discrimination or harassment.

## Induction checklist

There is an induction checklist included in the Management Forms section of this Employer’s Manual at section 23. This checklist sets out those matters which you should ensure are completed as a minimum, as soon as possible after new employees start work. The checklist confirms that you have provided employees with copies of all documents that they need to be given and that you have given all employees the details and training which they require to carry out their jobs effectively and safely. Once an induction checklist has been completed for an employee it should be placed on their personnel file. This checklist will later serve as proof that certain matters were discussed with the employee, should these matters arise as an issue.

It is also a good idea for a senior employee to meet with new employees after they have completed their first week of work, to discuss their progress over the course of that week, and to clarify any questions they have about their role with the Practice.

The risk of turnover, absenteeism, poor work habits or conflict situations occurring at the Practice will be minimised if each employee is clear about what is expected of them.

# PERFORMANCE APPRAISALS

It should be the Practice’s policy that work is undertaken in the most efficient and productive manner possible. Giving regular, contemporaneous feedback to your employees in a positive manner will play an important part in ensuring that this occurs.

To facilitate this, constructive, open communication is essential. Regular verbal and written feedback will help employees to gauge their standard of performance. The idea is not to make an employee feel threatened or insecure but to reinforce the notion that your Practice has high standards and will always strive for the provision of high quality service to its clients. Regular performance appraisals can also assist in achieving this objective.

## Objectives of performance appraisals

Performance appraisal is a formal system of planning and reviewing employee performance. It provides employers with an opportunity to comprehensively review key aspects of their employees’ performance, including employees’ skills and knowledge, their behaviours and achievements, and their working environment and supervisory requirements. It also provides employees with the opportunity to voice their concerns and aspirations in relation to their employment.

## How often should performance appraisals be conducted?

There is no legal obligation to conduct performance appraisals. However, they play an essential part in the good management of the Practice’s employees.

Moreover, if you should find yourself in a situation where you are contemplating dismissal in relation to a poor performing employee, a record of regular performance appraisals in which you have discussed what the Practice’s expectations of an employee are, and provided guidance on how to achieve those expectations, will provide the Practice with evidence of the deficiencies in that employee’s performance to support your actions.

It is up to you to decide how often you conduct performance appraisals. The size of the Practice and the demographic of its workforce will help inform a decision as to how regularly formal performance appraisals are undertaken. However, as a guide, it is recommended that they are undertaken at least every six to 12 months.

## Guidelines for the use of performance appraisals

Broadly speaking, the performance appraisal involves:

### determining how well employees are doing their job;

### communicating this information to employees;

### establishing a plan for performance improvement or development;

### assisting employees to implement this plan, including providing access to training and development tools as required.

## Before the performance appraisal meeting

A performance appraisal requires preparation before the meeting can occur.

Before you conduct any performance appraisal, the employee should be made aware of the grounds on which their performance will be assessed. Ideally, you should advise new employees when they commence that you have a system of performance appraisals, when appraisals will be conducted and what factors will be used to assess their performance. This will give the employee a clear indication of the goals and objectives of the Practice and what is expected of them.

Prior to conducting a performance appraisal, employers need to consider the purpose of the appraisal and have sufficient and correct information on hand, for example, copies of previous performance appraisals, specific performance criteria, performance against budget statistics, and training and development undertaken since the last appraisal.

Both employer and employee should also fill out an appraisal form, with a view to comparing and discussing these forms with the employee during the appraisal. This will help maximise the benefits obtained from the appraisal process and provide honest feedback about how employees gauge their own conduct and ability.

## During the performance appraisal meeting

The performance appraisal should be conducted in a private confidential area.

A performance appraisal is a mutual communication process which should seek to adopt a balanced approach towards both positive aspects of performance, and those where there is room for improvement. A two way conversation between employer and employee is essential to make the appraisal procedure effective. It is recommended that employers use probing questions, for example, *‘Are there any parts of your job which you feel you could perform better?’,* *‘Are there any areas for training and development that you consider would assist you to more effectively perform your role?’ etc*.

You should endeavour to discuss areas for improvement in such a way as to show that it is the employee’s performance and not their personality which is under scrutiny. You should assist employees with strategies to assist with continued development and performance in those areas and to agree on timeframes within which this will occur. In raising concerns over an employee’s performance, it is best to do so as objectively as possible, and not in such a way as to seem like a personal attack on the employee.

At all times you should show respect for an employee’s position, but also show your leadership and support. Your role is to encourage continued learning and recommend initiatives for further improvement, while showing appreciation for the efforts that have been made by the employee.

Appraisal forms should be signed and dated by both the employer and the employee as a record of the points discussed and agreed upon. Completion of performance appraisal documentation can at times be treated as a nuisance. However, in seeking to retain talented employees, it is vital for employers to participate fully in the process and to ensure that matters discussed, including agreed outcomes and training and development needs highlighted are properly recorded and actioned upon.

## After the performance appraisal meeting

It is necessary for employers to ensure that the feedback and outcomes from the performance appraisal are put into practice. This may include implementing training and development for an employee, or reviewing an employee’s technical skills on a regular basis.

A sample Staff Appraisal Sheet is included in the Staff Manual. It is a basic document which provides an example of the kinds of questions employers and employees can consider prior to the performance appraisal meeting. However, it is only intended as an example, and you should make appropriate adjustments to the sheet if there are other matters which are particularly relevant to your Practice or to the employee whose performance is being considered.

# DISCRIMINATION, WORKPLACE HARASSMENT (BULLYING), SEXUAL HARASSMENT

## Overview

In the Staff Manual, the Practice commits itself as being an equal opportunity employer. The underlying principle of equal employment opportunity is the notion of merit, and it is on this basis that the Practice undertakes to make appointments and promotions.

Equal opportunity also means that the Practice must commit to fostering a work environment free from discrimination, workplace harassment and sexual harassment.

The prevention of discrimination, sexual and workplace harassment is important because, as well as the obvious risk of litigation:

### work performance can suffer as a result of these behaviours creating an intimidating and hostile work environment;

### the detrimental effects on work output are seldom limited to one person and are often spread across a section or work unit;

### service delivery to clients may subsequently be negatively affected;

### the health of people subjected to discriminatory behaviours, harassment and sexual harassment may suffer, resulting in increased sick leave or compensation claims as well as personal duress to the individuals concerned; and

### such behaviours may result in staff resigning. This incurs a loss of the investment made in those people and it may lead to increased recruitment and retraining costs.

## Discrimination

Various anti-discrimination legislation exists at both the Federal and State/Territory levels to prohibit discrimination and harassment in the pre-work and work areas.

Such legislation also applies to the provisions of goods and services. To this extent, you need to be aware that this policy applies equally to the Practice and its employees’ dealings with clients. In other words, both the Practice and individual employees can also be liable for acts of discrimination against clients that the Practice and its employees may deal with in the course of employment.

Generally speaking, discrimination occurs when a person with an ‘attribute’ is treated less favourably than another person without the attribute is or would be treated in the same or similar circumstances.

Federal anti-discrimination legislation prohibits discrimination against someone (either directly or indirectly) on the basis of any of the following attributes:

### sex

### sex orientation;

### gender identity;

### intersex status;

### age;

### race, colour, descent, national extraction, social origin, national or ethnic origin;

### impairment;

### disability (which is defined broadly to include total or partial loss of bodily or mental functions, presence of organisms causing disease or illness, difference in learning and disorder, illness or disease affecting thought processes, perception of reality, emotions or judgment resulting in disturbed behaviour) which presently exists, previously existed or may exist in the future or can be imputed to a person;

### association with a person with a disability;

### criminal record;

### marital or relationship status;

### pregnancy, potential pregnancy, breastfeeding or family responsibilities;

### religion;

### political opinion;

In addition to mirroring some of the attributes which exist at a Federal level (as listed above), anti-discrimination laws in each State and Territory also prohibit discrimination against a person or persons, either directly or indirectly, on the basis of certain attributes. Below is a table summarising the position in each State and Territory and the relevant categories of discrimination.

| Discrimination categories generally | | | | | | | | |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Cth | ACT | NSW | NT | Qld | SA | TAS | VIC | WA |
| * sex * sexual orientation * gender identity * intersex status * marital or relationship status * pregnancy or potential pregnancy * breastfeeding * family responsibilities * age * race (including colour, descent, national or ethnic origin) * racial hatred * disability (which is defined broadly to include total or partial loss of bodily or mental functions, presence of organisms causing disease or illness, difference in learning and disorder, illness or disease affecting thought processes, perception of reality, emotions or judgment resulting in disturbed behaviour) which presently exists, previously existed or may exist in the future or can be imputed to a personassociation with a person with a disability * criminal record * religion * political opinion, * national extraction or social origin | * accommodation status * age * race * employment status * genetic information * immigration status * industrial activity * sex, sex characteristics * sexuality or intersex status * physical features * gender identity * record of a person’s sex having been altered * relationship status * breastfeeding or pregnancy * parent, family, carer or kinship responsibilities * disability, including requiring a guide dog or other assistance animal * religious or political conviction * profession, trade, occupation or calling * subjection to domestic or family violence * irrelevant criminal record * having had one of these attributes in the past * being a relative or associate of a person who is identified with any of the above attributes | * disability * sex, or sex characteristics * sexual harassment expressly prohibited * pregnancy * breastfeeding * age * race * homosexuality * transgender (including vilification) * marital or domestic status * compulsory retirement * carer’s responsibility * HIV/Aids (vilification) * relative or associate of person who is identified with one of above attributes | * race * sex * sexuality * age * marital status * pregnancy * parenthood * breastfeeding * impairment * trade union or employer association activity * religious belief or activity; * political opinion, affiliation or activity * irrelevant medical record * irrelevant criminal record * a person’s details being published under section 66M of the *Fines and Penalties (Recovery) Act 2001* (NT) * association with a person who has, or is believed to have, an attribute referred to in this section | * age * sex * race * impairment * breastfeeding * relationship status * pregnancy * parental status * lawful sexual activity * sexuality * gender identity * family responsibilities * religious belief or religious activity * political belief or activity * trade union activity * association with, or relation to, a person identified on the basis of any of the above attributes | * age * disability * sex * pregnancy * race * intersex status * sexual orientation * gender identity * marital or domestic partnership status * association with a child * caring responsibilities * religious appearance or dress * spouse or domestic partner’s identity | * race * age * sexual orientation * lawful sexual activity * gender * gender identity * intersex variations of sex characteristics; * marital status * relationship status; * pregnancy * breastfeeding * parental status; * family responsibilities * disability * industrial activity * political belief or affiliation * political activity * religious belief or affiliation * religious activity * irrelevant criminal record * irrelevant medical record * association with a person who has, or is believed to have, any of these attributes | * age * disability * pregnancy and breastfeeding * gender identity, lawful sexual activity and sexual orientation * political belief or activity * religious belief or activity * race * industrial activity or employment activity * parental status or carer status * physical features * sex * sex characteristics * marital status * an expunged homosexual conviction * personal association with a person who is identified by reference to any of the above attributes | * sex * sexual orientation * sexual harassment prohibited * marital status * family responsibilities and family status * pregnancy * breastfeeding * gender history * race * religious or political conviction * age * racial harassment * impairment * publication of relevant details on Fines Enforcement Registrar’s website * generally, relative or associate of a person who is identified with certain of the above attributes |

It is unlawful to discriminate against anyone on the basis of the factors listed in the table above. If any of your employees discriminate against a person on the basis of these attributes in the pre-work or work area, or in the provision of goods and services, then the Practice may also be liable for the discrimination, unless it can prove that reasonable steps were taken to prevent the discrimination.

It is necessary to ensure that employees have this information fully explained to them when they begin employment. This is the reason why you need to take great care to ensure that all employees are adequately trained about discrimination and harassment laws.

## Ensuring that you do not discriminate against employees or potential employees

The principles of discrimination relate to pre-employment stages, such as advertising and interviewing for applications, as well as to conduct during employment. Further information about discrimination during advertising and interviewing for applications can be found in sections 7 and 8 of this Employer’s Manual.

As the employer you must be careful to ensure that no unlawful discrimination occurs in your workplace. In all your decisions and actions you must ensure that no-one is treated unfavourably because they possess one of the attributes listed above.

## Two types of discrimination - direct and indirect

Direct discrimination occurs when a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different.

Examples of treating someone less favourably on the basis of an attribute they possess or by an act involving a distinction, exclusion or preference, include:

### judging someone on their political or religious beliefs rather than their work performance;

### using stereotypes or assumptions to guide decision-making about a person’s career;

### undermining a person’s authority because of their race, gender or sexual preference;

### making offensive jokes or comments about another worker’s racial or ethnic background, gender, sexual preference, age, disability or physical appearance; or

### denying further training to employees on the basis of impairment.

Indirect discrimination occurs when a requirement is imposed which:

### a person with the attribute does not or is not able to comply; and

### a higher proportion of people without the attribute comply or are able to comply; and

### is not reasonable.

It may initially appear fair because the same rules are applied to everyone but a closer look at the effect of the requirement being imposed will show that some people are disproportionately affected by the requirement.

Examples of indirect discrimination:

### Awarding bonuses for not using sick leave - this will disadvantage any employee who has had to take sick leave because of an impairment.

### Promotion on the basis of seniority - this can mean indirect discrimination against women because many have had time off work to care for children.

Sometimes it is hard to recognise acts of discrimination or decisions that have been based on discriminatory grounds. The following are some examples of discrimination in the workplace that would be considered unlawful under the legislation.

## Discrimination on the basis of age

*Glenda, 53, is a mother of children who have now all grown up. Glenda has returned to work to fill in some of her spare time. After one year of being back at work her manager thinks Glenda is getting a little too old for her position, despite the fact that all her tasks are completed well and on time. Glenda is given four weeks notice and asked to retire.*

This constitutes discrimination. Employees can bring an age discrimination complaint if they are forced to retire because of their age. It is important to remember however that it is not against the law to end an employee’s employment if they are not performing effectively.

## Discrimination on the basis of sex

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| --- |
| *Brendan, 20, applies for the position of receptionist at ‘JB Accounting and Associates’. The staff partner has never heard of or seen a male receptionist in an accounting practice and is sceptical as to how his conservative clients will respond to being greeted by a man. Although Brendan has two years experience working for another professional practice and presents well in the interview, the staff partner is of the opinion that it just won’t work. The position is given to a 17 year old female with no prior experience and average communication skills.* |

If Brendan was turned down for the position on that basis, it would be direct discrimination on the grounds of sex. Brendan would have been treated unfairly because he is a male. The actions of the staff partner in this example are against the law and Brendan would have a right of action against the staff partner and the Practice.

## Discrimination on the grounds of parental status

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| --- |
| *Mary has applied for a job as administration manager with ‘ABC Accounting Practice’. Mary has a lot of experience in similar positions and worked in the accounting profession for five years before taking time off to raise a family. Mary now has two children in school and shares the responsibility of caring for the children with her husband. During the interview the employer asks if Mary has any responsibilities that would prevent her fulfilling her job to her highest capacity. Mary says no, but mentions her children and states that she and her husband share the responsibility for their care. There is only one other applicant for the position and the employer notes that the other applicant has no children or other responsibilities. Mary is the more qualified for the job but the employer decides to employ the other applicant assuming that Mary’s family responsibilities will be a distraction.* |

This would constitute discrimination on the basis of parental status. You should also keep in mind that discrimination on the grounds of parental status can include discrimination against someone on the basis that they do not have children.

## Discrimination on the basis of race

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| --- |
| *Mike is an Indigenous Australian. Mike has a few years experience as a tax accountant and applies for a position with ‘The Tax Specialist’. The Tax Specialist is situated in an area where there is a strong Asian community. Mike is unsuccessful in his application for the position. He is told that he is underqualified and that in any event that he ‘doesn’t look like most of the clients so he won’t fit in’.* |

Mike is not given the job for two reasons (1) he is underqualified, and (2) his race. Even if the first reason is true, Mike may still have a case because race is an irrelevant consideration when determining someone’s suitability for a certain position. If Mike can establish that race was the substantial reason why he did not obtain the position, then the employer will have acted unlawfully and both the employing partner and the Practice may be liable.

## Discrimination on the basis of religion

*Jane is a Muslim. She has been working at a new practice now for two months. Jane wears a hijab to work and attends the local mosque to pray during her lunch breaks. The Employer is annoyed that Jane’s hijab is not in accordance with the Practice’s clerical staff uniform and the other staff are ostracising her saying that she never talks to them during breaks. Because of the disharmony Jane’s arrival has caused among the staff in the workplace, the employer decides to terminate her employment.*

This constitutes discrimination on the ground of religion. Jane’s hijab in no way constituted a health or safety risk to herself or other employees and her attendance at the nearby mosque during designated breaks causes no disruption to the workplace. The only reason she was fired is because of her religious beliefs.

Employers must be aware of their own personal prejudices when making decisions that would affect an employee’s future. It is important that when making decisions you look closely at the reasons behind these decisions to ensure these reasons are valid and not an exercise of your own personal preferences.

## Workplace Rights

Fair Work provides for additional protection in the workplace for employees where they have a ‘workplace right’.

A person has a ‘workplace right’ if they:

### are entitled to the benefit of, or have a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body;

### are able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or

### are able to make a complaint or enquiry in relation to their employment, or to a person/body having the capacity under a workplace law to seek compliance with that law or a workplace instrument.

For example, an employee exercises a workplace right if they make a safety complaint. An employee has a workplace right if they propose to take a period of parental leave (to which they are entitled under a workplace law). An employee is exercising a workplace right if they appear as a witness in a former colleague’s unfair dismissal hearing.

Neither employers, nor any other person, may take ‘adverse action’ against an employee because the employee has, exercises or proposes to exercise their workplace rights. Adverse action may not be taken in order to prevent the exercise of a workplace right. ’Adverse action’ is defined in broad terms to include:

### injury to employment;

### discrimination between employees;

### alteration of an employee’s position to his or her prejudice;

### refusal to employ an employee;

### discrimination in the terms and conditions of employment offered to a prospective employee; and

### dismissal,

and includes threatening to take action, or organising action.

There are also prohibitions on taking adverse action against employees because:

### they engage in industrial activity (e.g. organising for a union); or

### of a protected attribute (i.e. the attributes that must not form the basis of discrimination).

There is no distinction between direct and indirect discrimination under the *Fair Work Act.* There are exemptions from liability where the alleged discriminatory conduct is not unlawful under any relevant State or Federal anti-discrimination law or where the discrimination is taken because of the inherent requirements of the relevant position.

## Sexual harassment

Federal, State and Territory legislation make sexual harassment unlawful.

Sexual harassment is essentially unwelcome sexual attention or unwelcome conduct of a sexual nature. It encompasses situations where a person is subjected to unsolicited and unwelcome sexual conduct by another person. It may take the form of unwelcome touching or physical contact, remarks with sexual connotations, requests for sexual favours, leering or display of offensive material.

More specifically, sexual harassment happens if a person:

### subjects another person to an unsolicited act of physical intimacy (e.g. uninvited touching, kisses or other physical contact); or

### makes an unsolicited demand or request (whether directly or by implication) for sexual favours from the other person (e.g. repeated invitations to go out after prior refusal); or

### makes a remark with sexual connotations relating to the other person (e.g. sex-based insults, taunts, teasing or name calling); or

### engages in any other unwelcome conduct of a sexual nature in relation to the other person (e.g. sexually explicit conversation, persistent questions or insinuations about a person’s private life, sexual innuendos),

and the person engaging in the conduct does so:

### with the intention of offending, humiliating or intimidating the other person; or

### in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.

Examples of conduct which could amount to sexual harassment include:

### kissing, attempts at sexual intercourse or overt sexual conduct;

### sexually explicit conversations or references to sexual activity;

### gender based insults, teasing or taunting;

### intrusive questions of a sexual nature at a job interview;

### proposals of marriage or declarations of love; or

### innuendos and crude jokes.

Sexual harassment is not behaviour which is based on mutual attraction, friendship or respect. If the interaction is consensual, welcome and reciprocated, it is not sexual harassment.

Sexual harassment does not need to be repeated. A single act of sexual harassment is sufficient to give rise to a complaint.

From 11 November 2021 employees will be able to make an application to the stop-bullying jurisdiction of the Fair Work Commission for orders stopping sexual harassment at work.

## Who is liable for sexual harassment

Someone who harasses another person will be personally liable for that sexual harassment. A person may also be personally liable for causing, instructing, inducing, aiding or permitting another person to discriminate against or sexually harass somebody else.

As with unlawful discrimination, an employer may be vicariously liable for sexual harassment which is committed by its employees or by its agents unless ‘all reasonable steps’ have been taken to prevent the sexual harassment occurring.

Not knowing that an employee has sexually harassed someone will not discharge your liability.

## Workplace harassment (bullying)

Workplace harassment (also known as bullying) has the potential to harm the health and safety of employees, and consequently, employers need to take seriously their obligation to minimise the risk of bullying occurring in the workplace.

It can have legal consequences for an employer in the sense that:

### if it endangers the health and safety of someone at the workplace, the employer could be prosecuted under occupational health and safety legislation;

### it may cause an injury that forms the basis of a workers compensation claim; and

### it may prompt an employee to make a complaint to the Fair Work Commission and seek orders to prevent further bullying.

Workplace harassment is behaviour where a person is subjected to behaviour, other than sexual harassment:

### that is repeated, unwelcome and unsolicited; and

### the person considers to be offensive, intimidating, humiliating or threatening; and

### a reasonable person would consider to be offensive, intimidating, humiliating or threatening.

Some examples of behaviour which, if they occur repeatedly, may amount to workplace harassment include:

### abusing a person loudly, usually when others are present;

### repeated threats of dismissal or other severe punishment for no reason;

### constant ridicule and being put down;

### leaving offensive messages on email or the telephone;

### sabotaging a person’s work, for example, by deliberately withholding or supplying incorrect information, hiding documents or equipment, not passing on messages and getting a person into trouble in other ways;

### maliciously excluding and isolating a person from workplace activities;

### persistent and unjustified criticisms, often about petty, irrelevant or insignificant matters;

### humiliating a person through gestures, sarcasm, criticism and insults, often in front of customers, management or other workers; or

### spreading gossip or false, malicious rumours about a person with an intent to cause the person harm.

Workplace harassment does not include:

### reasonable management action taken in a reasonable way by the person’s employer in connection with the person’s employment;

### a single incident of harassing type behaviour. Whilst a single incident will not amount to workplace harassment, it may still be unacceptable and may need to be dealt with as a performance management issue.

Since 1 January 2014 the Fair Work Commission now has powers to intervene and make orders where employees complain about bullying.

A worker who *‘reasonably believes that he or she is being bullied at work’* can apply to the FWC for a stop bullying order. There is no timeframe for an employee to lodge an application. However they must still be employed at the workplace.

Under the *Fair Work Act 2009* (Cth), a worker is bullied if:

### while the employee is at work in a constitutionally-covered business:

#### an individual; or

#### a group of individuals;

repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and

### that behaviour creates a risk to health and safety.

What constitutes unreasonable behaviour is not set out in the FW Act, however, the ‘FWC Anti-workplace bullying Guide’ and ‘Benchbook’ provide guidance defining unreasonable behaviour as ‘behaviour that a reasonable person, having regard to the circumstances, may see as unreasonable’. Examples given including behaviour that is victimising, humiliating or threatening.

As above, the FW Act expressly provides that bullying does not include reasonable management action carried out in a reasonable manner.

The Fair Work Commission must start to deal with a bullying application within 14 days of it being made. If the FWC believes that an application is valid and bullying conduct has occurred and that there is a risk that bullying will continue, it can issue orders requiring, for example:

### the individual, or group of individuals, to stop the specified Behaviour;

### regular monitoring of behaviour by an employer or principal;

### compliance with an employer’s or principal’s bullying policy;

### the provision of information and additional support and training to workers; or

### the employer to review their bullying policy.

The Fair Work Commission cannot make an order requiring the payment of money as compensation for bullying.

The Fair Work Commission has released a Benchbook and Case Management Model which provide guidance on how the new jurisdiction operates. The Case Management Model:

### informs employers and employees about the scope of the new anti-bullying jurisdiction and the remedies available through the FWC;

### emphasises the use of dispute resolution procedures such as mediation, conciliation and arbitration, which will be carried out by FWC staff and members; and

### outlines the process for an anti-bullying application from lodgment to the making of orders by the Fair Work Commission.

The Benchbook provides detailed information on the definition of bullying under the new legislation, when it applies, how to make applications to the FWC and outcomes that can be achieved through the FWC’s intervention. The Benchbook also notes that the FWC has been granted greater flexibility to gather information it considers appropriate in relation to an anti-bullying application. This may include contacting the employer or other parties to the application (such as the alleged bully), conducting a conference or holding a formal hearing.

The FWC has also launched a dedicated anti-bullying web page: https://www.fwc.gov.au/disputes-at-work/anti-bullying.

## What are ‘reasonable steps’?

To reduce the risk of the Practice being liable for workplace harassment (bullying), sexual harassment or discrimination perpetuated by its employees or agents, the Practice must take ‘all reasonable steps’ to prevent this conduct. This means that the Practice must take active precautionary measures to minimise the risk of workplace harassment, sexual harassment and discrimination occurring. What is considered reasonable will differ between each organisation but, regardless of size, each employer is legally required to take all reasonable steps to prevent sexual harassment if they wish to minimise risk of liability.

To be able to prove that reasonable steps were taken, it is vital that you develop a strategy to address the possibility of workplace harassment, sexual harassment and discrimination at the Practice. As part of this strategy, all employees must receive training and become very familiar with what is and is not acceptable at your workplace.

The policy on discrimination and harassment included in the Staff Manual is a good start to discharging your obligation as an employer to take ‘all reasonable steps’. However by itself, this will not be enough. In order to show that all reasonable steps were taken, it is also necessary to provide employees with training on workplace harassment, discrimination and sexual harassment. For this reason, it is recommended that you officially launch your anti-discrimination and harassment policy at a staff meeting. As the employer you should give the policy your full endorsement and emphasise the fact that all employees (including managerial employees) are required to comply with it.

A further means of ensuring that the policy is promoted on an ongoing basis is to periodically remind employees of the policy and provide them with additional copies. The policy should also be displayed on the Practice’s intranet, or notice boards, or other places accessible to employees. You should always provide a copy of the policy to new employees as a standard part of your induction procedure.

To ensure that the policy is widely promoted and regularly updated you should allocate time periods for ongoing training and review of the policy (at least every two years is recommended).

## What to do if you receive a complaint of bullying, workplace harassment, sexual harassment or discrimination

As part of your legal responsibility to deal with harassment and discrimination there must be effective and accessible complaint procedures for all employees.

Complaints of discrimination or harassment may be extremely varied. They may be against a senior employee who has authority over the complainant or they may involve a co-worker. The allegations may be extremely serious or relatively minor. Complaints may be about a single incident or a series of incidents. The parties may be angry, distressed or anxious. A complex investigation may be required or the matter may be resolved quickly and informally. Because of the variables that can arise in harassment and discrimination cases it is important to offer both informal and formal mechanisms for dealing with the complaint.

## Informal complaint procedure

An informal complaint procedure refers to an in-house complaint procedure. In the Staff Manual all staff have been provided with details of procedures to be followed if they have any grievance arising in relation to work. This includes:

### employees choosing to approach the person who is perpetrating the behaviour with a view to discussing their concerns with them and asking them to cease their behaviour;

### employees approaching their supervisor to report the matter and to ask for assistance. If employees do not feel comfortable approaching their supervisor, then they may choose to approach another senior employee to report the matter.

The Staff Manual provides that every complaint will be treated seriously and investigated promptly, confidentially and impartially. Disciplinary action may be taken against employees who are found to have unlawfully discriminated against, or harassed, other employees. It is particularly important that the Practice ‘lead by example’ and follow these steps in every case, particularly in the event that a complaint is made against a senior or managerial employee.

It is also important that the Practice ensure that managerial employees and supervisors have been provided with training, not only with respect to their obligations in these areas, but also, in how to deal with a scenario when an employee approaches them with a complaint that they have been discriminated against, sexually harassed or bullied. It is advisable to specifically list such a senior employee or employees within the Practice as contact officer(s).

Managerial employees and supervisors must ensure that:

### if they are approached by an employee about a complaint of discriminatory behaviour or harassment, that the complaint is treated seriously and that steps are taken as soon as practicable to investigate the complaints;

### employees are treated equitably and are not subjected to unlawful discrimination; and

### employees who make complaints are not victimised in any way.

It is important to remember that workplace harassment, sexual harassment and discrimination issues can be very difficult and sensitive to deal with. You must make sure that every complaint is handled with confidentiality, impartiality and sensitivity. If you deem it necessary and/or appropriate, seek specific legal advice to assist you in investigating complaints and in dealing with employees who are found to have breached their obligations in these areas.

After the issue has been raised with the senior employee/contact officer it is important to call a meeting between the complainant and the senior employee/contact officer, so all the facts can be ascertained. It is important that notes are taken during this interview and the contact officer confirms with the complainant that the notes are accurate.

After the initial interview, the senior employee or contact officer should inform the complainant that he/she will investigate the matter further. An investigation can then be conducted internally, or with the assistance of a third party investigator.

After investigations have been carried out it is important to consult with the complainant again about the decision reached in the matter, and the proposed solution. It may be that the Practice is satisfied that the conduct complained of did not occur. Alternatively, the Practice may be satisfied that the alleged conduct did occur, and that disciplinary action is to be taken against the perpetrator. In the event the Practice determines that the alleged behaviour is more likely than not to have occurred, it is recommended that the Practice seek information from the complainant as to any further resolution they may be seeking, for example a change in work practices.

## External complaints procedure

If the complainant remains dissatisfied as to the proposed solution, or if they feel uncomfortable generally about utilising the internal complaints procedure, they may make a formal complaint to the Fair Work Commission, the Australian Human Rights Commission or the relevant State or Territory anti-discrimination body listed below.

Employees are encouraged in the Staff Manual to use the internal complaints procedure first. However, if they choose to make a complaint with one of the listed bodies, this is their legislative right, and they should not be threatened or treated unfairly for doing so, or ‘encouraged’ to withdraw their complaint. This will only make things worse.

If the complainant decides to initiate a complaint with either of these bodies, both the Practice and any individuals against whom allegations of harassment or discrimination have been made will be asked by the relevant body to respond formally to the allegations. Once you have been notified of the existence of a complaint by such a body it is important that you seek legal advice as to the conduct of the matter. Again, it is vitally important that the complainant is not treated detrimentally or victimised because they have made a complaint. This will only compound the matter and potentially make it worse for the Practice in seeking to defend the claim.

## Enforcing the policy

Any complaints should be investigated and appropriately dealt with. The alleged harasser should not be presumed guilty, and it is equally important that this person is afforded natural justice, just as much as it is to ensure that the complainant’s complaint is properly investigated and treated with confidentiality and sensitivity. Litigation can often be avoided if a complaint is given proper consideration right from the start.

If after investigation it is concluded that an employee has breached the policy, he/she should be cautioned and counselled about their conduct or, if appropriate in the circumstances, disciplined. Where the employee’s conduct is sufficiently serious, or where there is a pattern of inappropriate conduct by the employee, it may be warranted to dismiss the employee. Records of disciplinary action should be maintained.

## Contact details for discrimination complaints

Employees are able to lodge complaint through the bodies set out for each State and Territory below.

| Cth | ACT | NSW | NT | Qld | SA | TAS | VIC | WA |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Australian Human Rights Commission**  Level 3, 175 Pitt Street, SYDNEY NSW 2000  GPO Box 5218 SYDNEY NSW 2001  Telephone:  (02) 9284 9600  National Information Service:  1300 656 419  Internet: https://humanrights.gov.au/  Email: [complaintsinfo@humanrights.gov.au](mailto:complaintsinfo@humanrights.gov.au) | **ACT Human Rights Commission**  Linlay Crisp Centre, Level 1/5 Constitution Ave, CANBERRA 2601  Telephone:  (02) 6205 2222  TTY:  (02) 6205 1666  Email: human.rights@act.gov.au  Internet: <http://www.hrc.act.gov.au> | **Anti-Discrimination Board of NSW**  **Parramatta**  Level 7/10 Valentine Avenue, Parramatta NSW  PO Box W213, Parramatta Westfield NSW 2150  Telephone:  (02) 9268 5555  **Toll free:**  1800 670 812  Email: [adbcontact@justice.nsw.gov.au](mailto:adbcontact@justice.nsw.gov.au)  Internet: https://antidiscrimination.nsw.gov.au/ | **Northern Territory Anti-Discrimination Commission**  Level 9, NT House, 22 Mitchell St , Darwin, NT 0800  Postal Address: LMB 22, GPO Darwin NT 0801  Telephone:  (08) 8999 1444  **Free Call:**  1800 813 846  General enquiries and to submit a complaint: antidiscrimination@nt.gov.au  Internet: https://adc.nt.gov.au/ | **Queensland Human Rights Commission**  **Brisbane**  Level 20, 53 Albert Street, Brisbane  City East Post Shop, PO Box 15565, City East QLD 4002  **Cairns**  Ground floor, 10 Grove Street, Cairns  PO Box 4699, Cairns QLD 4870  **Rockhampton** First Floor, State Government Centre, 209 Bolsover Street, ROCKHAMPTON  PO Box 1390, Rockhampton QLD 4700  **Townsville**  Ground Level, 187-209 Stanley Street Townsville  PO Box 1566, Townsville QLD 4810  **Free Call:** 1300 130 670  General email: [info@qhrc.qld.gov.au](mailto:info@adcq.qld.gov.au)  Internet: https://www.qhrc.qld.gov.au/ | **Equal Opportunity Commission South Australia**  Level 15, GPO Exchange, 10 Franklin St, Adelaide, SA  Postal address: GPO Box 464, ADELAIDE, SA 5001  Telephone:  (08) 8207 1977  Country callers: 1800 188 163  Email: [OCEO@sa.gov.au](mailto:OCEO@sa.gov.au)  Internet: https://www.eoc.sa.gov.au/ | **Office of the Anti-Discrimination Commissioner, Equal Opportunity Tasmania**  Level 1, 54 Victoria Street, Hobart 7000  Postal address: Equal Opportunity Tasmania GPO Box 197 HOBART, TAS 7001  Telephone:  (03) 6165 7515  Statewide local call:  1300 305 062  Text: 0409 401 083  Email: office@equalopportunity.tas.gov.au  Internet: https://equalopportunity.tas.gov.au/home | **Victorian Equal Opportunity and Human Rights Commission**  Level 3, 204 Lygon Street, Carlton 3053  Telephone:  1300 891 848  Email: [complaints@veohrc.vic.gov.au](mailto:complaints@veohrc.vic.gov.au)  [enquiries@veohrc.vic.gov.au](mailto:enquiries@veohrc.vic.gov.au)  Internet: https://www.humanrights.vic.gov.au/ | **Equal Opportunity Commission Western Australia**  Albert Facey House, 469 Wellington Street PERTH  Postal Address: PO Box 7370, Cloisters Square, Perth WA 6850  Telephone (08) 9216 3900  TTY: (08) 9216 3936  Country callers: 1800 198 149  Email: eoc@eoc.wa.gov.au  Internet:  https://www.wa.gov.au/organisation/equal-opportunity-commission |
|  |  |  |  | **Queensland Civil and Administrative Tribunal**  Level 11, 259 Queen Street, BRISBANE 4000  Postal address: GPO Box 1639, Brisbane, QLD 4001  Telephone:  1300 753 228  Internet:  http://www.qcat.qld.gov.au |  |  |  |  |
|  | **Fair Work Commission**  Level 3, 14 Moore Street, Canberra, ACT, 2600  GPO Box 539, Canberra City, ACT 2601  Telephone: 1300 799 675  Facsimile: (02) 6247 9774  Email: [canberra@fwc.gov.au](mailto:canberra@fwc.gov.au) | **Fair Work Commission** [**Sydney**](http://www.fwc.gov.au/index.cfm?pagename=aboutvirtualtour&page=contact&state=nsw)  Level 10, Terrace Tower 80 William St, East Sydney, NSW, 2011,  Telephone: 1300 799 675  Facsimile: (02) 9380 6990  Email: sydney@fwc.gov.au  [**Newcastle**](http://www.fwc.gov.au/index.cfm?pagename=aboutvirtualtour&page=contact&state=nsw&anch=newcastle)  Level 3, 237 Wharf Road, Newcastle, NSW 2300 | **Fair Work Commission**  10th Floor, Northern Territory House, 22 Mitchell Street, Darwin, NT 0800  GPO Box 969, Darwin, NT 0801  Telephone: 1300 799 675  Facsimile: (03) 9655 0420  Email: [darwin@fwc.gov.au](mailto:darwin@fwc.gov.au) | **Fair Work Commission**  Level 14, Central Plaza Two, 66 Eagle Street, Brisbane, QLD 4000  GPO Box 5713, Brisbane, QLD 4001  Telephone: 1300 799 675  Facsimile: (07) 3000 0388  Email: [brisbane@fwc.gov.au](mailto:brisbane@fwc.gov.au) | **Fair Work Commission**  Level 6, Riverside Centre, North Terrace, Adelaide, SA 5000  PO Box 8072, Station Arcade, Adelaide, SA 5000  Telephone: 1300 799 675  Facsimile: (08) 8410 6205  Email: [adelaide@fwc.gov.au](mailto:adelaide@fwc.gov.au) | **Fair Work Commission**  1st Floor, 39–41 Davey Street, Hobart, TAS 7000  GPO Box 1232, Hobart, TAS 7001  Telephone: 1300 799 675  Facsimile: (03) 6214 0202  Email: [hobart@fwc.gov.au](mailto:hobart@fwc.gov.au) | **Fair Work Commission**  Level 4, 11 Exhibition Street, Melbourne, VIC 3000  GPO Box 1994, Melbourne, VIC 3001  Telephone: 1300 799 675  Facsimile: (03) 9655 0401  Email: [melbourne@fwc.gov.au](mailto:melbourne@fwc.gov.au) | **Fair Work Commission**  Floor 16, 111 St Georges Tce, Perth, WA 6000  GPO Box X2206, Perth, WA 6001  Telephone: 1300 799 675  Facsimile: (08) 9481 0904  Email: [perth@fwc.gov.au](mailto:perth@fwc.gov.au) |

It has been made clear in the Staff Manual that anyone found guilty of bullying, sexual harassment or discrimination against a co-worker, client or any other member of the public will be subject to serious disciplinary action. It is the employer’s responsibility to ensure that no bullying, sexual harassment or discrimination is tolerated.

# GENERAL EMPLOYEE GRIEVANCES

## Introduction to grievances

For the purposes of this policy, a grievance should be treated broadly as a concern or complaint from an individual relating to work or the work environment. A grievance may be about any act, omission, situation or decision by the Practice or a co-worker/co-workers, that the aggrieved employee considers to be unfair, inappropriate or unreasonable.

**Note:** in the case of complaints of discrimination, workplace harassment or sexual harassment, employees should be referred to the complaints mechanisms in that policy in the Staff Manual, and complaints in those areas should be addressed in accordance with that policy.

It is in the Practice’s best interests to encourage a productive and responsive working environment. It should aim to ensure that grievances that impact on or affect the Practice are resolved in a fair, prompt and considerate manner.

Most grievances can be avoided by establishing clear guidelines, policies and procedures with respect to the running of the Practice. Therefore, it is important that you make yourself available to employees to discuss any queries or concerns that they may have in relation to the information contained in the Staff Manual.

All senior members of the Practice are responsible for making themselves available to employees for listening, investigating and resolving individual complaints and problems.

## Procedures for dealing with employee conflict

In all cases, until the grievance is determined, the aggrieved employee should continue in normal work.

Direct resolution

If the behaviour of an employee is causing conflict with another employee it is recommended that the aggrieved employee seek to approach the person directly and try to work out a mutual resolution. The aggrieved employee should be encouraged to tell the person who is acting in an unfair or inappropriate way why his or her behaviour is unfair or unacceptable, and request that they alter or refrain from their behaviour.

If the aggrieved employee is unwilling to approach the person directly, then they can refer their concern to their supervisor or another senior member of the Practice in accordance with the following paragraphs.

Referral to supervisor or another senior member of the Practice

If the problem remains unresolved, the aggrieved employee should be encouraged to go to their supervisor to seek to resolve the issue.

There are some situations where an aggrieved employee may not want to take a complaint to their supervisor, for example, where concern relates to the supervisor, or where there is a personality conflict. In this case, the aggrieved employee can refer their complaint to another senior member of the Practice.

All complaints taken to a supervisor should be treated seriously and confidentially. All conversations and discussions should take place in a quiet area away from other employees. The option to remain anonymous should always be at the discretion of the employee making the complaint, and this decision must be respected by the Practice.

If a supervisor is approached to deal with a complaint, but considers that it would be improper for them to consider the grievance (because, for example, they have a particular relationship with the aggrieved employee, or the person the complaint is about), the complaint should be referred to another senior member of the Practice.

The supervisor or senior member of the Practice (as the case may be – referred to in the remainder of this policy as ‘supervisor’) should fully discuss the aggrieved employee’s concerns, to get a full understanding of the issues. The supervisor has the responsibility to listen, investigate, evaluate and respond to the aggrieved employee.

It may be necessary for the supervisor to talk to other people involved and to impartially hear their side of the story, before taking any steps to seek to resolve the matter.

Confidential written records of the complaint and the interview processes should be taken for future reference.

Following a full consideration of the matter, the supervisor should offer suggestions as to how the dispute can be resolved. For example, a conflict may be resolved by:

### compromise; or

### seeking an apology from the party complained about; or

### offering a change of working arrangements, if practicable.

However, no action should be taken without first talking to the aggrieved employee and getting their agreement.

It is always advisable to respond to an aggrieved employee in writing, so that there is a written record that the grievance has been considered and addressed.

If appropriate in a particular case, any disciplinary action against the person complained about should be conducted following the counselling and disciplinary guidelines in this Employer’s Manual.

All stages of the grievance process should be documented and file notes provided to the parties involved as appropriate.

Grievance paths beyond the Practice

If the aggrieved employee is not satisfied with the Practice’s response, then the Practice may need to consider other forms of dispute resolution, for example, the use of mediation through a third party provider.

## Procedure for dealing with employee/client conflict

Never allow employees to involve themselves in an argument with a client. At all times, employees must be courteous and professional towards clients. The Staff Manual advises employees that if they are involved in a discussion with a client which becomes heated or if they receive a complaint from a client, they should refer the issue to their supervisor. If you become aware that any employee has become involved in an altercation with a client, you should immediately discuss this matter with the employee to obtain clarification as to what has occurred. If appropriate, you may wish to make it clear to him or her that such behaviour is not acceptable and may result in disciplinary action being taken if the incident is serious enough or if certain behaviour re-occurs.

If a problem arises between an employee and a client, you must first speak with the relevant employee directly about the issue and not with other employees. Kindly point out your reasons for concern and ask for suggestions or recommendations as to how the issue can be dealt with.

If you believe it necessary, you may engage the employee and client in a discussion in an attempt to resolve the matter.

# INJURIES AT WORK

There is legislation in every Australian State and Territory which aims to protect the health, safety and welfare of all employees by imposing obligations on all employers.

Under such legislation, employers or persons conducting a business or undertaking (**PCBU**) are obliged to provide safe work conditions and work practices. Employees and workers also have obligations to co-operate with their employer or the PCBU (in some states), and to take reasonable care of the health and safety of themselves and others at their workplace.

## Work health and safety guidelines

In order to ensure that the Practice meets obligations for work health and safety, you must ensure that work health and safety guidelines are set and maintained at all times. Guidelines which are appropriate will depend on the circumstances of your Practice but some key guidelines that are recommended as a minimum are set out below:

### the workplace should be kept clean and tidy and with a minimum of clutter on shelves and floors;

### work station layouts should be inspected to ensure that employees are not exposed to overuse or strain-related injuries;

### all equipment, furniture and electrical appliances should be regularly inspected and any defects or faults reported and actioned;

### outlining through training and regular reminders to employees, safe methods of work, for example, safe manual handling of heavy boxes and other office equipment, encouraging clerical/administrative employees to take regular breaks from computer usage etc.;

### clearly outlining supervisory and managerial responsibilities in relation to work health and safety;

### putting in place mechanisms to ensure that employees consistently take annual leave each year and that there are processes in place to recognise and deal with serious workplace stress.

It is the Practice’s obligation to ensure that all employees understand the work health and safety guidelines that are in place and understand the importance of complying with those guidelines.

The induction process for new employees must include training on work health and safety issues. Once new employees have commenced with the Practice, you should ensure that work health and safety is not simply put to one side. Although professional accounting practices are generally low-risk in respect of potential for injury to employees, there have been a growing number of successful statutory and common law workers compensation claims relating to psychological and overuse-related injuries, which are common injuries sustained in office environments.

Circumstances may change or new equipment or work methods may be introduced which potentially have an impact on work health and safety, and you will need to be aware of this at all times.

Employees should also be given the opportunity to provide feedback on training methods to ensure that the quality of the training that is being provided is as high as possible.

## What happens if an employee is injured at work?

In certain circumstances, you may have a statutory obligation under legislation to provide notice to the relevant work health and safety authority, if an employee is injured at work. This is particularly the case if an employee sustains a serious injury or if a dangerous event occurs in a workplace.

Links to relevant work health and safety and workers’ compensation authorities in your State or Territory, are set out in the following two sections of this Employer’s Manual.

In the event an employee sustains a serious bodily injury at work or a dangerous event occurs in the workplace, it is recommended that the Practice obtain legal advice as to the steps it is obliged to take statutorily and as a matter of good practice.

# WORKERS’ COMPENSATION

## Overview

Systems of compensation for workers suffering work-based injury or illness exist in every Australian State and Territory. They are ‘no fault’ schemes, which means that compensation will be paid to employees and workers as long as they meet the particular requirements of the applicable legislation for a workplace injury.

The rights given to employees and workers under this legislation cannot be excluded, modified or ‘contracted out of’ by way of private arrangement between employer and employee. Every employer must arrange for, and keep up to date, a workers compensation policy covering all of their employees and workers as the case may be.

An injury can be physical (including diseases contracted at work) or psychological, where employment was a significant contributing factor. An injury can also include the aggravation, exacerbation or deterioration of an injury or an illness, where employment was a significant contributing factor.

Generally, workers’ compensation schemes pay for an injured worker’s loss of earnings, and medical and related expenses, including expenses incurred as part of the rehabilitation process. The employer will generally be required to meet these expenses, and will be reimbursed under its workers compensation insurance policy.

Increasingly, emphasis is being given to the rehabilitative strategies in respect of injured workers, with a view to assisting them to return to work.

## Workers’ compensation legislation, links and contact details

Set out below are references to the workers’ compensation legislation and regulations relevant to each state or territory and contact details for the applicable workers’ compensation authorities in each State or Territory.

| Workers’ Compensation | | | | | | | | |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | ACT | NSW | NT | Qld | SA | TAS | VIC | WA |
| **Legislation** | *Workers Compensation Act 1951*  *Workers Compensation Regulation 2002* | *Workers Compensation Act 1987*  *Workers Compensation Regulation 2016*  *Workplace Injury Management and Workers Compensation Act 1998* | *Return to Work Act 1986*  *Return to Work Regulations 1986* | *Workers’ Compensation and Rehabilitation Act 2003*  *Workers’ Compensation and Rehabilitation Regulation 2014* | *Return to Work Act 2014*  *Return to Work Regulations 2015* | *Workers Rehabilitation and Compensation Act 1988*  *Workers Rehabilitation and Compensation Regulations 2021* | *Accident Compensation Act 1985*  *Accident Compensation Regulations 2012*  *Accident Compensation (Occupational Health and Safety) Act 1996*  *Workers Compensation Act 1958*  *Workplace Injury Rehabilitation and Compensation Act 2013*  *Workplace injury Rehabilitation and Compensation Regulations 2014* | *Workers’ Compensation and Injury Management Act 1981*  *Workers’ Compensation and Injury Management Regulations 1982* |
| **Contact details** | **WorkSafe ACT**  GPO Box 158, Canberra City, ACT 2601  Telephone: 13 22 81  Email: worksafe@worksafe.act.gov.au  Internet: https://www.worksafe.act.gov.au/Home | **State Insurance Regulatory Authority (SIRA) of NSW**  Locked Bag 2906 Lisarow NSW 2252  Phone: 13 10 50    Email (employer): [contact@sira.nsw.gov.au](mailto:contact@sira.nsw.gov.au)  Email (worker): [complaints@iro.nsw.gov.au](mailto:complaints@wiro.nsw.gov.au)  OR [contact@sira.nsw.gov.au](mailto:contact@sira.nsw.gov.au)  Internet: https://www.sira.nsw.gov.au/ | **NT WorkSafe**  1800 250 713  E-mail: [datantworksafe@nt.gov.au](mailto:datantworksafe@nt.gov.au)  Internet: http://www.worksafe.nt.gov.au  **Darwin**  Ground Floor, Building 3, Darwin Corporate Part, 631 Stuart Highway, Berrimah NT  Telephone: 1800 019 115  Postal address: GPO Box 1722, Darwin NT 0801  **Katherine**  Randazzo Centre, 14 Katherine Terrace, Katherine NT  Telephone: 1800 019 115  **Alice Springs**  Ground Floor, The Green Well Building, 50 Bath Street, Alice Springs NT  Telephone: 1800 019 115 | **WorkSafe**  **WorkCover Queensland** 280 Adelaide Street, Brisbane QLD 4000  GPO Box 2459 Brisbane QLD 4001  Phone: 1300 362 128  Fax: 1300 651 387  Internet: https://www.worksafe.qld.gov.au/about/who-we-are/workcover-queensland | **WorkCover Corporation of South Australia**  **Return to Work SA**  400 King William St, Adelaide SA 5000  GPO Box 2668 Adelaide SA 5001  Phone: 13 18 55  Email : info@rtwsa.com  Internet: https://www.rtwsa.com/ | **WorkSafe Tasmania**  Phone: (03) 6166 4600 (Outside Tasmania)  Local rate: 1300 366 322 (Inside Tasmania)  Email: [wstinfo@justice.tas.gov.au](mailto:wstinfo@justice.tas.gov.au)  Internet:  https://worksafe.tas.gov.au/topics/compensation/workers-compensation / | **WorkSafe Victoria**  [1](file:///C:\NRPortbl\Working\KSOURRY\%201) Malop Street, Geelong VIC 3220  Phone: (03) 9641 1555  Toll Free: 1800 136 089  Other offices available [here](https://www.worksafe.vic.gov.au/find-worksafe-office).  Internet: https://www.worksafe.vic.gov.au/ | **WorkCover WA**  2 Bedbrook Place, Shenton Park WA 6008  Phone: (08) 9388 5555  Fax: (08) 9388 5550  Advisory Services: 1300 794 744  Internet: http://www.workcover.wa.gov.au |
|  |  |  |  |  |  | **Workers Rehabilitation and Compensation Tribunal**  Address: 38 Barrack Street, Hobart TAS 7000  Postal address: GPO Box 1311, Hobart TAS 7001  Telephone: 1800 657 500  Email: [wrc.personalcompensation@tascat.tas.gov.au](mailto:Workers.Compensation@justice.tas.gov.au)  Internet: [www.tascat.tas.gov.au](http://www.workerscomp.tas.gov.au/) |  |  |

It is recommended that the Practice seeks full advice in relation to its workers’ compensation obligations, including in relation to taking out and maintaining an appropriate workers’ compensation policy, which is compliant with legislative requirements applicable to the Practice.

# WORK HEALTH AND SAFETY

## Overview

Work health and safety laws generally place an obligation on employers to ensure their employees’ health and safety at work. Such legislation provides general standards for employers to meet in this area, and also allows for prosecutions to occur and for damages to be recovered, where these standards are not met.

Each jurisdiction has different health and safety legislation, and it is important for the Practice to familiarise itself with the requirements of the relevant legislation.

A list of references to the health and safety legislation and regulations relevant to each State or Territory, and contact details for the applicable health and safety organisations in each State or Territory are set out below. A general summary is provided as follows.

## Work health and safety legislation and contact details

Set out in the table below are references to the health and safety legislation and regulations relevant to each State or Territory, and contact details for the applicable health and safety organisations in each State or Territory.

In recent years, new harmonised work health and safety laws have replaced existing workplace health and safety legislation in all States and Territories except Victoria.

The new model work health and safety (**WHS**) laws consists of:

### model WHS Act;

### model WHS Regulations; and

### model Codes of Practices.

While the harmonised WHS laws from each jurisdiction are not (or will not be) identical because each State and Territory (as well as the Commonwealth Government) has passed or will pass its own laws, at the completion of harmonisation, the WHS laws between most States and Territories will be similar as each set of laws, regulations and Codes are or will ideally be based on the ‘model’ legislation referred to above.

Under the model WHS Act, duties are (or will be) owed by the PCBU, which is often, though not always, the employer. The PCBU may be a company, a partnership, a sole trader or an unincorporated association and it is this entity which holds the primary duty under the harmonised WHS regime.

In addition, the harmonised WHS regime imposes duties upon workers, officers of the PCBU and others at the workplace, which will include the employing entity (if it is not the same as the PCBU).

It is relevant to note that the term ‘officer’ is also interpreted very broadly under the model Act and may extend to anyone who participates in making decisions that affect a part of the business or undertaking, regardless of whether or not they are formally appointed as officers. For example, a Consultant to the business or a HR Manager that has responsibility for making decisions may be an officer for the purposes of the model Act. The Commonwealth, Queensland, New South Wales, the Northern Territory and the Australian Capital Territory passed the new harmonised laws and they came into effect on 1 January 2012.

On 12 October 2017, the Queensland Parliament passed the Work Health and Safety and Other Legislation Amendment Act 2017. A number of provisions commenced at the assent of this Act, while further provisions commenced on 1 July 2018.

South Australia passed the *Work Health and Safety Act 2011* on 1 November 2012 and the *Tasmanian* [*Work Health and Safety Act 2012*](http://www.thelaw.tas.gov.au/linkto.w3p;doc_id=1++2012+AT@EN+CURRENT) commenced on 1 January 2013.

The Western Australian *Work Health and Safety Act 2020* received assent on 10 November 2020. However it will not come into effect until the supporting regulations are finalised, which will likely occur in 2022.

It is not clear when, if at all, Victoria will follow. As at November 2021, the Victorian Government has confirmed that it will not adopt the national model workplace health and safety laws in their current form.

| Work Health and Safety Legislation and contact details | | | | | | | | |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | ACT | NSW | NT | Qld | SA | TAS | VIC | WA |
| **Legislation** | *Work Health and Safety Act 2011*  *Work Health and Safety Regulation 2011* | *Work Health and Safety Act 2011*  *Work Health and Safety Regulation 2011* | *Work Health and Safety (National Uniform Legislation) Act*  *Work Health and Safety (National Uniform Legislation) Regulations* | *Work Health and Safety Act 2011*  *Work Health and Safety and Other Legislation Amendment Act 2015*  *Work Health and Safety and Other Legislation Amendment Act 2017*  *Work Health and Safety Regulations 2011* | *Work Health and Safety Act 2012*  *Work Health and Safety Regulations 2012* | *Work Health and Safety Act 2012*  *Workplace Health and Safety Regulations 2012* | *Occupational Health and Safety Act 2004*  *Occupational Health and Safety Regulations 2007* | *Occupational Safety and Health Act 1984*  *Occupational Safety and Health Regulations 1996* |
| **Contact details** | **WorkSafe ACT**  PO Box 158, Canberra City, ACT 2601  Telephone: 13 22 81  Email: worksafe@worksafe.act.gov.au  Internet: https://www.worksafe.act.gov.au/Home | **SafeWork NSW**  Postal address: Locked Bag 2906 Lisarow NSW 2252  Service centres available [here](https://www.service.nsw.gov.au/service-centre).  Phone: 13 10 50  Internet: https://www.safework.nsw.gov.au/ | **NT WorkSafe**  1800 250 713  E-mail: [datantworksafe@nt.gov.au](mailto:datantworksafe@nt.gov.au)  Internet: http://www.worksafe.nt.gov.au  **Darwin**  Ground Floor, Building 3, Darwin Corporate Part, 631 Stuart Highway, Berrimah NT  Telephone: 1800 019 115  Postal address: GPO Box 1722, Darwin NT 0801  **Katherine**  Randazzo Centre, 14 Katherine Terrace, Katherine NT  Telephone: 1800 019 115  **Alice Springs**  Ground Floor, The Green Well Building, 50 Bath Street, Alice Springs NT  Telephone: 1800 019 115 | **WorkSafe Qld**  1 William Street, Brisbane QLD 4000  GPO Box 69, Brisbane QLD 4001  Telephone: 1300 362 128  Office locations located [here](https://www.worksafe.qld.gov.au/contact/regional-office-locations).  Internet: https://www.worksafe.qld.gov.au/ | **SafeWork SA**  **Level 4, 33 Richmond Road, Keswick SA 5001**  **Postal address: GPO Box 465, Adelaide SA 5001**  **General Telephone: 1300 365 255**  **Critical incidents (24 hours): 1800 777 209**  Internet: http://www.safework.sa.gov.au/ | **WorkSafe Tasmania**  PO Box 56, Rosny Park TAS 7018  Phone: 03 6166 4600 (Outside Tasmania)  Phone: 1300 366 322 (Inside Tasmania)  Email: [wstinfo@justice.tas.gov.au](mailto:wstinfo@justice.tas.gov.au)  Internet: https://www.worksafe.tas.gov.au/home | **WorkSafe Victoria**  1 Malop Street, Geelong VIC 3220 Phone: (03) 9641 1555  Toll Free: 1800 136 089  Other offices available [here](https://www.worksafe.vic.gov.au/find-worksafe-office).  Internet: http://www.worksafe.vic.gov.au/ | **WorkSafe WA** (Department of Mines, Industry Regulation and Safety)  Mason Bird Building, 303 Sevenoaks St, Cannington WA 6107  Phone: 1300 307 877  Email: [wscallcentre@dmirs.wa.gov.au](mailto:wscallcentre@dmirs.wa.gov.au)  Internet: https://www.commerce.wa.gov.au/worksafe |

# REMOTE WORKING AND WORKING FROM HOME

## Background

The COVID-19 pandemic has caused significant disruption to the way Australians work. However, it has allowed changes to the workplace such that workers are now able to work from home where possible.

Employers and Practices need to remain aware, that just because employees are working remotely or from home, that they still have a primary duty of care to ensure, as far as reasonably practicable, the health and safety of all their workers.

## Working from home checklists and practical considerations

A work from home checklist to be distributed to employees is included at the end of this document and sets out the safety considerations that an employee should consider when setting up their home or remote workspace. However, it is not reasonably practicable to impose tough ergonomic requirements in respect of all employees, provided that employees continue to assess risks and manage their safety at home, given the relatively low risks and that imposing tougher requirements will result in a need for employees to access annual leave or be stood down.

Practices may choose to direct employees to complete this checklist so that there is a record of each employee’s workspace available in the event of an illness or injury to that employee.

There is no obligation on the Practice to allow an employee to take their monitors, chairs or other equipment home, however the Practice should consider whether permitting employees to take monitors, chairs or other equipment home, is likely to reduce any anticipated fall in productivity as a result of employees working from home.

If an employee advises that they do not have the resources to work at home, then you will need to allow them to continue to work at the workplace. If employees cannot work at their usual workplace because of a workplace shutdown, you will need to:

### consider alternative duties that the employee can perform at any other workplaces;

### confer with those employees with a view to them accessing annual leave; and

### considering standing down those employees under section 524(1)(c) of the FW Act without pay (or with any pay that the Practice may wish to pay at its discretion).

## Risks to health and safety

Working from home may change, increase or create potential work health or safety risks. To understand these risks, a Practice must consult with their workers. In addition to the physical health and safety of employees, Practices also have a primary duty of care to ensure, as far as reasonably practicable, the mental health and safety of their workers. This is particularly relevant in light of the psychologically stressful impact of COVID-19. A Practice must do what they can to reduce these psychological risks.

Safe Work Australia (**SWA**) have identified the potential risks to employees working from home to include:

### physical risks from poor work environment, such as workstation set up, heat, cold, lighting, electrical safety, home hygiene and home renovations; and

### psychosocial risks such as isolation, high or low job demands, reduced social support from managers and colleagues, fatigue, low job control, management of working hours, online harassment and family and domestic violence.

SWA have also identified psychosocial hazards arising from COVID-19. Relevant to practitioners, these hazards could include:

### **Isolated work** – for example where workers are working from home.

### **Low support** – for example workers working in isolation may feel they don’t have the normal support they receive to do their jobs or where work demands have dramatically increased supervisors may not be able to offer the same level of support.

### **Poor environmental conditions** – for example where temporary workplaces may be hot, cold or noisy.

### **Poor organisational change management** – for example if businesses are restructuring but are not providing information or support to workers.

SWA recommend the following tips for employers to manage employees’ mental health, particularly if they are working remotely or from home:

### regularly ask your workers how they are going and if there is anything causing them stress, and encourage them to stay in contact with each other;

### be well informed with information from official sources, regularly communicate with workers and share relevant information as it comes to hand;

### consult your workers on any risks to their psychological health and how these can be managed;

### make sure workers are effectively disengaging from their work and logging off at the end of the day;

### eliminating or minimising physical risks;

### offer flexibility where possible;

### provide workers with a point of contact to discuss their concerns and to find workplace information in a central place;

### inform workers about their entitlements if they become unfit for work or have caring responsibilities;

### proactively support workers who you identify may be more at risk of workplace psychological injury (e.g. frontline workers or those working from home); and

### refer workers to appropriate channels to support workplace mental health and wellbeing, such as employee assistance programs.

Safe Work Australia has published a number of different guides and considerations for employers regarding working from home. These resources can be accessed [here](https://www.safeworkaustralia.gov.au/safety-topic/managing-health-and-safety/working-home/resources).

## Managing Performance when employees are working remotely

A Practice should remain aware of what work their employees are performing while they are working from home. This might mean introducing measurable key performance indicators or some form of record keeping that documents what work employees are performing.

Just because employees are working remotely or from home, does not mean they are exempt from performing their duties diligently and carefully.

If a Practice suspects employees are underperforming or not performing any of their duties, the Practice should follow any performance management or disciplinary procedures already in place.

Where physical meetings to discuss performance or disciplinary concerns cannot be held in person, the Practice should make use of video conferencing software to enable these discussions to occur. Employees should also still be offered the opportunity to have a support person attend any performance or disciplinary meetings, even if this too occurs via video conference.

Practices who encounter these issues should also seek independent legal advice in the event there is risk of a dispute in the Fair Work Commission.

# LABOUR HIRE LICENSING – QUEENSLAND, ACT AND SOUTH AUSTRALIA

## Overview

There are now mandatory labour hire licensing schemes in a number of States and Territories across Australia.

In Queensland, the scheme is established by the *Labour Hire Licensing Act 2017* (Qld) (**LH Licensing Act Qld**) and the *Labour Hire Licensing Regulation 2018* (Qld) (**LH Regulations Qld**), which we use as a helpful example below. The South Australian scheme is established by the *Labour Hire Licensing Act 2017* (SA) *and Labour Hire Licensing Regulations 2018* (SA).

In May 2021, the ACT introduced a similar mandatory labour hire licensing scheme through the *Labour Hire Licensing Act 2020* (ACT) and *Labour Hire Licensing Regulation 2021* (ACT).

Generally as part of these schemes labour hire providers must:

### have a licence to operate in the relevant State (which requires satisfying a number of requirements); and

### carry out regular reporting on their labour hire activities.

Further, people who engage labour hire providers must only engage *licensed* providers. There are heavy penalties for breaches of this obligation.

A Practice should obtain legal advice specific to their State of Territory if they are intending to engage workers through a labour hire provider, as the legislation in each jurisdiction is slightly different. We set out general information below.

## Who is a Labour Hire Provider?

Generally, a person provides labour hire services if, in the course of carrying on a business, the person supplies a ‘worker’ to do work for another person.

Subject to the applicable jurisdiction, a person generally ‘provides labour hire services’ regardless of whether:

### the worker provided is an employee of the person;

### a contract is entered into between the worker and the provider, or between the provider and the person to whom the worker is supplied;

### the worker is supplied by the provider to another person directly or indirectly through one or more agents or intermediaries; or

### the work done by the worker is under the control of the provider, the person to whom the worker is supplied, or another person.

In summary, labour hire is a relationship formed when the labour services of a worker are on-hired by a labour hire provider to a host business.

An individual is a worker for a provider if the individual enters into an arrangement with the provider under which:

### the provider may supply, to another person, the individual to do work; and

### the provider is obliged to pay the worker, in whole or part, for the work.

There may be exceptions to this definition set out in any relevant regulations.

## When is an individual not a worker?

Individuals may not be workers for the purposes of the labour hire licensing schemes if they are:

### an individual employed by the provider:

#### and their wages are equal to or more than the amount of the high income threshold under the FW Act, which from 1 July 2021 is $158,500 per annum; and

#### If the individual however is employed under a modern award or enterprise agreement and their salary exceeds the high-income threshold, they will be taken to be a ‘worker’ for the purposes of the LH Licensing Act.

*For example, an employee who is paid more than $158,500 per annum but is employed in accordance with an enterprise agreement will not be a worker for the purposes of the LH Licensing Act.*

### for a provider who is a corporation – an individual who is an executive officer of the corporation and the only individual the provider supplies, in the course of carrying on a business, to another person to do work;

### an in-house employee of a provider whom the provider supplies to another person to do work on a temporary basis on one or more occasions. An example of work on a temporary basis is a consultant employed by a consultancy business supplied to a business (commonly known as a secondment arrangement);

### an individual who a provider supplies to another person to do work if the provider and the other person are each part of an entity or group of entities that carry on business collectively as one ‘recognisable business’. An example of this is a landscaping business comprised of a number of companies that are responsible for different aspects of the business, and the business’ workers are all employed by one of the companies and are supplied to work for one or more of the other companies within the business; or

### in the case of ACT, public servants.

The supply of a worker to do work for a person happens when the worker first starts to do work for the person in relation to the supply.

Examples of when a labour hire licence is required[[1]](#footnote-1)

| Occupation | Example | Yes, a licence is required | No, a licence is not required |
| --- | --- | --- | --- |
| Administration Officer | An accounting firm contacts a temp agency to provide two extra administration officers for two weeks. The temp agency pays the administration officers’ wages and invoices the accounting firm. | The temp agency is considered to be a labour hire provider in this case. |  |
| Accountant | An accounting firm is contacted by one of its clients who requires an accountant to work at its business for three months. The accountant is paid by the accounting firm and not the client. |  | This would be considered a secondment arrangement. |
| Building and construction industry | A building company is developing a block of apartments and subcontracts the electrical work to another business. The electrical subcontractor is responsible for fulfilling the contractual obligations which includes supplying its workers to the site and for the rectification of any defects in the work done. |  | This appears to be a genuine subcontracting arrangement and is therefore not considered to be labour hire. |
| Building and construction industry | An unlicensed or licensed subcontractor contracts to a licensed trade contractor to provide workers on an hourly rate basis to perform work for the trade contractor’s business. The subcontractor does not provide materials, is not responsible for rectifying defects, and is not engaged to meet other contractual obligations. The subcontractor is simply providing labour-only services to carry out work as directed by the trade contractor. | The subcontractor providing the workers is considered to be providing labour hire services in this case. |  |
| Employing entity – 1 recognisable business | The Good Doctors medical group operates medical centres (known as ‘Good Doctors’) throughout Queensland. The Good Doctors medical group uses an employing/service entity company within its corporate group to employ and pay the Good Doctors workers (doctors, nurses and reception staff). These workers only work for Good Doctors medical centres under the one recognisable Good Doctors business umbrella. |  | The workers employed by the Good Doctors employing/service entity company within the Good Doctors corporate group are not considered to be labour hire workers in this case. |

## Prohibited Conduct

Licence required

Under the mandatory schemes, a person (including a corporation) must not provide labour hire services unless the person is the holder of a licence. It is an offence to provide labour hire services without a licence and penalties will apply. For example, under the LH Licensing Act Qld, a failure to hold a licence attracts a maximum penalty $413,550 for a corporation, and a maximum penalty of $142,536.90 or three years’ imprisonment for an individual.

Further, in Queensland and South Australia, a person must not advertise or in any way hold out, that the person provides or is willing to provide labour hire services, unless the person is the holder of a licence. The maximum penalty for this offence is $27,570 in Queensland. Similar obligations and penalties exist in the ACT to not falsely represent that a person holds a labour hire licence.

Compliance costs

There are often costs involved in applying for a licence and complying with the mandatory labour hire licensing schemes, based on the size of the business.

For example, in Queensland, the amount of each licence application fee (as well as renewal) ranges from $1,057 to $5,285 (as at 1 November 2021) and is dependent upon which tier each business is defined by under the LH Regulations. The differences between a Tier 1, 2 and 3 business is the total amount of wages within the financial year in which the application is made or within the financial year preceding the day on which the application is made.

A Tier 1, 2 and 3 business is defined as follows:

### Tier 1 business is defined as having total wages of less than $1.5 million,

### Tier 2 business has total wages between $1.5 million and $5 million; and

### Tier 3 business has total wages of $5 million or more.

A licensee must also keep a copy of each financial document described in the licensee’s application for a licence under section 6 of the LH Regulations Qld. Examples of these financial documents include: profit and loss statements, balance sheets, bank statements or an independent accountant’s report. If a Practice fails to keep such records this may result in a maximum fine of $2,757.

There are also ongoing general reporting obligations under the LH Regulations Qld. A Practice’s reporting obligations include keeping each record or document in a secure, orderly or accessible way.

If a practice keeps documents in electronic form then a licensed Practice must ensure that the computer system that such documents are stored on is backed up at least once a month. Again, a failure to abide by this aspect of the LH Regulations Qld may result in maximum fines of $1,378.50 for each offence.

A licensee must keep each record or document the licensee is required to keep under the LH Licensing Act Qld for at least seven years after the licensee stops being a licensee, otherwise a maximum penalty of $2,757 may result.

Other general obligations

The relevant labour hire licensing legislation may also contain other general obligations, such as:

### compliance with legal obligations under relevant laws;

### providing a compliant report within 28 days after a reporting period ends;

### reporting prescribed changes in circumstances within a certain amount of time;

### producing a copy of a licence if asked by an inspector, worker or other person;

### providing licence particulars to host; and

### not transferring, selling, disposing of, lending or hiring out a licence to another person.

Relevant law and prescribed changes are usually prescribed in relevant regulations.

For example, the LH Licensing Act Qld defines the term ‘**relevant law’** to be:

### the LH Licensing Act Qld;

### a provision of an Act or law of the State, the Commonwealth or another State imposing an obligation on a person in relation to workers, including, for example, obligations about:

#### keeping records about workers; and

#### the payment of tax or superannuation for workers; and

#### ensuring the health and safety of workers; or

#### the *Age Discrimination Act 2004* (Cth);

#### the *Australian Human Rights Commission Act 1986* (Cth);

#### the *Anti-Discrimination Act 1991* (Qld);

#### the *Child Employment Act 2006* (Qld);

#### the *Disability Discrimination Act 1992* (Cth);

#### the *Electrical Safety Act 2002* (Qld);

#### the *Fair Work Act 2009* (Cth);

#### the *Independent Contractors Act 2006* (Cth);

#### the *Industrial Relations Act 2016* (Qld);

#### the *Migration Act 1958* (Cth);

#### the *Payroll Tax Act 1971* (Qld);

#### the *Queensland Building and Construction Commission Act 1991* (Qld);

#### the *Racial Discrimination Act 1975* (Cth);

#### the *Sex Discrimination Act 1984* (Cth);

#### the *Superannuation Guarantee (Administration) Act 1992* (Cth);

#### the *Work Health and Safety Act 2011* (Qld); or

#### the *Workers’ Compensation and Rehabilitation Act 2003* (Qld);

### a provision of a law, including a local law, about the standards of buildings and structures, to the extent it relates to a building or structure used to provide accommodation to a worker.

If a Practice fails to adhere to these obligations this may result in maximum penalties ranging from $13,785 to $27,570 or one-year imprisonment.

The term ‘**prescribed change’,** in circumstances, has a broad definition under the LH Licensing Act Qld and means any change prescribed by regulation relating to:

### a matter the chief executive must consider in deciding whether a person is a fit and proper person to provide labour hire services or details about a licence shown on the register; or

### for a licensee – accommodation for workers supplied to another person by the licensee.

These changes range from a change in business name or contact details to if an executive officer of the corporation is convicted of a serious criminal offence (section 16 of the LH Regulations).

The LH Licensing Act Qld also details that persons who counsel, procure or aid the commission of an offence under the LH Licensing Act Qld will be taken to have committed the offence and be liable to the penalty prescribed for the offence. This is not limited to a specific section or part of the LH Licensing Act Qld.

Licensees will need to ensure they do not breach a labour hire licence condition, or be subject to penalties. Licensees may also need to provide information about compliance upon request from the commissioner.

## Arrangements with unlicensed providers and avoidance arrangements

Under the mandatory schemes, a person (including a corporation) must not, without a reasonable excuse, enter into an arrangement with a provider for the provision of labour hire services to the person, unless the provider is the holder of a licence.

It is a reasonable excuse for the person not to comply if, when the person entered into the arrangement, the provider was shown on the register as the holder of a licence.

Similarly, in Queensland and South Australia, a person (including a corporation) must not enter into an arrangement with another person (an avoidance arrangement) for the supply of a worker if the person knows or ought reasonably to know that arrangement is designed to circumvent or avoid an obligation imposed by the scheme, unless the person has a reasonable excuse. There are also reporting obligations in relation to these avoidance arrangements.

There are penalties for breach of these obligations. For example, in Queensland, the maximum penalty for these offences for a corporation is $413,550 and for an individual the penalty is $142,536.90 or three years imprisonment. For more information also refer to the following websites:

### Queensland - <https://www.labourhire.qld.gov.au/i-provide-labour-hire/licensing> and

### ACT - <https://www.worksafe.act.gov.au/licensing-and-registration/labour-hire-licensing> and

### South Australia - https://www.sa.gov.au/topics/business-and-trade/licensing/labour-hire/industries.

# LABOUR HIRE LICENSING – VICTORIA

## Overview

Victoria also has a mandatory labour hire licensing scheme. Whilst it is similar to schemes in other jurisdictions, there are some differences, particularly to relevant definitions.

In Victoria, the *Labour Hire Licensing Act 2018* (**LH Licensing Act**) and the *Labour Hire Licensing Regulation 2018* (**LH Regulations**) establish a mandatory labour hire licensing scheme. As part of this scheme labour hire providers must:

### have a licence to operate in Victoria (which requires satisfying a number of requirements); and

### carry out annual reporting on their labour hire activities.

Importantly, unlike Queensland, the LH Licensing Act in Victoria has the potential to capture certain work outside of Victoria.

## Who is a Labour Hire Provider?

In Victoria, a person provides labour hire services (the provider) if, in the course of conducting a business, the provider supplies one or more individuals to another person (the host) to perform work in and as part of a business or undertaking of the host, and the individuals are workers for the provider.

A similar definition applies to persons providing recruitment or placement services. In Victoria, providers also include certain recruitment services and contractor management services.

A person provides labour hire services regardless of whether:

### a contract has been entered into between the provider and the host;

### the individuals recruited or placed by the provider are recruited or placed directly or indirectly through one or more intermediaries; or

### the work performed is under the control of the provider or the host.

In summary, labour hire is a relationship formed when the services of a worker are on-hired by a labour hire provider to a host business.

An individual is a worker, for a provider, if there is an arrangement in force between the individual and the provider under which:

### the provider supplies, or may supply, the individual to one or more other persons to perform work; and

### the provider is obliged to pay the individual (in whole or part) for the performance of the work by the individual, whether directly or indirectly through one or more intermediaries.

Alternatively, an individual is a worker, for a provider, if there is an arrangement in force between the individual and the provider under which the provider:

### recruits the individual for, or places the individual with, one or more other persons to perform work, being persons who are obliged to pay the individual (in whole or part) for the performance of the work by the individual, whether directly or indirectly through one or more intermediaries; or

### recruits the individual as an independent contractor for one or more other persons to perform work, and manages the contract performance by the independent contractor.

An individual may be a worker for a provider regardless of whether:

### the individual is an employee of the provider;

### a contract has been entered into between the individual and the provider; or

### the individual is an apprentice, or is under a training contract, within the meaning of the *Education and Training Reform Act 2006* (Vic)*.*

There are exceptions to this definition as set out under the LH Regulations.

## When is an individual not a worker?

The LH Regulations provide guidance and examples of when an individual is taken to perform work in and as part of a business or undertaking.

Generally, individuals are not workers for the purpose of the LH Licensing Act if they are:

### certain classes of secondees other than where the provider is predominantly in the business of providing the services of workers to other persons. (A secondee means a worker of a provider whom the provider provides to another person to do work on a temporary basis and:

#### is engaged as an employee by the provider on a regular and systematic basis; and

#### has a reasonable expectation that the employment with the provider will continue; and

#### primarily performs work for the provider, other than as a worker supplied to another person to do work for that other person);

### providing workers as part of an entity or group of entities carrying on a business collectively as one recognisable business;

### a small body corporate providing a director where the body corporate has no more than two directors;

### public sector employees who are seconded, transferred, provided or made available to do work for another person;

### students to whom Division 1 or 2 of Part 5.4 of the *Education and Training Reform Act 2006* applies; and

### on vocational placements.

Employers who are in the practice of providing workers or secondees will need to consult the LH Regulations or the Victorian Labour Hire Authority if they believe they may require a labour hire licence.

## Examples of when a labour hire licence is required[[2]](#footnote-2)

| Occupation | Example | Yes, a licence is required | No, a licence is not required |
| --- | --- | --- | --- |
| Hospitality | A hospitality staffing agency, HSA Pty Ltd (the provider) supplies waitstaff to restaurant (the host) for a large function. The waitstaff are considered to be working ‘in and as part of’ the host’s restaurant business as they are performing the work of the host business, at the host’s premises, directed and supervised by the host and are not considered to be providing a specialised service. The work performed by the workers is a key function of the host’s business and is the same as the work performed by the host’s own employees. HSA Pty Ltd pays the waitstaff it provides, and invoices the restaurant for the hours worked by the waitstaff. | Looking at the engagement as a whole, this arrangement would be considered to the provision of labour hire services, and would require HSA Pty Ltd to have a labour hire licence. |  |
| Accountant | An accounting firm, Accountant Partners & Co, provides an accountant to work on a client’s premises, for the purpose of preparing the client’s tax documentation. The accountant is still performing the work in their capacity as an accountant, employed by Accountant Partners & Co, performing work that Accountant Partners & Co has been engaged to do. |  | This would be considered a secondment arrangement. |
| Building and Construction Industry | Drilling Pty Ltd is engaged by EFG Mining Pty Ltd to drill for samples on 5 different sites as part of a team assessing the sites for suitability for mineral mining. The work of the different contractors in the team is coordinated by EFG Mining Pty Ltd. Drilling Pty Ltd provides the drill rig and all staff required to operate the rig. While the work is performed on a site which is controlled and operated by EFG Mining Pty Ltd, the work done by the employees of Drilling Pty Ltd is not subject to direction or supervision by EFG Mining Pty Ltd, aside from matters of site safety and coordination with the other teams. The nature of the drilling work is highly specialised, using specialist equipment, and while drilling is a usual part of site exploration and assessment, it is not usually work that EFG Mining Pty Ltd does themselves, and is not a key part of their usual operations. |  | This appears to be a genuine contracting arrangement and is therefore not considered to be labour hire. |

## Prohibited Conduct

Licence Required

Under the LH Licensing Act, a person (including a corporation) must not provide labour hire services unless the person is the holder of a licence. Under the LH Licensing Act, a failure to hold a licence attracts a maximum penalty $581,568 for a body corporate, and a maximum penalty of $145,392 for a natural person.

Further, a person must not advertise or in any way hold out, that the person provides or is willing to provide labour hire services, unless the person is the holder of a licence. The maximum penalty for this offence for a body corporate is $145,392 and for an individual is $36,348.

Compliance Costs

The amount of each licence application fee (as well as renewal) ranges from $1,623.24 to $7,995.96 and is dependent upon which tier each business is defined by under the LH Regulations. The differences between a Tier 1, 2 and 3 business is the annual turnover for the previous 4 quarters at fee payment.

A Tier 1, 2 and 3 business is defined as follows:

### Tier 1 business is defined as having an annual turnover of no more than $2 million;

### Tier 2 business is defined as having an annual turnover of between $2,000,001 and $10 million; and

### Tier 3 business is defined as having an annual turnover of $10 million or more.

A license holder must also keep a copy of each document related to the business available for inspection by an inspector in a form. The documents must be retained for 6 years. Failure to keep such records may result in a maximum fine of $137,392 for a body corporate and $36,348 for an individual.

## Other general obligations

There are other general obligations that licensees have under the LH Licensing Act, including:

### complying with legal obligations under relevant laws;

### notifying of certain and prescribed changes within 30 days of the change;

### taking reasonable steps to ensure availability of nominated officers; and

### producing a copy of a licence if asked by an inspector, provider, worker of a provider or host, police officer or a prescribed person.

Failure to adhere to these and other obligations may result in maximum penalties ranging from $2,907.84 - $581,568 for a body corporate and $2,180.88 - $145,392 for an individual.

The term ‘**prescribed change**’ in the circumstances under the LH Licensing Act means a change prescribed by the LH Regulations and of such significance that notification of the change would constitute grounds for cancellation of a licence. These prescribed changes are that, to the license holder’s knowledge:

### a relevant person is no longer a fit and proper person as required by the LH Licensing Act; or

### a relevant person is no longer compliant with the legal obligations required by section 23 of the LH Licensing Act.

The LH Licensing Act also details that persons who aid, abet, counsel or procure the commission of a contravention of a civil remedy provision under the LH Licensing Act will be taken to have committed the offence and be liable to the penalty prescribed for the offence.

## Arrangements with unlicensed providers and avoidance arrangements

Under the LH Licensing Act a person (including a corporation) must not, without a reasonable excuse or the provider being included in the Register as the holder of a licence at the time of the arrangement, enter into an arrangement with a provider for the provision of labour hire services to the person, unless the provider is the holder of a licence. The maximum penalty for this offence is $528,704 for a body corporate, and $132,176 for a natural person.

Similarly, a person (including a corporation) must not enter into an arrangement with another person (an avoidance arrangement) for the supply of a worker if the person knows or has reasonable grounds to suspect that the proposed arrangement is for the purpose of avoiding or circumventing an obligation that would otherwise be imposed by the LH Licensing Act. There are also obligations to notify as soon as reasonably practicable after becoming aware of the proposed arrangement.

For more information also refer to: <https://labourhireauthority.vic.gov.au/provider/>

# COUNSELLING AND DISMISSAL PROCEDURE

## Purpose

Significant resources are invested in training and selecting employees. Dismissal should be a last resort after counselling has failed to resolve a problem. Any termination of employment should occur in accordance with those obligations imposed by legislation, any relevant award or other industrial instrument and the employee’s employment contract. The following steps are designed to minimise the risk that dismissal is unfair or unlawful because it fails to comply with those obligations.

Reference should be made to the employee’s personnel file before undertaking any step in this procedure. In particular, you should familiarise yourself with the employee’s terms and conditions of employment, including any award and the employee’s history of employment with your Practice.

## Counselling

The purpose of counselling is to give the employee an opportunity to respond to your concerns with a view to resolving the issues. Counselling can be informal, but a formal process is preferable, in that it provides documentary evidence that counselling took place.

Formal counselling should comprise of a meeting between the appropriate member of management and the employee, in the presence (if possible) of a third party, such as another member of management or the employee’s immediate supervisor.

At the meeting, the following steps should be addressed:

### Alert the employee to any concerns, specifying particular instances. Where appropriate, refer to the employee’s job or position description and their letter of appointment.

### Ask the employee to respond to those concerns.

### Consider the employee’s responses.

### If the responses are inadequate, explain to the employee why they are inadequate.

### Tell the employee what is required of them. Give advice on how it may be achieved.

### Specify a period over which to achieve what is required of them. The amount of time given should be reasonable.

### At the end of the meeting, ensure that the counselling form is completed. Ensure that the manager conducting the counselling and the witness sign the form.

### Ask the employee to sign the completed form. If the employee refuses, write on the form ‘At the end of the meeting [insert employee’s name] was given this form and asked to sign, but refused to do so.’ Sign and date this annotation.

If adequate improvement is demonstrated with respect to a particular problem raised during counselling, the problem is resolved and no longer a valid reason for dismissal.

If the problem is not resolved, further counselling sessions should be held. At each subsequent counselling session, refer to the previous session and tell the employee that there has been no or inadequate improvement.

The number of counselling sessions and the time between each depends on the circumstances and the problem. Common sense should prevail.

As further counselling sessions are held, the consequences of failing to comply with warnings should become progressively more serious. If the problem is of a serious or persistent nature, the employee should be told that failure to resolve the problem will result in dismissal. In particular, the employee should be told at the final counselling session that dismissal will result if the problem is not resolved.

An annual performance review can be used as a counselling session, provided the problems are specifically dealt with and a lengthy period has not elapsed after the review.

Records of counsellings, no matter how informal, must be kept on the employee’s personnel file. In the case of short discussions, diary notes will suffice. In the absence of written evidence, it could be your word against the employee’s.

## Unfair dismissal legislation

Legislation contains provisions which set out the circumstances in which a dismissal will be unfair. There are two ways that a dismissal can be unfair. The first is if the dismissal can be considered [harsh, unjust or unreasonable](#unjust_or_unreasonable). The second is if the dismissal is for one of the [invalid reasons](#When_will_a_dismissal_be) listed in the legislation.

These two aspects are explained separately below in more detail and there is a table below which includes:

### hyperlinks to the relevant legislation;

### references to the relevant legislative sections; and

### a summary of the exclusions from unfair dismissal.

Once the legal aspects have been explained, some practical steps are then set out to help you with the process of employee counselling and, if necessary, dismissal. These practical steps are intended to assist you to satisfy your legal obligations before a decision is made to dismiss an employee and to provide you with sufficient evidence to defend an unfair dismissal claim, should one be made against you.

## When will a dismissal be unfair?

Whether a dismissal is unfair depends on the circumstances of each case. Generally, the following factors will be considered when determining this question:

### whether the employee was told the reason for dismissal, and if so was the employee given an opportunity to make out a defence or provide an explanation;

### whether the dismissal related to the operational requirements of the business or to the employee’s performance;

### if the dismissal related to the employee’s performance, whether the employee was warned about their performance and given an opportunity to respond to allegations about their performance;

### the nature of the employee’s duties immediately before the dismissal; and

### any other matter that the commission considers relevant.

Obviously, a broad range of matters may be considered under these headings. The key to satisfying these requirements is open communication with your employees and ensuring that you do not jump to conclusions about an employee’s performance before you give them a chance to tell you their side of the story. Interview and counselling tips are set out below and these are aimed at ensuring that these requirements have been met.

## Employees excluded from unfair dismissal laws

Procedural fairness is particularly important where employees have access to unfair dismissal remedies.

The following employees are generally **excluded** from making unfair dismissal applications:

### employees who have not completed the minimum employment period (see section 10.2 of this Employer’s Manual);

### employees who earn above the high income threshold (currently $148,700, excluding employer superannuation contributions), unless they are covered by an award or enterprise agreement;

### employees of small businesses (fewer than 15 employees) in cases where the dismissal was consistent with the Small Business Fair Dismissal Code;

### the employee was employed under a fixed term contract and the employment terminated at the end of the period; and

### employees whose termination of employment was a case of genuine redundancy.

If in doubt about whether unfair dismissal laws apply, it may be necessary to obtain legal advice.

## When will a dismissal be for an invalid reason?

In addition to remedies for unfair dismissal, state and federal industrial relations and discrimination legislation specifically prohibit termination of employment for the following reasons (or for reasons including one of these reasons):

### temporary absence from work because of illness or injury. The FW Regulations provide that an illness is not temporary if the employee’s absence extends for more than three months (or their total absences within a 12 month period have been more than three months) AND the employee is not on paid personal/carer’s leave for the duration of the absence;

### trade union membership or non-membership;

### race, colour, sex, sexual preference, transsexuality, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

### absence from work during maternity leave or other parental leave;

### the filing of a complaint or participation in proceedings against an employer involving an alleged violation of laws or regulations, or recourse to competent administrative authorities;

### absence from work during maternity or other parental leave; and

### temporary absence from work for the purpose of engaging in a voluntary emergency management activity where the absence is reasonable having regard to all circumstances.

These restrictions generally apply to all employees, irrespective of their income or award coverage. A termination on any one of the above grounds is unlawful and the employee may seek reinstatement and/or compensation. Penalties may also be awarded against the employer.

If you are considering dismissing an employee and any of these reasons may be involved (even if it is not your reason for dismissal but the circumstances may suggest that it could be your reason for dismissal), you should seek legal advice before proceeding with the dismissal.

## Possible reasons for dismissing employees

There are four common types of circumstances in which you may need to dismiss an employee. These are:

### the employee’s performance is unsatisfactory;

### the employee has been guilty of misconduct;

### the employee is ill or injured and cannot undertake the inherent requirements of their position; or

### the employee’s position becomes redundant.

The same principles apply to the discussions that you should have with an employee in each of these circumstances, but a slightly different approach will be necessary in each case.

## Dismissing an employee for unsatisfactory performance

If you wish to dismiss an employee due to their unsatisfactory performance, and they are not excluded from bringing an unfair dismissal claim because of any of the exclusions summarised in the above table, you will need to show that the employee has:

### been made aware of your expectations of them;

### has been given a chance to explain the reasons for their poor performance; and

### has been allowed an opportunity to improve their performance after you have discussed it with them.

There is no set rule about the number of warnings that you should give an employee.

Unless specifically stated in an award or agreement you do not have to give three warnings (written or otherwise). However, you should give your employee a reasonable opportunity to improve their performance without having to issue a large number of open-ended warnings. The employee must understand the consequences if their performance or conduct does not improve.

Discussions held should be clear and focussed enough to ensure that if the employee is eventually dismissed, that dismissal is not harsh, unjust or unreasonable. When discussing poor performance you should keep the following in mind:

### You should be as specific as possible when outlining the aspects of the employee’s performance that are not satisfactory. For example, you should talk about a particular incident that the employee was involved in, the manner in which they dealt with that situation and why that was unsatisfactory. It will not be sufficient to tell an employee that they just do not have a good attitude if unfair dismissal laws apply;

### You need to ask the employee if there is any explanation for what has happened. If they refer you to an incident in which someone else was involved, you should tell them that you will need to follow this up further. For example, if the employee tells you that they were unable to complete a particular task because another employee failed to get all relevant particulars or necessary details, you should follow this up with the other employee and not simply assume that the employee you are counselling was at fault;

### You should set a time frame for improvement and clearly state which things you will be referring to in determining if there has been an improvement. You should take care that any expectations set are reasonable and are achievable. If targets are set which cannot be met, then you will not be able to justify the dismissal on the basis that the employee has not met those targets.

## Dismissing an employee for misconduct

What amounts to misconduct?

Employees must be made aware at the beginning of their employment what is and what is not acceptable conduct at a professional practice. Some examples of misconduct are:

### stealing;

### reporting to work under the influence of drugs or alcohol;

### inflicting or threatening to inflict physical or sexual abuse or harassment;

### dishonesty;

### failing to disclose a situation of conflict;

### a serious breach of confidentiality; and

### insubordination.

What does and does not amount to misconduct is not listed exhaustively in any legislation or award. It remains at your discretion to determine the limits and guidelines within which your staff should act and behave. As the employer, it is your responsibility to make employees aware of policies and guidelines and ensure proper warning and grievance procedures are in place so issues of misconduct can be dealt with early, and termination of employment is not necessarily the only option.

That said, it is not possible for you or the Practice to simply nominate conduct that will be taken to be misconduct. In order to be misconduct, actions must amount to a fundamental breach of the employee’s obligations. The misconduct must be so incompatible with an employee’s obligations to the employer that complete disregard for the employment relationship has been demonstrated.

It is relevant to draw a distinction between misconduct and poor performance, because the legislation allows an employer to dismiss an employee without giving notice in cases of serious misconduct.

Termination for misconduct

If misconduct is so serious that dismissal is the most appropriate action, certain steps need to be followed to ensure that the dismissal conforms with guidelines and requirements set down by the law.

If an employee is guilty of serious misconduct, it is possible for you to lawfully dismiss that employee because of that misconduct, without providing a second chance. There are limits to the cases in which this applies though and you should seek advice before dismissing an employee for misconduct, to confirm that the misconduct is serious enough to justify instant dismissal and that you have adequately investigated the incident(s).

Procedure

If you think that an employee is guilty of misconduct you should take the following steps:

### ensure that you have adequately investigated the facts to make sure that there is no other explanation for what has happened. For example, if bank documents appear to show that money has been stolen from the takings, you should firstly confirm with your bank that the documents are accurate;

### arrange a meeting with the employee and tell him/her that they may have a third party present at the meeting as a witness if they wish. That person should not be permitted to participate in the meeting, but is there to act as the employee’s witness. You may tape the meeting, if at all possible, to avoid later problems with establishing what was discussed. Always ask the employee’s permission before you tape the meeting and explain that it will provide both of you with an accurate record of what is discussed. If taping the meeting is not an option, you should always have a witness present with you to take notes of the discussion;

### at the meeting, you should address the following steps:

#### alert the employee to your concerns, specifying particular instances. If appropriate, tell them the results of any investigations that you have made;

#### ask the employee to respond to these concerns. If the employee wants to provide a response to the allegations in writing, you should allow them to do so unless there are mitigating reasons why they should respond in a face to face meeting;

#### consider the employee’s responses. If they offer alternative explanations for the events, obtain full details and follow it up further. If necessary, adjourn the meeting to obtain any further information that you may need and then reconvene the meeting to deal with those matters;

#### if the responses are inadequate, explain to the employee why they are inadequate;

#### if the employee admits the allegations but tells you of some mitigating circumstances, consider these when determining how you are going to deal with the situation;

#### at the end of the meeting, ensure that the [counselling form](#COUNSELLING_FORM) (sample document provided in the management forms section of this Manual) is completed. Ensure that you and a witness sign the form; and

#### ask the employee to sign the completed form. If the employee refuses, write on the form ‘At the end of the meeting [insert employee’s name] was given this form and asked to sign but refused to do so.’ Sign and date this annotation;

### if you conclude that there is no satisfactory explanation for what happened, the employee may then be dismissed. As already stated though, you should make sure that the conduct is serious enough to justify dismissal. It will be best if you take some time after the meeting to weigh up the employee’s response before deciding whether the employee is to be dismissed; and

### a letter of termination and (if required) a termination payment summary must be given to the employee when dismissed (sample documents are provided in the management forms section of this Manual). It is important that these documents are **not** prepared before the conclusion of the counselling interview. To do so would show that you have preconceived ideas about the outcome of the interview and are not serious about considering any explanations that the employee could offer.

## Dismissing an employee because they are ill or injured

You should not consider terminating an employee’s employment because they are ill or injured, unless you are confident that their absence from work is no longer a ‘temporary absence’ (see section 20.6 above).

Once the employee’s absence is no longer ‘temporary’, you may consider terminating their employment. You will need to consider:

### if the injury or illness is work-related - State or Territory workers compensation laws, which may prevent you from terminating employment due to a compensable injury within a certain time frame (e.g. 12 months from the date of injury);

### whether the employee can undertake the inherent requirements of their position. If they cannot, then this may justify a termination, but you will need to ensure that what you call the ‘inherent requirements’ are justifiable, as these may be challenged before a court. If the employee can perform some of the inherent requirements, but not all, you may need to consider whether they could perform all the requirements if some reasonable adjustments were made. Failure to consider this may result in liability for discrimination; and

### whether you have access to satisfactory medical evidence about the employee’s condition, their prognosis and their ability to undertake the inherent requirements of the job.

Termination of employment due to incapacity can be a minefield, due to the many laws that cover this area. It is prudent to seek legal advice before making any decisions in this regard.

## Dismissing an employee because their position is redundant

An employee’s position will be redundant if you no longer require anyone to do the work that they have been doing. This can happen in circumstances including:

### the job is replaced by technology;

### the business is restructured and the job no longer exists; or

### you can no longer afford to retain the employee due to economic circumstances.

Redundancy is not related to the performance or behaviour of individual employees. It will also not be a genuine redundancy if you simply think that the employee does not really fit in with your office. You will need to show that no one will be doing the job that the employee is doing. Even if your business has been restructured and you genuinely no longer require certain employees, you will still need to ensure that the process used to implement the redundancies is fair. Under the Fair Work provisions, a redundancy will not be a genuine redundancy if:

### the relevant award provisions for redundancy are not complied with, such as any obligations to consult with the employee about the proposed redundancy; or

### it would be reasonable in all the circumstances for the person to be redeployed within the employer’s enterprise or within the enterprise of an associated entity.

If you are satisfied that a redundancy is genuine, you should be open with the employees who will be affected and tell them as soon as possible of the decision that has been made. If there are other positions available for them at the Practice, you should offer them those positions. If there are no other positions available, you should prepare a letter to the employee, explaining why their position has been made redundant and telling them when their employment will cease. In most cases you will be entitled to choose whether you give a certain period of notice, or make a payment in lieu of that notice period.

Subject to the exclusions below, most employees will be entitled to a redundancy payment under the FW Act. An employee may also be entitled to severance pay if they have a contractual entitlement or if there is an established custom or practice of the employer of making severance payments to employees. If in doubt as to the severance payment (if any) to be made, you should seek legal advice.

A sample letter advising an employee of redundancy can be found in the management forms section of this Manual.

Since 1 January 2010 under the NES, employers have had a statutory obligation to pay redundancy pay to all employees, in accordance with the table set out below.

| Period of continuous service | Redundancy pay entitlement |
| --- | --- |
| At least one year but less than two years | 4 weeks |
| At least two years but less than three years | 6 weeks |
| At least three years but less than four years | 7 weeks |
| At least four years but less than five years | 8 weeks |
| At least five years but less than six years | 10 weeks |
| At least six years but less than seven years | 11 weeks |
| At least seven years but less than eight years | 13 weeks |
| At least eight years but less than nine years | 14 weeks |
| At least nine years but less than ten years | 16 weeks |
| At least 10 years | 12 weeks |

As discussed at section 5.5 of this Employer’s Manual, you should consider whether the redundant employee had a pre-existing entitlement to redundancy pay prior to 1 January 2010 (for example as a result of the application of a state award). If so (as will be the case for most clerical workers), the employee’s entire service with the employer should be considered. If not (as may be the case with professional staff), service prior to 1 January 2010 does not count for the purposes of calculating an employee’s entitlement to redundancy pay.

There are some exclusions from the requirement to pay redundancy pay under the NES. These include:

### where the employee has not completed 12 months continuous service with the employer;

### the employer is a small business employer (fewer than 15 employees);

### where there is a transfer of business (e.g. sale of the Practice) and the employee obtains employment with the new owner (where the new owner recognises the employee’s continuity of service), or the employee rejects an offer of employment that is on terms substantially similar to and no less favourable than the employee’s employment with the previous owner;

### casual employees.

## Small Business Fair Dismissal Code

The Federal Government publishes a Small Business Fair Dismissal Code, which can be accessed at: <https://www.fwc.gov.au/about-us/legislation-regulations/small-business-fair-dismissal-code>

You can use this if you are a small business employer, i.e. you employ fewer than 15 employees.

The purpose of the Code is to help small business employers to terminate employment in a manner consistent with procedural fairness, without too rigorous an application of laws or principles.

If you are a small business employer, and you comply with the Code, your employee cannot make an unfair dismissal claim unless they can show that you failed to comply with the Code.

## Payments and practical steps to be taken on dismissal

Once you have decided to dismiss an employee, you should provide the employee with written notification that their employment has been terminated and make arrangements for the employee to return any property of the Practice which is in their possession.

You should also complete an Employment Separation Certificate and provide this to the employee with the written notification of their employment being terminated. There are sample letters of termination included in the management forms section of this Manual.

You will need to ensure that the employee has been given the appropriate amount of notice of their dismissal, or payment in lieu of that notice period, and that their final pay is calculated and forwarded to them as soon as possible after their employment ending.

## Notice period

As a general rule employees (other than casuals) are entitled to notice of dismissal or payment in lieu of notice. The amount of notice will be the greater of the notice period set out in:

### an award which covers the employee;

### the employee’s letter of appointment; or

### the FW Act.

The minimum notice periods in the FW Act depends on the employee’s length of continuous service with an employer. They are:

|  |  |
| --- | --- |
| Length of Continuous Service | Notice 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 of age and has completed at least 2 years of service with the employer | one extra week |

You should ensure that an employee who is dismissed is either given their minimum period of notice or, where provided for in the letter of appointment or award, pay in lieu of that notice period.

In the absence of an agreed notice period, an employee may claim ‘reasonable notice’ at common law. Reasonable notice may exceed the above minimum notice periods commonly seen in industrial legislation. To determine what is reasonable notice in the circumstances, factors such as the following are relevant:

### length of time for which the employee is employed;

### nature of the employment;

### status;

### seniority and salary of the position;

### employee’s age;

### employee’s qualifications and experience;

### degree of job mobility; and

### what the employee gave up to come to the present employer.

The requirement to provide notice or pay in lieu of notice does not apply, however, in cases where an employee has been guilty of serious misconduct, such that it would be unreasonable to expect an employer to continue employment during a notice period.

## Payment of other entitlements

In addition to notice, an employer must pay an employee’s outstanding entitlements as soon as possible following their employment coming to an end. This is still the case, even if an employee has been guilty of such serious misconduct that you have made the decision to dismiss them without notice.

You should never prepare an employee’s final pay before you have your final meeting with the employee. If unfair dismissal laws apply, you should give the employee an opportunity to answer any allegations against them and should never attend a final meeting with a pre-conception about whether it will be necessary to dismiss the employee or not. Letters of termination and termination pay to employees can be prepared after your discussions with the employee are complete, if you do decide to proceed with the dismissal.

## Ensuring that you have evidence to support your actions

When dealing with problems that may arise with your employees, you should keep in mind that it may be necessary later on to be able to establish what has happened, if an employee makes an application for reinstatement, on the basis that they have been unfairly dismissed.

You should get into the habit of making short diary notes whenever an issue comes up that concerns an employee’s performance. If it is necessary for you to have a more formal meeting with the employee, take notes which are as detailed as possible, or tape the meeting with the employee’s consent, and provide the employee with a copy of those notes. If possible, you should ask the employee to sign the notes in acknowledgment that they accurately reflect what was discussed at the meeting. In some cases, however, insisting that the employee sign the notes may only inflame the situation and in this case you should simply keep your original notes or tape recording that provided the basis for the typed notes and file them away in case you need them later.

There is no magic in the documents which you should create - just keep in mind that you will need a record of what has happened and that you should be keeping the employee well informed about the processes that are being used.

# RESIGNATION OF EMPLOYEE

## Introduction to resignations

If an employee resigns, the employment relationship will not come to an end until the employer has accepted the resignation. For this reason, if an employee resigns, it is important to respond to their resignation [in writing](#ACCEPTING_RESIGNATION) either:

### accepting the terms of their resignation; or

### offering to discuss the employee’s resignation before final acceptance will be granted.

An employee who resigns is required to give the minimum notice period outlined in their letter of appointment or applicable industrial instrument (whichever is greater).

If an employee gives notice of resignation which is longer than the notice period stipulated in their letter of appointment or applicable industrial instrument, you are entitled to terminate their employment earlier than the final date of work given to you by the employee. In order to do this, you would need to tell the employee that you have accepted their resignation, but will not be requiring their services after a specified date. When choosing the earlier date from which you wish their employment to come to an end, you must ensure that you have met the minimum notice requirements in their letter of appointment or applicable industrial instrument (whichever is greater).

If you do not wish the employee to actually work for the notice period, perhaps because you think that they may be disruptive now that they have resigned, you could inform the employee that you will be making a payment to them in lieu of notice and that, accordingly, their employment will come to an end on the last day that they actually work with the Practice.

An exit interview should be conducted with any employees who resign to ensure that they are parting company with the Practice on an amicable basis and to determine their reasons for leaving.

Steps should be taken to ensure the employee returns all of the Practice’s property in their possession.

## What if the employee withdraws a resignation?

If an employee resigns and the employer has not yet accepted that resignation, the employee is entitled to withdraw the resignation and continue in employment. If, however, an employer has already accepted the resignation, it is not generally allowable for an employee to then attempt to withdraw their resignation. This is possible, however, in a very limited number of circumstances.

If an employee has resigned in the heat of the moment, then an employer may be expected to allow the employee a reasonable opportunity to withdraw the resignation after they have cooled off. In these circumstances, the withdrawal of the resignation would need to be as soon as was reasonably practicable for the employee and could not be, for example, a matter of days after the resignation had been made.

## What is a constructive dismissal?

If an employee has been placed in a situation where he or she feels that there is no alternative but to resign, then the resignation in this case would not be considered to be a true resignation but, in substance, would be considered to be equivalent to a dismissal by the employer. In cases such as this, even if the employer does not allow the employee to withdraw his or her resignation, an action for unfair dismissal may be brought by the employee, on the basis that they did not truly resign but were dismissed by being forced to resign.

A ‘forced’ or ‘constructive’ dismissal may occur when an employee is told to ‘resign or be dismissed’. If your employee can prove that he or she was threatened with dismissal, it may be determined that your employee did not resign but was constructively dismissed.

Another form of forced dismissal is when an employee's responsibilities or duties are fundamentally altered so that you are in fact changing his or her contract of employment. In this case, you must formally offer the employee a new contract of employment. If the employee declines to accept the new contract, ensure that you follow the appropriate termination procedure.

# REFERENCES

## Statements of Service

As references have the potential to expose employers to liability, any references issued on the Practice letterhead should be approved by the Staff Partner. There is no legal obligation to provide a reference.

Instead employers might like to provide a statement of service. All staff should, upon request, be issued with a [statement of service](#Statement_of_Service) following termination of employment setting out:

### the name and address of the employee;

### the period of the employee’s employment with the Practice;

### the position held by the employee at the time of termination;

### the address of the location at which the employee performed their duties; and

### a general statement of the type of duties performed by the employee shortly before termination.

If the Practice is prepared to act as a referee then the Staff Partner should be specified as the relevant contact person.

## Personal References

Partners, professional staff and office managers may provide personal written references but not on the Practice letterhead and not as a representative of the Practice. Likewise, they may act as referees provided they make it clear to the former employee and anybody who contacts them in respect of the former employee that they are doing so in their personal capacity and not as a representative of the Practice.

**MANAGEMENT**

**FORMS**

# MANAGEMENT FORMS

## Employment application form

EMPLOYMENT APPLICATION FORM

Surname:

First name:

Address:

Telephone No.: \_\_\_\_\_\_\_\_\_\_\_\_\_\_(Work)\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (Home)\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_(Mobile)

Qualifications:

(List formal qualifications relevant to this position)

Employment history:

Other relevant experience or skills:

Are you legally entitled to work in Australia? 🞏 Yes 🞏 No

What languages, other than English, do you speak, read or write:

Do you have any disability or medical condition that would affect your ability to do this job? (Please give details)

Names, addresses, telephone numbers or two referees from whom confidential reports may be obtained:

**Person 1**

Name:

Address:

Phone No:

Position:

**Person 2**

Name:

Address:

Phone No:

Position:

## Letter to job applicant to comply with APP1 and APP5

***[We recommend that if recruiters pass on resumes to your Practice, that they be required to issue similar letters on collection of the relevant resume]***

[PRACTICE LETTERHEAD]

**[Date]**

**[Name and address of applicant]**

Dear **[Applicant’s name]**

**RE: Confirmation of Receipt of Application**

Thank you for your Application for Employment.

We use the information you have provided in your application to assess your employment application, and to facilitate our internal business operations. We may collect additional information about you from third parties, such as from previous employers, [#insert any third parties you collect information from, such as referees, recruiters, academic institutions, licence and background checking services, social media]. Please let us know if you do not wish for contact to be made with any of your previous employers. If you choose not to provide us with your personal information, or the information you have provided to us is incomplete or inaccurate in any way, we may not be able to process your Application For Employment.

We will disclose your personal information to our workers and consultants who assist us in operating our business and assessing your employment application, [#insert any other third parties you disclose information to,] third parties to whom you have agreed we may disclose your information (such as referees, recruiters, and previous employers), or as otherwise required or authorised by law. Your personal information will also be disclosed to third party service providers who assist us in operating our business, some of whom are located overseas, such as [#insert – what service providers do you use who are located overseas?] located in [#insert – what country/countries are the service providers located in?] [**#NOTE:** see the note regarding overseas disclosure on the template privacy policy in the manual]. We have taken reasonable steps to ensure these third parties have appropriate security for your personal information.

Our privacy policy, available at **[insert details]**, sets out more detailed information about the ways in which we use, disclose and handle your personal information, and describes the ways in which you may access personal information we collect and hold about you, how you can seek correction of that information, how you can make a complaint about a breach of the Privacy Act, and how we will deal with a complaint.

Yours sincerely

**Staff Partner**

## Reference checklist

REFERENCE CHECKLIST

Applicant’s name:

Position:

**Checklist**

**Reference #1**:

(a) Referee’s Name:

(b) Referee’s Position:

(c) Referee’s contact details:

(d) Date contacted:

(e) Comments:

**Reference #2**:

(a) Referee’s Name:

(b) Referee’s Position:

(c) Referee’s contact details:

(d) Date contacted:

(e) Comments:

**Reference #3**:

(a) Referee’s Name:

(b) Referee’s Position:

(c) Referee’s contact details:

(d) Date contacted:

(e) Comments:

**Example questions to ask referee**

1. What duties did the applicant perform whilst employed with your organisation?

2. Was the applicant honest and reliable?

3. What in your opinion are the applicant’s best qualities/skills?

4. Why did the applicant leave your employment?

5. If you were in a position to, would you re-employ the applicant?

6. If you were able to, would you be prepared to provide the applicant with a written reference?

## Staff induction checklist

STAFF INDUCTION CHECKLIST

Employee’s name:

Position:

Date commencing employment:

**Checklist**

**Forms to collect from the employee**

1. Certified Copy of qualifications  Yes  No

2. Duplicate copy of letter of appointment signed  Yes  No

**Forms that need to be given to new employee to complete**

1. Bank Account Details Form  Yes  No

2. Staff Emergency Contact Details  Yes  No

3. Employment Declaration Form  Yes  No

**Staff Orientation**

1. Tour through workplace  Yes  No

2. Introduction to all staff  Yes  No

3. Provide copy of Staff Manual  Yes  No

4. Outline content of:

(a) Fire Drill/Emergency Evacuation Policy  Yes  No

(b) Anti-Discrimination Policy  Yes  No

(c) Sexual Harassment Policy  Yes  No

(d) Work Health and Safety Policy  Yes  No

(e) Email/Internet Policy  Yes  No

(f) Discrimination and Harassment Complaints Procedure  Yes  No

(g) Grievance Procedure  Yes  No

Date:

Staff Partner’s Signature:

Note: This checklist is to be kept on the personnel file of the employee.

## Counselling form

COUNSELLING FORM

1. Date of meeting: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

2. Subject of meeting: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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3. Employee involved: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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4. Witness present: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

5. Employer’s concern/allegation: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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6. Employee’s response: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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7. Employer’s warning/decision/time frame (if any specified) for improvement:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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Signed as a true and correct record of this meeting by:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Staff Partner

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Witness

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Employee

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

## Example letter to employee advising of potential redundancy

[PRACTICE LETTERHEAD]

**[Date]**

Dear

Re: **Operational Issues**

As you may be aware, **[insert practice name]** has recently been considering business costs and the possibility of a business restructure. [**insert reasons for review/proposed restructure** – e.g. ‘In the competitive **[insert industry]** market, it is important that we are in a position to contain the operational costs of the Practice whilst at the same time maintaining efficiency.’**]**

We have identified that the business is not operating as efficiently as possible and, as such, we are looking at restructuring **[the business or the insert name of business unit]** to ensure optimum efficiency is attained.

As a result of this, we need to consider reducing costs, including changing the focus of the Practice to ensure our survival in the market. This may include the option of reducing staff numbers to create greater efficiency gains.

Your position is one that has been identified as potentially being affected by this proposed restructure. We would like to discuss the proposed restructure with you and give you with the opportunity to provide any feedback you may have on this matter. Specifically, you will appreciate that if the restructure proceeds, your position may become redundant and this may result in the termination of your employment. In providing any response please feel free to include any alternative ideas you may have. We would prefer to do this promptly so that we can make decisions as to the best way forward.

Please let us know if you are available to discuss on **[insert day date and time]**. If you need more time to consider your input, please let us know. If you would like to bring a support person with you, please feel free.

We look forward to meeting with you then.

Yours faithfully

**Staff Partner**

## Example letter to employee advising of decision to proceed with redundancy

[PRACTICE LETTERHEAD]

**[Date]**

Dear **[Employee’s name]**

Re: **Operational Issues**

Further to our meeting yesterday, after careful consideration of the operational requirements of the business, the skills required, the future of the Practice and the availability of other positions, we regret to inform you that your current position will be made redundant as of **[insert date and time (e.g. close of business) redundancy becomes effective].**

**[INSERT FOR AWARD EMPLOYEE OR WHERE THERE IS AN ENTITLEMENT TO SEVERANCE PAY:]**

In addition to your [#Salary][#wages] up to the date of termination, you will be paid in lieu of notice **[WHERE APPLICABLE – and redundancy payments]** in accordance with the **[insert name of award OR insert name of legislation],** the amounts set out in the table below.

|  |  |  |
| --- | --- | --- |
| Entitlement | Amount | Total |
| Annual leave | **[Number of weeks]** weeks | $**[Amount]** |
| Notice | **[Number of weeks]** weeks | $**[Amount]** |
| Redundancy pay | **[Number of weeks]** weeks | $**[Amount]** |
| Total: |  | $ |

**[INSERT WHERE THERE IS NO ENTITLEMENT TO REDUNDANCY PAY:]**

We confirm that you have no legal entitlement to a redundancy payment in the event of redundancy. **[OPTIONAL -** However, if you are prepared to sign a Deed of Release, we are prepared to make an ex-gratia payment to you in consideration for signing the Deed.**]**

On this basis, given your length of service, your entitlements will be:

|  |  |  |
| --- | --- | --- |
| Entitlement | Amount | Total |
| Annual leave | **[Number of weeks]** weeks | $**[Amount]** |
| Notice | **[Number of weeks]** weeks | $**[Amount]** |
| Ex-gratia | **[Number of weeks]** weeks | $**[Amount]** |
| Total: |  | $ |

We will also provide you with a **[OPTIONAL** – personal reference**]** and Statement of Service.

If you would like to discuss this further, please contact me directly.

Yours faithfully

**Staff Partner**

## Example letter to employee with final termination details

[PRACTICE LETTERHEAD]

**[Date]**

Dear

Re: **Operational Issues**

Please find enclosed:

(a) a final record of wages;

(b) ETP Form;

(c) Statement of Service; and

(d) **[INSERT WHERE APPLICABLE -** personal reference].

I sincerely thank you for your service and wish you the best of luck with future endeavours.

Yours faithfully

**Staff Partner**

## Example letter to employee terminating employment for misconduct

[PRACTICE LETTERHEAD]

**[Date]**

**[Name and address of employee]**

Dear **[Employee’s name]**

RE: Employment with **[Name of practice]**

As you are aware a number of investigations have been carried out in relation to the alleged incident/s concerning you. The allegations are listed below.

1. **[List specific allegations made against the employee]**

2. **[List specific allegations made against the employee]**

3. **[List specific allegations made against the employee]**

**[use if you met with employee to discuss allegations]** In our conferences with you and **[name of witness]** on **[date/s]** those allegations were discussed and you provided me with your responses to the allegations.

[**use if a show cause letter sent]** I refer to my letter to you of **[date]** inviting you to show cause why your employment with **[insert practice name]** should not be terminated. In that letter I afforded you [**insert number of days]** to provide me with your responses to the allegations in the show cause letter. I confirm your response to the show cause letter was received on **[date].**

**[use in either scenario]** For the reasons outlined below I have decided that the appropriate disciplinary action to impose in these circumstances is the termination of your employment effective immediately.

In reaching my decision, I have given consideration to the material before me including your response **[dated date to the Show Cause Letter dated date] OR your responses given in our meeting of [date].** I have also given consideration to:

* [**insert other matters considered i.e. seriousness of the allegation, explanations, work record, extenuating or mitigating circumstances, impact on the business and public perception in the business etc.]**
* **[insert analysis of why the allegations are serious and why it justifies termination of employment]**
* **[insert any other relevant consideration - length of service, previous work history etc.]**

I confirm that your employment with **[insert practice name]** will come to an end today. You will be paid any accrued and outstanding annual leave, **[use if relevant],** long service leave, [**end alternate text]** and payment in lieu of notice in accordance with **[insert either Contract or relevant legislation],** into the last nominated bank account that you provided **[insert practice name]** in the next pay run.

You are required to return all **[insert practice name]**  property in your possession to **[name]** **[position]** by close of business **[date].**

If anything in this letter requires further explanation please contact me immediately.

We wish you the best in the future.

Yours sincerely

**Staff Partner**

## Example letter terminating employment for performance/conduct issues

[PRACTICE LETTERHEAD]

**[Date]**

**[Name and address of employee]**

Dear **[Employee’s name]**

RE: Employment with **[Name of practice]**

I refer to our **[meetings** or **performance discussions]** on **[date]** in relation to the performance concerns we have. As you know you were afforded **[insert time frame for improvement]** to improve on your performance. Unfortunately, no **[or]** inadequate improvement have been made to rectify the problems identified, namely:

1. **[List problems that led to the need for counselling sessions - be specific]**

2. **[List problems that led to the need for counselling sessions - be specific]**

3. **[List problems that led to the need for counselling sessions - be specific]**

[**use if a show cause letter sent]** Consequently, on **[date]** I wrote to youinviting you to show cause why your employment with **[insert practice name]** should not be terminated. In that letter I afforded you [**insert number of days]** to provide me with your responses to the allegations in the show cause letter. I confirm your response to the show cause letter was received on **[date].**

For the reasons outlined below I have decided that your employment cannot continue and therefore advise that your employment with **[insert practice name]** will be terminated as of today.

In reaching my decision, I have given consideration to the material before me including your response **[dated date to the Show Cause Letter dated date] OR your responses given in our meeting of [date].** I have also given consideration to:

* **[insert other matters considered i.e. seriousness of the underperformance, explanations, work record, extenuating or mitigating circumstances, impact on the business and public perception in the business etc.]**
* **[insert analysis of why the performance issues are serious and why it justifies termination of employment]**
* **[insert any other relevant consideration - length of service, previous work history etc.]**

I confirm that your employment with **[insert practice name]** will come to and today. You will be paid any accrued and outstanding annual leave, **[use if relevant],** long service leave, [**end alternate text]** and payment in lieu of notice in accordance with **[insert either Contract or relevant legislation],** into the last nominated bank account that you provided **[insert practice name]** in the next pay run.

You are required to return all **[insert practice name]**  property in your possession to **[name]** **[position]** by close of business **[date].**

If anything in this letter requires further explanation please contact me immediately.

We wish you the best in the future.

Your sincerely

**Staff Partner**

## Example statement of service

[PRACTICE LETTERHEAD]

STATEMENT OF SERVICE

**[date]**

To Whom It May Concern

**[Name of employee]** of **[employee’s address]** was employed with **[name of practice]** from **[date of commencement of employment]** to **[date of termination of employment]** in the position of **[employee’s position title]** at our **[location practice where employee worked]** office.

Throughout **[employee’s name]** employment, **[he/she]** performed the following duties:

1. **[List employees main duties]**

2. **[List employees main duties]**

3. **[List employees main duties]**

4. **[List employees main duties]**

Yours faithfully

**Staff Partner**

## Remote/ Home based work self assessment checklist

|  |  |
| --- | --- |
| Name |  |
| Position |  |
| Phone number |  |
| Address of assessment |  |
| Telephone (home) |  |
| Mobile |  |
| Completed by |  |
| Proposed working from home schedule |  |
| Date |  |

**Instructions**

1. Please print this document and complete all sections and, where asked, provide photographs.
2. This checklist should be completed by the employee applying to work from home as it outlines the provisions which should be in place prior to commencing work from home.
3. If you answer ‘No’ to any question, the Workplace Health and Safety (**WHS**) representative may contact you to discuss corrective actions.

**Declaration and authorisation**

I state that all information provided by me on this form is true and correct.

When working from home my contact details are as stated on the front of this form.

I will review and resubmit this checklist to the WHS representative at least every 12 months or if my situation changes (e.g. change residential address or the position of my home office within my residence).

Complete form, print, sign, date and submit to the WHS representative with required documentation.

| Approval | Name | Signature | Date |
| --- | --- | --- | --- |
| **Employee** |  |  |  |
| **WHS representative** |  |  |  |
| **HR representative** |  |  |  |

## Home based work self assessment checklist

| Assessment | Yes | No | N/A | Corrective action | Person responsible | Completion date |
| --- | --- | --- | --- | --- | --- | --- |
| Is the desk set up so frequent trunk twisting or rotation is not required? |  |  |  |  |  |  |
| Is there enough space under the desk to allow free movement? |  |  |  |  |  |  |
| Are you able to sit close to the workstation without any impediment and is there adequate leg room? |  |  |  |  |  |  |
| Is the area tidy and well kept? |  |  |  |  |  |  |
| Is there adequate storage available? |  |  |  |  |  |  |
| Are items safely stored to eliminate the risk of falling? |  |  |  |  |  |  |
| Are floors and walkways free of trip hazards and clear of clutter? |  |  |  |  |  |  |
| Are floors even surfaces and free of cracks, holes, worn carpets, loose flooring or mats with curling edges? |  |  |  |  |  |  |
| Are mats properly secured? |  |  |  |  |  |  |
| Are stairs and handrails in good condition? |  |  |  |  |  |  |
| Are landings clear of obstructions? |  |  |  |  |  |  |
| Is there adequate internet and phone access (i.e. reception) in the home office area? |  |  |  |  |  |  |
| Are electrical equipment and cords in good condition? (i.e. not frayed, torn etc.). |  |  |  |  |  |  |
| Are switches and power outlets or boards in good condition and not overloaded?  **#Note:** Double adapters are not to be used. |  |  |  |  |  |  |
| Are power boards either: |  |  |  |  |  |  |
| (a) tested and tagged every five years; or |  |  |  |  |  |  |
| (b) contain a safety switch (residual current device or earth leakage circuit breaker) and tested every two years? |  |  |  |  |  |  |
| Are leads and cords kept clear of walkways and tucked away tidily under the desk? |  |  |  |  |  |  |
| Is there a basic first aid kit available for use? |  |  |  |  |  |  |
| Are smoke alarms in working order? |  |  |  |  |  |  |
| Is there a CO2 or dry powder extinguisher with a current tag or fire blanket available for use? |  |  |  |  |  |  |

1. ## These are examples only. Practices should seek advice about whether they are required to hold a labour hire license. Full table for Queensland Practices can be found at <https://www.labourhire.qld.gov.au/i-provide-labour-hire/licensing>

   [↑](#footnote-ref-1)
2. These are examples only. Practices should seek advice about whether they are required to hold a labour hire license. Further examples can be found at https://labourhireauthority.vic.gov.au/provider/general-definition-of-labour-hire-services/ [↑](#footnote-ref-2)